

No. 16-31139

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

MARCUS BERRY,
Plaintiff – Appellee

v.

AUTO-OWNERS INSURANCE COMPANY,
Defendant – Appellant

On Appeal from the United States District Court, Middle District of Louisiana, No. 3:13-cv-00145, Honorable Brian A. Jackson, Presiding

RECORD EXCERPTS FOR APPELLANT

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Matthew J. Paul
Brendan A. Curtin
STANLEY, REUTER, ROSS, THORNTON
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TABLE OF CONTENTS

<u>Contents</u>	<u>Page</u>
1. Docket Sheet (ROA.1).....	R.E.01
2. Notice of Appeal, Doc. No. 87 (ROA.534) (Nov. 2, 2016).....	R.E.14
3. Jury Verdict, Doc. No. 41 (ROA.211) (Sep. 17, 2014).....	R.E.16
4. Final Judgment, Doc. No. 56 (ROA.297) (May 7, 2015)*	R.E.18
5. Ruling and Order Denying Motion for Relief from a Judgment Pursuant to Fed. R. Civ. P. 60(b) or Alternatively a Declaratory Judgment, Doc. No. 75 (ROA.426) (June 17, 2016)	R.E.19
6. Ruling and Order Denying Motion to Alter or Amend a Judgment Pursuant to Fed. R. Civ. P. 59(e), Doc. No. 86 (ROA.519) (Oct. 27, 2016).....	R.E.30
7. Final Pretrial Order, Doc. No. 20 (ROA.132) (June 23, 2014).....	R.E.45
8. Initial Disclosures of Auto-Owners and Leon Roberson, Doc. No. 8 (ROA.70) (Aug. 2, 2013).....	R.E.57
9. Declarations Pages Showing Policy Limits (ROA.329).....	R.E.60

* Auto-Owners is not appealing from the Final Judgment directly, but rather from the district court's denial of relief under Rule 60(b) and Rule 59(e). Nevertheless, for the Court's convenience, the Final Judgment and Jury Verdict are included here.

1. Docket Sheet

**U.S. District Court
Middle District of Louisiana (Baton Rouge)
CIVIL DOCKET FOR CASE #: 3:13-cv-00145-BAJ-RLB**

Berry v. Roberson et al
Assigned to: Chief Judge Brian A. Jackson
Referred to: Magistrate Judge Richard L. Bourgeois, Jr.
Case in other court: 5th Circuit, 15-30483
5th Circuit, 16-31139

Date Filed: 03/07/2013
Date Terminated: 09/19/2014
Jury Demand: Defendant
Nature of Suit: 350 Motor Vehicle
Jurisdiction: Diversity

Cause: 28:1441 Notice of Removal-Tort/Motor Vehicle (P.I.)

Plaintiff

Marcus Berry

represented by **Jeffrey N. Rabb**
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V.

Defendant

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Defendant

Leon Roberson

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ATTORNEY TO BE NOTICED

Scott Michael Levy
(See above for address)
ATTORNEY TO BE NOTICED

Defendant

Progressive Paloverde Insurance Co.
TERMINATED: 08/29/2014

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Date Filed	#	Docket Text
03/07/2013	<u>1 (p.14)</u>	NOTICE OF REMOVAL from 19th Judicial District Court, Case Number 618,605. (), filed by Leon Roberson, Auto-Owners Insurance Company. (Attachments: # <u>1 (p.14)</u> Exhibit A, # <u>2 (p.39)</u> Exhibit B, # <u>3 (p.41)</u> Attachment Civil Cover Sheet)(Levy, Scott) (Entered: 03/07/2013)
03/07/2013	<u>2 (p.39)</u>	Corporate Disclosure Statement by Auto-Owners Insurance Company. (Levy, Scott) (Entered: 03/07/2013)
03/26/2013	<u>3 (p.41)</u>	ANSWER to Complaint with Jury Demand by Auto-Owners Insurance Company, Leon Roberson.(Levy, Scott) (Entered: 03/26/2013)
06/14/2013	<u>4 (p.47)</u>	ORDER: Scheduling Conference set for 7/11/2013 at 11:00 AM in chambers before Magistrate Judge Richard L. Bourgeois Jr. Status Report due by 7/5/2013. Signed by Magistrate Judge Richard L. Bourgeois, Jr on 6/14/2013. (JSL) (Entered: 06/14/2013)
07/03/2013	<u>5 (p.56)</u>	STATUS REPORT by All Parties. (Rabb, Jeffrey) (Entered: 07/03/2013)
07/10/2013	<u>6 (p.65)</u>	STATUS REPORT <i>Amendment</i> by All Parties. (Levy, Scott) (Entered: 07/10/2013)
07/10/2013	<u>7 (p.67)</u>	SCHEDULING ORDER: The scheduling conference set for 7/11/2013 is CANCELLED. In accordance with FRCP 16(b), the following discovery deadlines are established. Amended Pleadings due by 7/15/2013. F.R.C.P. 26(a)(1) disclosures due by 8/2/2013. Discovery due by 12/16/2013. Plaintiff's Expert Witness List due by 11/1/2013. Defendant's Expert Witness List due by 11/15/2013. Plaintiff's Expert Reports due by 12/2/2013. Defendant's Expert Reports due by 12/16/2013. Discovery from Experts due by 2/3/2014. Motions shall be filed by 3/3/2014. Proposed Pretrial Order due by 6/23/2014. Motions In Limine shall be filed by 7/21/2014. Responses to Motions In Limine shall be filed by 8/11/2014. Affidavit of Settlement Efforts due by 8/11/2014. Pretrial Conference set for 7/10/2014 at 09:00 AM in chambers before Chief Judge Brian A. Jackson. Joint jury instructions, voir dire, verdict forms, and trial briefs due by 8/29/2014. Jury Trial set for 9/15/2014 at 09:00 AM in Courtroom 2 before Chief Judge Brian A. Jackson. Jury Trial set for 9/16/2014 at 09:00 AM in Courtroom 2 before Chief Judge Brian A. Jackson. Jury Trial set for 9/17/2014 at 09:00 AM in Courtroom 2 before Chief Judge Brian A. Jackson. Jury Trial set for 9/18/2014 at 09:00 AM in Courtroom 2 before Chief Judge Brian A. Jackson. Signed by Magistrate Judge Richard L. Bourgeois, Jr

		on 7/10/2013. (JSL) (Entered: 07/10/2013)
08/02/2013	<u>8 (p.70)</u>	NOTICE of Initial Disclosures by Auto-Owners Insurance Company (Levy, Scott) (Entered: 08/02/2013)
08/05/2013	<u>9 (p.73)</u>	NOTICE of Rule 26 Initial Disclosures by Progressive Paloverde Insurance Company (Foster, Douglas) (Entered: 08/05/2013)
08/05/2013	<u>10 (p.76)</u>	Corporate Disclosure Statement by Progressive Paloverde Insurance Company identifying Corporate Parent Progressive Insurance Company for Progressive Paloverde Insurance Company. (Foster, Douglas) (Entered: 08/05/2013)
10/07/2013	<u>11 (p.78)</u>	NOTICE of Deposition of Marcus Berry (Foster, Douglas) Modified on 10/8/2013 to edit text (CGP). (Entered: 10/07/2013)
11/22/2013	<u>12</u>	Expert Witness List by Auto-Owners Insurance Company, Leon Roberson. (For your free look at document, enter your ECF login and pw to confirm your right to view). (Attachments: # <u>1 (p.14)</u> Attachment Curriculum Vitae - Kenneth Boudreaux, # <u>2 (p.39)</u> Attachment Curriculum Vitae - Larry Stokes, # <u>3 (p.41)</u> Attachment Curriculum Vitae - James Butler, # <u>4 (p.47)</u> Attachment Curriculum Vitae - Allen Joseph, # <u>5 (p.56)</u> Attachment Curriculum Vitae - Curtis Partington)(Levy, Scott) Modified to edit text on 12/3/2013 (SMG). (Entered: 11/22/2013)
11/22/2013	<u>13</u>	Expert Witness List by Progressive Paloverde Insurance Company. (For your free look at document, enter your ECF login and pw to confirm your right to view). (Foster, Douglas) Modified to edit text on 12/3/2013 (SMG). (Entered: 11/22/2013)
03/03/2014	<u>14 (p.80)</u>	MOTION for Summary Judgment by Marcus Berry. (Attachments: # <u>1 (p.14)</u> Attachment Memo, # <u>2 (p.39)</u> Exhibit Exhibit A, # <u>3 (p.41)</u> Exhibit Exhibit B, # <u>4 (p.47)</u> Exhibit Exhibit C)(Rabb, Jeffrey) (Entered: 03/03/2014)
03/12/2014	<u>15 (p.101)</u>	NOTICE to Take Deposition of Dr. Joseph Turnipseed by Auto-Owners Insurance Company, Leon Roberson.(Levy, Scott) (Entered: 03/12/2014)
03/24/2014	<u>16 (p.103)</u>	NOTICE to Take Deposition of Dr. Joseph Turnipseed by Auto-Owners Insurance Company, Leon Roberson.(Levy, Scott) (Entered: 03/24/2014)
03/24/2014	<u>17 (p.105)</u>	MEMORANDUM in Opposition to <u>14 (p.80)</u> MOTION for Summary Judgment filed by Auto-Owners Insurance Company. (Attachments: # <u>1 (p.14)</u> Exhibit A, # <u>2 (p.39)</u> Exhibit B, # <u>3 (p.41)</u> Statement of Contested Facts)(Levy, Scott) (Entered: 03/24/2014)
04/01/2014	<u>18 (p.128)</u>	MEMORANDUM in Opposition to <u>14 (p.80)</u> MOTION for Summary Judgment filed by Progressive Paloverde Insurance Company. (Foster, Douglas) (Entered: 04/01/2014)
04/10/2014	<u>19 (p.130)</u>	NOTICE to Take Deposition of Dr. Joseph Turnipseed by Auto-Owners Insurance Company, Leon Roberson.(Levy, Scott) (Entered: 04/10/2014)

06/23/2014	<u>20 (p.132)</u>	Final Pretrial Order by All Parties. (Rabb, Jeffrey) Modified to edit text on 6/24/2014 (SMG). (Entered: 06/23/2014)
06/24/2014	21	Notice to Counsel: Pretrial Conference reset for 7/10/2014 at 10:00 AM in chambers before Chief Judge Brian A. Jackson. THIS IS A TIME CHANGE ONLY! (This is a TEXT ENTRY ONLY. There is no hyperlink or PDF document associated with this entry.) (PJH) (Entered: 06/24/2014)
07/10/2014	23	Minute Entry for proceedings held before Chief Judge Brian A. Jackson: Final Pretrial Conference held on 7/10/2014. Counsel for the Plaintiff informed the Court that the Plaintiff and Defendant Progressive have reached a settlement in this matter. The Court instructed Counsel for the Plaintiff to file proper pleadings into the record reflecting that a settlement between Plaintiff and Progressive. Trial stipulations are discussed. Bench Book (3 copies) of pre-marked, Bates stamped exhibits shall be filed on or before 9/8/2014. An exhibit and witness list shall be included in each Bench Book. If exhibits exceed 50 pages, Counsel shall submit exhibits in electronic format (flash drive) to the Court by 9/8/2014. Counsel shall report to Chambers at 8:30 the morning of trial. If a settlement conference is desired, Counsel shall contact the Magistrate Judge for scheduling of the conference. Additional supplement to the Motion for Summary Judgment shall be filed by 7/24/2014. Replies to supplemental filing shall be filed by 8/5/2014. The Court will issue Ruling on the Motion for Summary Judgment will be forthcoming. (This is a TEXT ENTRY ONLY. There is no hyperlink or PDF document associated with this entry.) (PJH) (Entered: 07/29/2014)
07/23/2014	<u>22 (p.144)</u>	Supplemental MEMORANDUM in Support of <u>14 (p.80)</u> MOTION for Summary Judgment filed by Marcus Berry. (Attachments: # <u>1 (p.14)</u> Exhibit Ex. A-Deposition of Dr. Allen Joseph)(Rabb, Jeffrey) (Entered: 07/23/2014)
08/11/2014	<u>24 (p.152)</u>	AFFIDAVIT of Settlement Efforts by All Plaintiffs. (Rabb, Jeffrey) (Entered: 08/11/2014)
08/28/2014	<u>25 (p.154)</u>	Request for 60 Day Order of Dismissal Upon Compromise with Consent by Marcus Berry. (Attachments: # <u>1 (p.14)</u> Attachment Judgment of Dismissal)(Rabb, Jeffrey) Modified to edit text on 8/28/2014 (SMG). (Entered: 08/28/2014)
08/29/2014	<u>26 (p.157)</u>	PROPOSED JURY VERDICT FORM by Marcus Berry.. (Rabb, Jeffrey) (Entered: 08/29/2014)
08/29/2014	<u>27 (p.159)</u>	Proposed Voir Dire Questions by Marcus Berry. (Rabb, Jeffrey) (Entered: 08/29/2014)
08/29/2014	<u>28 (p.164)</u>	Proposed Jury Instructions by Marcus Berry. (Rabb, Jeffrey) (Entered: 08/29/2014)
08/29/2014	<u>29 (p.169)</u>	ORDER granting <u>25 (p.154)</u> Motion for Partial Dismissal as to Progressive Paloverde Insurance Company. Plaintiff's action is hereby DISMISSED without prejudiceas to Defendant Progressive Paloverde Insurance Company, to the right upongood cause shown within sixty (60) days, to reopen the action if the settlement isnot

		consummated.Signed by Chief Judge Brian A. Jackson on 8/29/2014. (PJH) (Entered: 08/29/2014)
08/29/2014	<u>30 (p.170)</u>	Proposed Jury Instructions by Auto-Owners Insurance Company. (Levy, Scott) (Entered: 08/29/2014)
08/29/2014	<u>31 (p.180)</u>	PROPOSED JURY Voir Dire Questions by Auto-Owners Insurance Company.. (Levy, Scott) Modified to edit text on 9/2/2014 (SMG). (Entered: 08/29/2014)
08/29/2014	<u>32 (p.184)</u>	Proposed Voir Dire Questions by Auto-Owners Insurance Company. (Levy, Scott) (Entered: 08/29/2014)
09/03/2014	<u>33 (p.188)</u>	RULING and ORDER granting in part and denying in part <u>14 (p.80)</u> Partial Motion for Summary Judgment. Plaintiff's motion is GRANTED on the issue of Defendant Leon Roberson's liability for the collision. Plaintiff's motion is DENIED on the issue of causation. Signed by Chief Judge Brian A. Jackson on 9/2/2014. (SMG) (Entered: 09/03/2014)
09/08/2014	<u>34 (p.196)</u>	RETURN OF SERVICE of subpoena(s) executed upon Allen S. Joseph, MD on 09/02/2014 by personal (Levy, Scott) (Entered: 09/08/2014)
09/08/2014	<u>35 (p.198)</u>	First MOTION to Enroll Matt N. Terrell as Additional Attorney by Marcus Berry. (Rabb, Jeffrey) (Entered: 09/08/2014)
09/09/2014		MOTION(S) REFERRED: <u>35 (p.198)</u> First MOTION to Enroll Matt N. Terrell as Additional Attorney . This motion is now pending before the USMJ. (SMG) (Entered: 09/09/2014)
09/09/2014	36	ORDER granting <u>35 (p.198)</u> Motion to Enroll Additional Attorney. Added attorney Matt N. Terrell as additional counsel of record for plaintiff, Marcus Berry. Signed by Magistrate Judge Richard L. Bourgeois, Jr on 9/9/2014. (This is a TEXT ENTRY ONLY. There is no hyperlink or PDF document associated with this entry.) (JSL) (Entered: 09/09/2014)
09/12/2014	<u>37 (p.201)</u>	RETURN OF SERVICE of subpoena(s) (Levy, Scott) (Entered: 09/12/2014)
09/14/2014	<u>38 (p.203)</u>	Proposed Jury Instructions by Auto-Owners Insurance Company. (Levy, Scott) (Entered: 09/14/2014)
09/15/2014	<u>39 (p.208)</u>	Minute Entry for proceedings held before Chief Judge Brian A. Jackson: Prospective jurors are sworn on voir dire and questioned. Upon completion of voir dire, prospective jurors are excused from the Courtroom. Counsel state no object to the make-up of the jury. After being duly chosen on voir dire, jurors are sworn and instructed by the Court. Counsel present opening statements to the Court. Stipulated exhibits, P3; P4; P5; P6; P7; P8; D1; D2; D3; D4; D5, are filed. Marcus Berry, Dr. Joseph Turnipseed, and Dr. J. C. Sonnier are sworn and testify on behalf of the Plaintiff. Outside the presence of the jury, Counsel for the Plaintiff proffers exhibit P10 into the record. Matter to continue, with jury, on Tuesday, September 16, 2014 at 8:30 a.m. (Court Reporter C. Smith-Neely.) (This is a TEXT ENTRY ONLY. There is no hyperlink or PDF document associated with this entry.) (PJH) (Main Document 39 replaced on 9/18/2014) (NLT). (Entered: 09/15/2014)

		09/16/2014)
09/16/2014	<u>40 (p.210)</u>	TRIAL Exhibit List (PJH) (Entered: 09/16/2014)
09/16/2014	<u>43 (p.214)</u>	Minute Entry for proceedings held before Chief Judge Brian A. Jackson: Jury Trial held and completed on 9/16/2014. G. Randolph Rice, Ph.D., and Constance Newsome are sworn and testify on behalf of the Plaintiff.Plaintiff rests. Outside the presences of the jury, Counsel for the Defendants move for a Directed Verdict under Rule 50 of the Federal Rules of Civil Procedure. Counsel for the Plaintiff states objection to the Defendants Motion for Directed Verdict as to causation only. For reasons stated on the record, and without objection from the Plaintiff, the Court grants the Defendants Motion Directed Verdict under Rule 50 of the Federal Rules of Civil Procedure as to the Plaintiffs property damage claim, and denies the Motion for Directed Verdict in all other respects. Dr. Allen Joseph is sworn and testifies on behalf of Defendants. Exhibit D6 is filed. Defendants rest. Marcus Berry, having been previously sworn, is recalled on rebuttal. Plaintiff rests on rebuttal. Jury charge conference is held outside the presences of the jury. The Court hears closing argument of counsel, and instructs the jury. The jury is excused from the Courtroom for deliberation. Counsel state no objections to the jury charges. Jury returns and renders its verdict. The jury is polled and the verdict is confirmed and filed into the record. The jury is excused. Judgement shall be entered accordingly. (Court Reporter C. Smith-Neely.) (PJH) (Entered: 09/19/2014)
09/17/2014	<u>41 (p.211)</u>	JURY VERDICT FORM. (SMG) (Entered: 09/17/2014)
09/17/2014	<u>42 (p.213)</u>	TRANSCRIPT REQUEST by Auto-Owners Insurance Company for proceedings held on September 15, 2014 before Judge Brian A. Jackson.. (Levy, Scott) (Entered: 09/17/2014)
09/19/2014	<u>44 (p.216)</u>	JUDGMENT in favor of Marcus Berry against Auto-Owners Insurance Company, Leon Roberson, and this action is hereby DISMISSED. Signed by Chief Judge Brian A. Jackson on 9/19/2014. (LLH) (Entered: 09/19/2014)
09/23/2014	<u>45 (p.536)</u>	NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings Jury Trial hearing before Judge Chief Brian A. Jackson held on 9-15-14. Court Reporter: Clare Smith-Neely. Phone Number: 225-389-3565. NOTICE RE REDACTION OF TRANSCRIPTS: The parties have five (5) business days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.lamd.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.. Redaction Request due 10/14/2014. Redacted Transcript Deadline set for 10/21/2014. Release of Transcript Restriction set for 12/19/2014. (Smith-Neely, Clare) (Entered: 09/23/2014)

10/17/2014	<u>46 (p.218)</u>	TRANSCRIPT REQUEST by Coleman T. Organ for proceedings held on 09/15-16/14 before Judge Brian A. Jackson.. (Organ, Coleman) Modified on 10/17/2014 to print doc to PDF (LLH). (Entered: 10/17/2014)
10/17/2014	<u>47 (p.220)</u>	MOTION for New Trial <i>or Alternatively Motion for Remittitur</i> by Auto-Owners Insurance Company. (Attachments: # <u>1 (p.14)</u> Exhibit A, STRICKEN FROM THE RECORD # 2 Exhibit B, # <u>3 (p.41)</u> Memorandum in Support) (Levy, Scott) Modified on 10/20/2014 Added MOTION for Remittitur rotated and replaced all documents (LLH). Modified on 4/28/2015 to remove the document as it has been stricken (BCL). (Entered: 10/17/2014)
10/17/2014	<u>48 (p.240)</u>	MOTION to Alter Judgment <i>or Amend Judgment to Add Interest</i> by Marcus Berry. (Attachments: # <u>1 (p.14)</u> Memorandum in Support)(Rabb, Jeffrey). Added MOTION to Amend on 10/20/2014 (LLH). (Entered: 10/17/2014)
10/17/2014	<u>49 (p.246)</u>	NOTICE of Application to Tax Costs by Marcus Berry (Attachments: # <u>1 (p.14)</u> Affidavit of Jeffrey N. Rabb, # <u>2 (p.39)</u> Exhibit Rice Invoice 112913, # <u>3 (p.41)</u> Exhibit Rice Invoice 091714, # <u>4 (p.47)</u> Exhibit Sonnier Invoice 091514, # <u>5 (p.56)</u> Exhibit Turnipseed Invoice 090214)(Rabb, Jeffrey) (Attachment 5 replaced on 10/20/2014) (SMG). (Entered: 10/17/2014)
11/07/2014	<u>50 (p.253)</u>	MEMORANDUM in Opposition to <u>49 (p.246)</u> Notice of Application to Tax Costs filed by Auto-Owners Insurance Company. (Levy, Scott) (Main Document 50 replaced on 11/10/2014) (NLT). Modified on 11/10/2014 to edit the text and to replace the main document in order to correct the page orientation (NLT). (Entered: 11/07/2014)
11/07/2014	<u>51 (p.259)</u>	First MEMORANDUM in Opposition to <u>47 (p.220)</u> MOTION for New Trial MOTION for Remittitur filed by Marcus Berry. (Attachments: # <u>1 (p.14)</u> Exhibit)(Rabb, Jeffrey) (Entered: 11/07/2014)
11/07/2014	<u>52 (p.276)</u>	MEMORANDUM in Opposition to <u>48 (p.240)</u> MOTION to Alter Judgment MOTION to Amend Judgment to Add Interest filed by Auto-Owners Insurance Company. (Levy, Scott) (Entered: 11/07/2014)
04/20/2015	<u>53 (p.867)</u>	<p>NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings Jury Trial (partial transcript) hearing before Judge Brian A. Jackson held on 9-16-14. Court Reporter: Clare Smith-Neely. Phone Number: 225-389-3565.</p> <p>NOTICE RE REDACTION OF TRANSCRIPTS: The parties have five (5) business days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.lamd.uscourts.gov.</p> <p>Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.. Redaction Request due 5/8/2015. Redacted Transcript</p>

		Deadline set for 5/18/2015. Release of Transcript Restriction set for 7/16/2015. (Smith-Neely, Clare) (Entered: 04/20/2015)
04/28/2015	<u>54 (p.281)</u>	RULING AND ORDER: The <u>47 (p.220)</u> Motion for New Trial, Or Alternatively Motion for Remittitur is DENIED IN PART and GRANTED IN PART. Specifically, Defendants' motion for a new trial based on juror misconduct is DENIED, while their motion for remittitur is GRANTED. The prior <u>44 (p.216)</u> Judgment is AMENDED, such that judgment is conditionally entered IN FAVOR OF Plaintiff Marcus Berry and AGAINST Defendants Leon Roberson and Auto-Owners Insurance Company in the sum of SEVEN HUNDRED NINETY THOUSAND (\$790,000.00) DOLLARS, with interest from the date of entry of final judgment, and costs. Plaintiff Berry shall file in the record within twenty-one (21) days from the date of this Ruling and Order a written notice to the Court stating whether he accepts or rejects the foregoing remittitur. If Plaintiff accepts the remittitur, final judgment in this matter, consistent with the findings herein, shall be rendered on the date of acceptance. If Plaintiff rejects the remittitur, the case of Plaintiff Marcus Berry versus Defendants Leon Roberson and Auto-Owners Insurance Company will be set for a new trial on the issue of general damages. Considering the Court's conditional judgment herein which alters the original judgment in this matter, Plaintiffs <u>48 (p.240)</u> Motion to Alter or Amend Judgment to Add Interest is DENIED AS MOOT. Document 47-2 in this matter STRICKEN from the record. Signed by Chief Judge Brian A. Jackson on 04/28/2015. (BCL) (Main Document 54 replaced on 5/7/2015) (NLT). (Entered: 04/28/2015)
05/05/2015	<u>55 (p.295)</u>	NOTICE of Acceptance of Remittiture by Marcus Berry (Rabb, Jeffrey) (Entered: 05/05/2015)
05/07/2015	<u>56 (p.297)</u>	FINAL JUDGMENT: Considering <u>55 (p.295)</u> Written Notice of Acceptance of Remittitur filed May 5, 2015; the final judgment in this matter is entered on May 5, 2015 IN FAVOR OF Plaintiff Marcus Berry and AGAINST Defendants Leon Roberson and Auto-Owners Insurance Company in the sum of SEVEN HUNDRED NINETY THOUSAND (\$790,000.00) DOLLARS, with interest from date of judicial demand, and costs. Signed by Chief Judge Brian A. Jackson on 05/07/2015. (BCL) (Entered: 05/07/2015)
05/28/2015	<u>57 (p.298)</u>	NOTICE OF APPEAL to the USCA for the 5th Circuit of <u>54 (p.281)</u> Order on Motion for New Trial, <u>56 (p.297)</u> Judgment, by Auto-Owners Insurance Company, Leon Roberson. Filing fee \$ 505, receipt number 053N-1239298. (Levy, Scott) Modified on 5/28/2015 to edit text(ELW). (Entered: 05/28/2015)
05/29/2015	<u>58 (p.300)</u>	Costs Taxed in amount of \$ 120.00 against Leon Roberson and Auto Owners Insurance Company (NLT) (Entered: 05/29/2015)
06/04/2015	59	USCA Case Number 15-30483 for <u>57 (p.298)</u> Notice of Appeal to the USCA for the 5th Circuit, filed by Auto-Owners Insurance Company, Leon Roberson. (TMR) (Entered: 06/04/2015)
06/08/2015	<u>60 (p.302)</u>	TRANSCRIPT REQUEST by Auto-Owners Insurance Company for proceedings held on 09/16/2014 before Judge Brian A. Jackson.. (Levy, Scott) (Entered: 06/08/2015)

06/18/2015		Record on Appeal #15-30483 Electronically Certified regarding <u>57 (p.298)</u> Notice of Appeal to the USCA for the 5th Circuit. US Court of Appeals notified of certification. (TMR) (Entered: 06/18/2015)
06/25/2015	<u>61 (p.920)</u>	<p>NOTICE OF FILING OF OFFICIAL TRANSCRIPT of Proceedings Jury Trial hearing before Judge Chief Brian A. Jackson held on 9-16-14. Court Reporter: Clare Smith-Neely. Phone Number: 225-389-3565.</p> <p>NOTICE RE REDACTION OF TRANSCRIPTS: The parties have five (5) business days to file with the Court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript will be made remotely electronically available to the public without redaction after 90 calendar days. The policy is located on our website at www.lamd.uscourts.gov.</p> <p>Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER.. Redaction Request due 7/13/2015. Redacted Transcript Deadline set for 7/23/2015. Release of Transcript Restriction set for 9/21/2015. (Smith-Neely, Clare) (Entered: 06/25/2015)</p>
06/25/2015	62	REQUEST by Auto-Owners Insurance Company for Record on Appeal regarding <u>57 (p.298)</u> Notice of Appeal to the USCA for the 5th Circuit,. (Levy, Scott) (Entered: 06/25/2015)
06/25/2015	<u>63</u>	Transmitted Electronic Record on Appeal to Counsel of Record regarding <u>57 (p.298)</u> Notice of Appeal to the USCA for the 5th Circuit,. The clerk of court will retain the responsibility of sending the record to the 5th Circuit upon their request. (Attachments: # <u>1 (p.14)</u> Certified Appeal Record, Docket Sheet, # <u>2 (p.39)</u> Certified Appeal Record, Vol. 1, # <u>3 (p.41)</u> Certified Appeal Record, Transcript 1 held 9/15/14, # <u>4 (p.47)</u> Certified Appeal Record, Transcript 2 held 9/16/14)(TMR) (Entered: 06/25/2015)
07/31/2015	64	REQUEST by All Plaintiffs for Record on Appeal regarding <u>57 (p.298)</u> Notice of Appeal to the USCA for the 5th Circuit,. (Rabb, Jeffrey) (Entered: 07/31/2015)
10/19/2015		Supplemental Record on Appeal #15-30483 Electronically Certified regarding <u>57 (p.298)</u> Notice of Appeal to the USCA for the 5th Circuit,. US Court of Appeals notified of certification. (TMR) (Entered: 10/19/2015)
10/19/2015	65	Electronic Access to the Record on Appeal is now available through the Court of Appeals CM/ECF document filing system. Instructions for accessing the record can be found at www.ca5.uscourts.gov/attorneys/attorney-forms/eroa_downloads . Request for paper exhibits in addition to the record on appeal and shipping information should be faxed to the clerks office at 225-389-3501. The clerk of court will retain the responsibility of sending the record to the 5th Circuit upon their request. (This is a TEXT ENTRY ONLY. There is no hyperlink or PDF document associated with this entry.) (TMR) (Entered: 10/19/2015)

01/05/2016	<u>66 (p.303)</u>	MANDATE of USCA as to <u>57 (p.298)</u> Notice of Appeal to the USCA for the 5th Circuit, filed by Auto-Owners Insurance Company, Leon Roberson. The judgment of the District Court is affirmed. FURTHER defendants-appellants pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of the Appeals Court. (NLT) (Entered: 01/05/2016)
04/20/2016	<u>67 (p.313)</u>	MOTION for Relief from a Judgment <i>Pursuant to Fed.R.Civ.P.60(b)</i> by Auto-Owners Insurance Company. (Attachments: # <u>1 (p.14)</u> Memorandum in Support, # <u>2 (p.39)</u> Exhibit A, # <u>3 (p.41)</u> Exhibit B, # <u>4 (p.47)</u> Proposed Pleading; Proposed Order)(D'Amour, Christopher) (Entered: 04/20/2016)
04/22/2016	<u>68 (p.369)</u>	RESPONSE in Opposition to <u>67 (p.313)</u> MOTION for Relief from a Judgment <i>Pursuant to Fed.R.Civ.P.60(b)</i> or Alternatively a Declaratory Judgment filed by All Plaintiffs. (Attachments: # <u>1 (p.14)</u> Exhibit)(Rabb, Jeffrey) Modified on 4/25/2016 to edit text (LLH). (Entered: 04/22/2016)
05/04/2016	<u>69 (p.397)</u>	Motion For leave to File Defendant Auto Owners Insurance Company's Reply Memorandum to Plaintiff's Opposition to <u>67 (p.313)</u> MOTION for Relief from a Judgment <i>Pursuant to Fed.R.Civ.P.60(b)</i> filed by Auto-Owners Insurance Company. (Attachments: # <u>1 (p.14)</u> Reply Memorandum, # <u>2 (p.39)</u> Proposed Order)(D'Amour, Christopher) Modified on 5/4/2016 to edit text (TNB). (Entered: 05/04/2016)
05/06/2016	<u>70 (p.407)</u>	ORDER granting <u>69 (p.397)</u> Motion for Leave to file Reply to <u>68 (p.369)</u> RESPONSE in Opposition to <u>67 (p.313)</u> MOTION for Relief from a Judgment Pursuant to Fed.R.Civ.P.60(b) or Alternatively a Declaratory Judgment. Signed by Chief Judge Brian A. Jackson on 5/6/2016. (LLH) (Entered: 05/06/2016)
05/06/2016	<u>71 (p.408)</u>	REPLY Memorandum to <u>68 (p.369)</u> Response in Opposition to <u>67 (p.313)</u> MOTION for Relief from a Judgment <i>Pursuant to Fed.R.Civ.P.60(b)</i> or Alternatively a Declaratory Judgment filed by Auto-Owners Insurance Company. (LLH) (Entered: 05/06/2016)
05/10/2016	<u>72 (p.415)</u>	MOTION for Leave to File Supplemental Memorandum in Opposition to Rule 60(b) Motion or Alternatively a Declaratory Judgement by Marcus Berry. (Attachments: # <u>1 (p.14)</u> Attachment)(Rabb, Jeffrey) Modified to edit text on 5/10/2016 (BLR). (Entered: 05/10/2016)
05/12/2016	<u>73 (p.421)</u>	ORDER granting <u>72 (p.415)</u> MOTION for Leave to File Supplemental Memorandum filed by Marcus Berry. Plaintiff be granted leave of Court to file his Supplemental Memorandum. Signed by Chief Judge Brian A. Jackson on 5/12/2016. (BLR) (Entered: 05/12/2016)
05/12/2016	<u>74 (p.422)</u>	Supplemental Memorandum in Opposition to <u>67 (p.313)</u> 60(B) Motion or Alternatively a Declaratory Judgment filed by Marcus Berry. (BLR) (Entered: 05/12/2016)
06/17/2016	<u>75 (p.426)</u>	RULING and ORDER denying <u>67 (p.313)</u> Motion for Relief from a Judgment Pursuant to FRCP 60(B) and Alternatively a Declaratory Judgment filed by Auto-Owners Insurance Company. Signed by Chief Judge Brian A. Jackson on 6/17/2016. (JDL) (Entered: 06/17/2016)
07/05/2016	<u>76 (p.437)</u>	

		MOTION to Substitute Richard C. Stanley in place of Christopher A. D'Amour as Attorney by Auto-Owners Insurance Company. (Attachments: # 1 (p.14) Proposed Pleading; Proposed Order)(D'Amour, Christopher) (Entered: 07/05/2016)
07/05/2016		MOTION(S) REFERRED: 76 (p.437) MOTION to Substitute Richard C. Stanley in place of Christopher A. D'Amour as Attorney . This motion is now pending before the USMJ. (EDC) (Entered: 07/05/2016)
07/07/2016	77	ORDER granting 76 (p.437) Motion to Substitute Attorney. Richard C. Stanley & Brendan Andrew Curtin substituted as counsel for Auto-Owners Insurance Company replacing Christopher A. D'Amour, Scott M. Levy. Signed by Magistrate Judge Richard L. Bourgeois, Jr. on 07/07/2016. (This is a TEXT ENTRY ONLY. There is no hyperlink or PDF document associated with this entry.) (JSL) (Entered: 07/07/2016)
07/14/2016	78 (p.440)	MOTION to Alter Judgment by Auto-Owners Insurance Company. (Attachments: # 1 (p.14) Memorandum in Support, # 2 (p.39) Exhibit A)(Curtin, Brendan) (Entered: 07/14/2016)
07/14/2016	79 (p.478)	Motion For Oral Argument On Defendant Auto-Owners Insurance Company's 78 (p.440) MOTION to Alter or Amend Judgment by Auto-Owners Insurance Company. (Attachments: # 1 (p.14) Proposed Pleading; Proposed Order)(Curtin, Brendan) Modified on 7/15/2016 to edit the text (TNB). Modified on 7/21/2016 to edit the text (TNB). (Entered: 07/14/2016)
08/04/2016	80 (p.481)	MEMORANDUM in Opposition to 78 (p.440) MOTION to Alter Judgment <i>Plaintiff's Opposition to Defendant's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e)</i> filed by Marcus Berry. (Rabb, Jeffrey) Modified on 8/30/2016 to substitute document as per Order #85(LLH). (Entered: 08/04/2016)
08/05/2016	81 (p.491)	MOTION to Substitute <i>Plaintiff's Opposition to Defendant's Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e)</i> by Marcus Berry. (Attachments: # 1 (p.14) Plaintiff's Opposition to Defendant's Motion to Alter of Amend judgment Pursuant to Fed. R. Civ. P. 59(e))(Rabb, Jeffrey) Modified on 8/5/2016 to edit the text (TNB). (Entered: 08/05/2016)
08/12/2016	82 (p.504)	MOTION for Leave to File Reply Memorandum in Support of 78 (p.440) Rule 59(e) MOTION to Alter or Amend Judgment by Auto-Owners Insurance Company. (Attachments: # 1 (p.14) Proposed Pleading; Proposed Order, # 2 (p.39) Proposed Pleading; Reply Memorandum)(Curtin, Brendan) Modified on 8/18/2016 to edit text (LLH). (Entered: 08/12/2016)
08/30/2016	83 (p.512)	ORDER granting 82 (p.504) MOTION for Leave to File Reply Memorandum in Support of 82 (p.504) Rule 59(e) Motion to Alter or Amend Judgment. The Clerk of Court is directed to file Reply Memorandum into the record. Signed by Chief Judge Brian A. Jackson on 8/29/2016. (LLH) (Entered: 08/30/2016)
08/30/2016	84 (p.513)	REPLY Memorandum in support of 78 (p.440) MOTION to Alter Judgment filed by Auto-Owners Insurance Company. (LLH) (Entered: 08/30/2016)

		08/30/2016)
08/30/2016	<u>85 (p.518)</u>	ORDER granting <u>81 (p.491)</u> Motion to Substitute Document. Signed by Chief Judge Brian A. Jackson on 8/29/2016. (LLH) (Entered: 08/30/2016)
10/27/2016	<u>86 (p.519)</u>	RULING AND ORDER denying <u>78 (p.440)</u> Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) and <u>79 (p.478)</u> Motion for Oral Argument. Signed by Chief Judge Brian A. Jackson on 10/26/2016. (LLH) Modified on 10/28/2016 to edit document type(LLH). (Entered: 10/27/2016)
11/02/2016	<u>87 (p.534)</u>	NOTICE OF APPEAL to the USCA for the 5th Circuit of <u>86 (p.519)</u> Order on Motion to Alter Judgment,, Order on Motion for Oral Argument, <u>75 (p.426)</u> Order on Motion for Miscellaneous Relief by Auto-Owners Insurance Company. Filing fee \$ 505, receipt number 053N-1487176. (Curtin, Brendan) (Entered: 11/02/2016)
11/09/2016	88	USCA Case Number 16-31139 for <u>87 (p.534)</u> Notice of Appeal to the USCA for the 5th Circuit, filed by Auto-Owners Insurance Company. (TMR) (Entered: 11/09/2016)

Case #: 3:13-cv-00145-BAJ-RLB

2. Notice of Appeal

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MARCUS BERRY

CIVIL ACTION

VERSUS

LEON ROBERSON, ET AL.

NO.: 13-00145-BAJ-RLB

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Defendant Auto-Owners Insurance Company (“Auto-Owners”), through undersigned counsel, appeals to the United States Court of Appeals for the Fifth Circuit from:

1. The Ruling and Order (Doc. 75) denying Auto-Owners’ Motion for Relief Pursuant to Fed. R. Civ. P. 60(b) to amend the final judgment (Doc. 56) entered on May 7, 2015; and
2. The Ruling and Order (Doc. 86) denying Auto-Owners’ Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e).

Respectfully submitted,

/s/ Brendan A. Curtin

Richard C. Stanley, 8487 T.A.

Brendan A. Curtin, 35732

Stanley, Reuter, Ross, Thornton & Alford, L.L.C.

909 Poydras Street, Suite 2500

New Orleans, Louisiana 70112

Telephone: 504-523-1580

Facsimile: 504-524-0069

Counsel for Auto-Owners Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of November, 2016, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

/s/ Brendan A. Curtin _____

3. Jury Verdict

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MARCUS BERRY

CIVIL ACTION

VERSUS

LEON ROBERSON, ET AL.

NO.: 3:13-cv-00145-BAJ-RLB

VERDICT FORM

1. Do you find by a preponderance of the evidence that the Plaintiff was injured as a result of the collision that occurred on February 15, 2012?

YES NO

If you answered "YES" to Question 1, proceed to Question 2. If you answered "NO" to Question 1, PROCEED NO FURTHER. The Foreperson should sign and date the last page of the Verdict Form and return to the courtroom.

2a. Do you find by a preponderance of the evidence that the Plaintiff suffered from a pre-existing condition?

YES NO

If you answered "YES" to Question 2a, proceed to Question 2b. If you answered "No" to Question 2a, PROCEED TO QUESTION 3.

2b. Do you find by a preponderance of the evidence that the Plaintiff's pre-existing condition was aggravated by the collision that occurred on February 15, 2012?

YES NO

If you answered "YES" to Question 2b, proceed to Question 2c. If you answered "No" to Question 2b, PROCEED TO QUESTION 3.

2c. If your answer to both 2a and 2b is "YES", then you must find what percentage of aggravation is attributable to the February 15, 2012 collision and what percentage, if any, the Plaintiff would have faced whether the collision happened or not. The total percentage assigned to both must equal 100%.

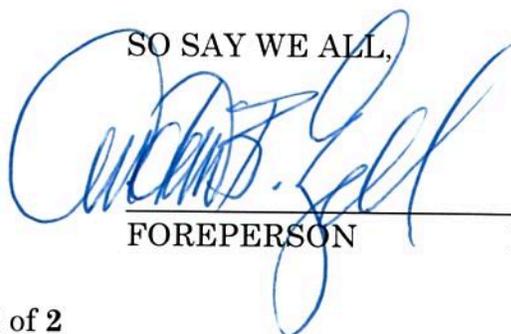
Percentage of aggravation to the Plaintiff's pre-existing condition attributable to the February 15, 2012 collision:	_____ %
Percentage of aggravation to the Plaintiff's pre-existing condition that the Plaintiff would have suffered whether the collision happened or not.	_____ %
Total Percentage:	_____ %

3. With regard to Question 2, state the entire amount of damages, if any, to which the Plaintiff is entitled as a result of the collision on February 15, 2012. (If you make no award for a particular category, please write "zero" in the blank.)

- (a) **Past/Present/Future Physical Pain and Suffering** \$ 600,000
 - (b) **Past/Present/Future Medical Expenses** \$ 390,000
 - (c) **Past/Present/Future Loss of Enjoyment of Life** \$ 300,000
- Total** \$ 1,290,000

SIGN AND DATE THE VERDICT FORM, AND NOTIFY THE COURT SECURITY OFFICER THAT YOU HAVE REACHED A VERDICT.

SO SAY WE ALL,



FOREPERSON

9/16/14

DATE

4. Final Judgment

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MARCUS BERRY

CIVIL ACTION

VERSUS

LEON ROBERSON, ET AL.

NO.: 13-00145-BAJ-RLB

FINAL JUDGMENT

Considering Plaintiff Marcus Berry's **Written Notice of Acceptance of Remittitur (Doc. 55)** filed May 5, 2015:

IT IS ORDERED, ADJUDGED, AND DECREED that final judgment in this matter is entered on May 5, 2015 **IN FAVOR OF** Plaintiff Marcus Berry and **AGAINST** Defendants Leon Roberson and Auto-Owners Insurance Company in the sum of **SEVEN HUNDRED NINETY THOUSAND (\$790,000.00) DOLLARS**, with interest from date of judicial demand, and costs.¹

Baton Rouge, Louisiana, this 7th day of May, 2015.



**BRIAN A. JACKSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

¹ The Court's prior conditional judgment specified that legal interest would be calculated from the date of entry of final judgment. (Doc. 54 at p. 13). Such a calculation of the interest award was erroneous. In diversity cases, state law governs the award of interest. *See New Amsterdam Cas. Co. v. Soileau*, 167 F.2d 767, 771 (5th Cir. 1948). Under Louisiana law, interest in judgments sounding in damages *ex delicto* runs from the date of judicial demand, that is, the time the complaint is filed. La. R.S. § 13:4203. *See also Texaco, Inc. v. Lirette*, 410 F.2d 1064, 1067 (5th Cir. 1969) (affirming amended judgment to allow legal interest from time of judicial demand in diversity tort action). Plaintiff's written acceptance of remittitur indicates his acceptance of judgment awarding interest from the date of judicial demand. (Doc. 55 at p. 1). Thus, the Court's final judgment herein reflects the proper interest award calculation, to which Plaintiff has already expressed acquiescence.

5. Ruling and Order Denying Rule 60(b) Relief

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MARCUS BERRY

CIVIL ACTION

VERSUS

LEON ROBERSON, ET AL.

NO.: 13-00145-BAJ-RLB

RULING AND ORDER

Before the Court is a **Motion for Relief from a Judgment Pursuant to Fed.R.Civ.P. 60(B) or Alternatively a Declaratory Judgment (Doc. 67)** filed by Auto-Owners Insurance Company, which seeks to add limiting language to a judgment entered by the Court against it and its insured pursuant to Federal Rule of Civil Procedure (“Rule”) 60(b)(6). (Doc. 67). Alternatively, Auto-Owners Insurance Company seeks a declaratory judgment stating that the judgment, as written, contains the limitation it requests without need for alteration. (*Id.*). Marcus Berry has filed a response, and both parties have submitted supplemental briefing. (Docs. 68, 71, 74). For the reasons that follow, Auto-Owners Insurance Company’s motion is **DENIED**.

I. BACKGROUND

This action arises from a car accident that occurred in February 2012. Marcus Berry (“Plaintiff”) filed suit against Leon Roberson, the driver of the other vehicle involved in the accident, and his insurer, Auto-Owners Insurance Company (“Defendant”). On September 17, 2014, a jury awarded Plaintiff \$1,290,000 in

damages, and the Court entered judgment against Leon Roberson and Defendant for that sum. (Docs. 14, 44).

Defendant thereafter timely filed a motion for new trial, or alternatively, a motion for a remittitur. (Doc. 47). Defendant asserted that juror misconduct warranted a new trial or that the damages awarded by the jury were excessive. (*Id.*). The Court denied Defendant's motion for a new trial and granted its motion for remittitur, reducing the total damages awarded to Plaintiff to \$790,000.00. (Doc. 54). Plaintiff later filed a notice accepting the Court's remittitur. (Doc. 55). The Court then entered a Final Judgment that read as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that final judgment in this matter is entered on May 5, 2015 **IN FAVOR** of Plaintiff Marcus Berry and **AGAINST** Defendants Leon Roberson and Auto-Owners Insurance Company in the sum of **SEVEN HUNDRED NINETY THOUSAND (\$790,000.00) DOLLARS**, with interest from date of judicial demand, and costs.

(Doc. 56).¹ Defendant and Leon Roberson timely filed an appeal from this Final Judgment to the United States Court of Appeal for the Fifth Circuit. (Doc. 57).

On appeal, Defendant and Leon Roberson only challenged the quantum of damages awarded to Plaintiff relative to future medical expenses and general damages.² (Doc. 66 at pp. 3—4). The Fifth Circuit rendered a decision affirming the Final Judgment entered by the Court on December 10, 2015. (Doc. 66). On December 27, 2015, Defendant asserts, and Plaintiff does not dispute, that it mailed a check in

¹ The Final Judgment contains a footnote that is omitted that relates to the calculation of interest. This footnote is not relevant to the motion *sub judice*.

² See also Brief of Petitioners-Appellants, Marcus Berry v. Auto-Owners Insurance Company; Leon Roberson, No. 15-30483 (5th Cir. Dec. 10, 2015).

the sum of \$100,000.00 to Plaintiff. (Doc. 67-1 at p. 2). Defendant contends that this amount corresponds to the limits contained in the policy under which it insured Leon Roberson. (Docs. 67-1 at p. 3, 67-3).

Sometime in April 2016, Defendant asserts that Plaintiff, for the first time, revealed his intent to collect from it the entire amount set forth in the Final Judgment. (Docs. 67-1 at p. 1, 67-2). In response to Plaintiff's efforts, Defendant filed the instant motion on April 20, 2016 seeking a declaratory judgment or relief pursuant to Rule 60(b)(6). Relative to its request for relief pursuant to Rule 60(b)(6), Defendant seeks to add language to the Final Judgment that references the Louisiana Direct Action Statute and the limits of the policy Defendant issued to Leon Roberson.

II. STANDARD OF REVIEW

“The purpose of Rule 60(b) is to balance the principle of finality of a judgment with the interest of the court in seeing that justice is done in light of all the facts.” *Hesling v. CSX Transp., Inc.*, 396 F.3d 632, 638 (5th Cir. 2005) (citing *Seven Elves, Inc. v. Eskenazi*, 635 F.2d 396, 401 (5th Cir. Jan. 1981)). “[T]he decision to grant or deny relief under Rule 60(b) lies within the sound discretion of the district court and will be reversed only for abuse of that discretion.” *Id.* (quoting *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (en banc) (citations omitted)). “A district court abuses its discretion if it bases its decision on an erroneous view of the law or on a clearly erroneous assessment of the evidence.” *Id.* (quoting *Kennedy v. Texas Utils.*, 179 F.3d 258, 265 (5th Cir. 1999) (citation omitted)).

A district court may grant relief under Rule 60(b) for one of six reasons listed therein: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) a void judgment; (5) a satisfied, released, or discharged judgment; or (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b). The Fifth Circuit has instructed that relief under Rule 60(b)(6) “is mutually exclusive from relief available under sections (1)-(5).” *Id.* at 642 (citing *Transit Cas. Co. v. Sec. Trust Co.*, 441 F.2d 788, 792 (5th Cir. 1971)). Furthermore, relief under Rule 60(b)(6) is only warranted when “extraordinary circumstances are present.” *Id.* (quoting *American Totalisator Co., Inc. v. Fair Grounds Corp.*, 3 F.3d 810, 815 (5th Cir. 1993) (citation omitted)).

The Declaratory Judgment Act provides that any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. 28 U.S.C. § 2201. There must be a determination of whether the declaratory judgment is justiciable, whether the court has the authority to grant the relief, and whether the court should exercise its discretion to decide the action. *Ironshore Specialty Ins. Co. v. Tractor Supply Co.*, 624 F. App’x 159, 163 (5th Cir. 2015) (unpublished but persuasive).

III. DISCUSSION

A. Arguments of the Parties

Defendant asserts that it was sued pursuant to the Louisiana Direct Action Statute, which reads in pertinent part:

The injured person or his survivors or heirs mentioned in Subsection A of this Section, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy; and, such action may be brought against the insurer alone, or against both the insured and insurer jointly and in solido

La. R.S. 22:1269(B)(1). Defendant argues that the language of the statute necessarily limits—or should necessarily limit—its exposure under the Final Judgment to the limits contained in the policy it issued to Leon Roberson. (Doc. 67-1 at pp. 1, 4–6; Doc. 71 at pp. 1–4). To the extent Defendant was required to introduce the limits of the policy at issue into evidence in order to avail itself of the same, Defendant directs the Court to a stipulation that was memorialized in the Final Pretrial Order. (Doc. 71 at p. 5; Doc. 20 at p. 4). Specifically, the parties stipulated that:

(5) At the time of the collision, there was a policy of liability insurance (policy # 48-378-494-01) provided by Defendant Auto Owners Insurance Company to policy holder Leon Roberson, under the terms of which it agreed to insure and indemnify Defendant Leon Roberson, for the damages asserted herein.

(Doc. 20 at p. 4). Defendant argues that it was entitled to rely upon this stipulation such that it was not required to introduce the policy or its limits into evidence at trial.³ (Doc. 71 at pp. 5–6). Alternatively, Defendant asserts that Federal Rule of Evidence 411 barred it from introducing the policy and its limits into evidence. (*Id.* at pp. 4–5).

³ Defendant asserts that it “was entitled to rely on the representations made in the Pre-trial Order such that there was no need to specifically introduce the policy at trial.” (Doc. 71 at p. 5). Immediately thereafter, Defendant asserts that “[s]imply put, policy limits are generally not admissible; nonetheless, the insurance policy was admitted into evidence via stipulation. But, regardless of this fact, the Direct Action Statute still does not require an insurer to introduce its policy in order to be bound by its limits.” (*Id.* at p. 6).

Defendant avers that Plaintiff's effort to recover the entire amount of the Final Judgment from it presents "unforeseen circumstances," because Plaintiff attempts to ignore the language of the Louisiana Direct Action. (Doc. 67-1 at p. 7). Defendant maintains that relief under Rule 60(b)(6) or a declaratory judgment is warranted to ensure that language in the Louisiana Direct Action Statute is not ignored. (Doc. 67-1 at pp. 6—10).

Plaintiff counters that the Direct Action Statute does not obviate the need of insurance companies to introduce policies of insurance—including the limits contained therein—into evidence in order to limit exposure to an excess judgment. (Doc. 68 at pp. 6—8). Although Defendant listed the policy at issue as an exhibit in the Final Pretrial Order, Plaintiff asserts that it never submitted the policy into evidence and consequently, the limits contained therein were never properly before the Court or the jury. (*Id.* at p. 4). Plaintiff further asserts that the stipulation reached by the parties only removed from contention the fact that Defendant issued a policy of insurance to Marcus Berry at the time of the accident; Plaintiff maintains that this stipulation did not in any way reference or incorporate the policy limits contained therein. (*Id.* at pp. 6—8).

Because evidence of policy limits was not properly before the Court or the jury, Plaintiff argues that Defendant is solidarily liable for the entire amount set forth in the Final Judgment. (*Id.*). Plaintiff further asserts that it believed Defendant did not introduce the policy at issue into evidence because it refused Plaintiff's offer to release Leon Roberson prior to trial. (*Id.* at p. 4). Regardless, Plaintiff argues that

Defendant's failure to introduce the policy at issue into evidence does not entitle it to relief under Rule 60(b) or a declaratory judgment that would have the same effect.

B. Law and Analysis

Louisiana law is clear that policies of insurance must generally be introduced into evidence in order for insurers to avail themselves of policy limits contained therein. *Williams v. Bernard*, 425 So. 2d 719 (La. 1983); *Willis v. State Farm Mut. Auto. Ins. Co.*, 99-708 (La. App. 3 Cir. 11/3/99); 747 So.2d 682, 683; *Payton v. Colar*, 488 So. 2d 1271, 1273 (La. App. 4 Cir. 1986), *writ denied*, 494 So. 2d 332 (La. 1986). Louisiana courts have also instructed that the Louisiana Direct Action Statute does not, in and of itself, limit an insurer's exposure under a judgment when evidence of policy limits is not introduced. *Willis*, 99-708; 747 So.2d at 683; *Payton*, 488 So. 2d at 1273. Thus, while the Louisiana Direct Action Statute imposes solidary liability on an insurer up to the policy limits of its insured, the mechanism to place such policy limits before the Court is an evidentiary one that does not operate automatically. *Id.*

Defendant does not persuasively distinguish the weight of Louisiana jurisprudence on this issue. The Court therefore looks to determine what evidence, if any, was introduced related to the policy of insurance Defendant issued to Leon Roberson. In doing so, the Court is mindful that Louisiana courts have distinguished between stipulations reached as to coverage under an insurance policy and stipulations reached as to the limits of an insurance policy. *Perkins v. Carter*, 09-673, pp. 7—11 (La. App. 5 Cir. 12/29/09); 30 So.3d 862, 867—869; *Malloy v. Vanwinkle*, 94—2060, pp. 2—4 (La. App. 4 Cir. 9/28/95), 662 So.2d 96, 99.

Although not dispositive, Defendant concedes that it did not publish the policy at issue to the jury at trial. (Doc. 71 at p. 5 n.3). See *Briscoe v. Stewart*, 423 So. 2d 1198 (La. App. 4 Cir. 1982), *writ denied*, 432 So. 2d 266 (La. 1983) (insurer's admission of policy into evidence did not require its publication to the jury). The Court also notes, however, that the policy does not appear on the list of exhibits introduced at trial. (Doc. 40). A review of the trial transcript confirms that the policy was not submitted into evidence by Defendant. Trial Transcript, Volume I, 9-15-14, 182:1—188:20. And while the Court did instruct the jury to consider the parties' stipulations of fact, Plaintiff is correct to note that the parties did not enter into any stipulation that set forth the policy limits that Defendant now relies upon to limit its exposure under the Final Judgment.⁴ (Doc. 40); Trial Transcript, Volume II, 9-16-14, 174:20—175:18.

Briefly, the Court dispels Defendant's assertion that Federal Rule of Evidence 411 barred it from introducing the policy into evidence. A cursory reading of Federal Rule of Evidence 411 reveals that evidence of liability insurance is not admissible to prove negligence or other wrongful acts by the insured. Fed. R. Evid. 411. The rule goes on to say that ". . . the court may admit this evidence for *another purpose*, such as proving a witness's bias or prejudice or proving agency, ownership, or control." *Id.* (emphasis added). Rule 411 did not prohibit Defendant from admitting the policy into

⁴ Again, this stipulation read:

(5) At the time of the collision, there was a policy of liability insurance (policy # 48-378-494-01) provided by Defendant Auto Owners Insurance Company to policy holder Leon Roberson, under the terms of which it agreed to insure and indemnify Defendant Leon Roberson, for the damages asserted herein.

evidence for the purpose of establishing its limited liability vis-à-vis the limits contained therein and the Louisiana Direct Action Statute.⁵ Defendant could have mitigated any risk of prejudice created by admission of the policy into evidence by requesting that it not be published to the jury, that it be redacted, or that a limiting instruction be given. *See DSC Commc'ns Corp. v. Next Level Commc'ns*, 929 F. Supp. 239, 242—46 (E.D. Tex. 1996).

Against the backdrop of this evidentiary lacuna, the Court concludes that the Final Judgment did not erroneously omit language that would limit Defendant's liability to the policy limits it now seeks to rely upon, and Defendant is therefore not entitled to the declaratory judgment it requests. The Court cannot simply declare that the Final Judgment says something that it plainly—or implicitly—does not in response to evidence that was not properly before it.

The Court next addresses whether Defendant is entitled to the relief it requests pursuant to Rule 60(b)(6). As previously indicated, Defendant has not sought relief pursuant to Rule 60(b)(1) and instead argues that “relief under Rule 60(b)(6) is appropriate given that the requested relief does not fall in any of the other enumerated grounds.” (Doc. 67-1 at p. 7). Defendant unquestionably had the evidence it belatedly brings to the Court's attention even before its insured injured Plaintiff. Upon review, the Court concludes that “extraordinary circumstances” within the meaning of Rule 60(b)(6) are simply not present to warrant disturbing the Final

⁵ Although the existence and amount of a liability policy is not relevant under the law of most states, the existence of a liability policy is an essential element of a claim brought pursuant to the Louisiana Direct Action Statute.

Judgment. See *Hesling*, 396 F.3d at 642 & n.6. As recognized by the court in *Payton*, which denied the same relief Defendant now seeks, Defendant “had ample time prior to and during trial to procure admissible evidence of the policy limits” in this case.⁶ *Payton*, 488 So. 2d at 1272. Furthermore, “when judgment was rendered holding [Defendant] solidarily liable for an amount in excess of its policy limits, [it] could have appealed.” *Id.* Defendant did not, however, raise this issue on appeal.

In light of the Louisiana jurisprudence discussed *supra*, the Court concludes that Defendant’s failure to raise the issue of its policy limits in its answer, (Doc. 3), in a motion for summary judgment, in its response to Plaintiff’s motion for summary judgment, (Doc. 17), in a proposed verdict form, in its proposed jury instructions, (Docs. 30, 38), and critically, by way of stipulation or introduction of evidence at trial militates against finding that “extraordinary circumstances” are present under Rule 60(b)(6). The Court is guided, in part, by the cautionary language in *Willis* that recognizes the difficulty of discerning whether an insurer’s failure to introduce a policy into evidence is a deliberate decision designed to protect its insured from an excess judgment. *Willis*, 99-708; 747 So.2d at 683. The Court has no way of knowing if there was any strategic value in withholding the policy from evidence.

⁶ The Court is aware that in *Payton*, the insurer sought relief by way of a motion for new trial and/or judgment notwithstanding the verdict and/or remittitur pursuant to state procedural law. *Payton*, 488 So. 2d at 1272.

IV. CONCLUSION

Accordingly,

IT IS ORDERED that the **Motion for Relief from a Judgment Pursuant to Fed.R.Civ.P. 60(B) or Alternatively a Declaratory Judgment (Doc. 67)** filed by Auto-Owners Insurance Company is hereby **DENIED**.

Baton Rouge, Louisiana, this 17th day of June, 2016.



**BRIAN A. JACKSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

6. Ruling and Order Denying Rule 59(e) Relief

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MARCUS BERRY

CIVIL ACTION

VERSUS

LEON ROBERSON, ET AL.

NO.: 13-00145-BAJ-RLB

RULING AND ORDER

Before the Court is the **Motion to Alter or Amend a Judgment Pursuant to Fed. R. Civ. P. 59(e) (Doc. 78)** filed by Auto-Owners Insurance Company (“Defendant”). Defendant asks the Court to reconsider and amend the previous Ruling and Order (Doc. 75) addressing Defendant’s Motion for Relief from Judgment Pursuant to Fed. R. Civ. P. 60(B) or Alternatively a Declaratory Judgment (Doc. 67) and to, by extension, enter a new judgment that includes language limiting Defendant’s liability to the policy limits contained in the insurance contract issued to Mr. Leon Roberson. Marcus Berry (“Plaintiff”) filed a response (Doc. 80) and Defendant replied (Doc. 84). Oral argument is not necessary. For the reasons that follow, Defendant’s motion is **DENIED**.

I. BACKGROUND

Plaintiff filed the instant personal injury action in the Nineteenth Judicial District Court, East Baton Rouge Parish, Louisiana, on January 29, 2013. (Doc. 1). The lawsuit was thereafter removed to this Court on March 7, 2013, and the matter was tried before a seven-member jury. On September 19, 2014, the jury awarded Plaintiff \$1,290,000. (Doc. 41). Upon motion by the Defendant, the Court reduced

damages awarded to Plaintiff to \$790,000. (Doc. 54). Plaintiff later filed a notice accepting the Court's remittitur. (Doc. 55). The Court's Final Judgment was rendered "IN FAVOR of Plaintiff Marcus Berry and AGAINST Defendants Leon Roberson and Auto-Owners Insurance Company." (Doc. 56). Defendant and Mr. Roberson timely appealed the Final Judgment to the U.S. Court of Appeals for the Fifth Circuit (Doc. 57), which the Fifth Circuit affirmed. (Doc. 66).

On June 3, 2015, Defendant mailed a check in the sum of \$100,000 to Plaintiff, which allegedly corresponded to the limits contained in the policy under which it insured Mr. Roberson. (Doc. 67-2). When Plaintiff rejected the payment and sought to collect from Defendant the entire amount set forth in the Final Judgment, Defendant sought a declaratory judgment or, in the alternative, relief under Federal Rule of Civil Procedure ("Rule") 60(b).¹ (Doc. 67). The Court denied Defendant's request for relief, holding that because Defendant failed to introduce its policy into evidence at trial, Defendant failed to demonstrate the presence of "extraordinary circumstances" under Rule 60(b)(6). (Doc. 75).

In response to this Court's ruling, Defendant filed the instant motion on July 14, 2016, seeking to alter or amend the Court's Ruling and Order denying relief pursuant to Federal Rule of Civil Procedure ("Rule") 59(e). Relative to its request for relief under Rule 59(e), Defendant seeks to by extension amend the Final Judgment

¹ Defendant's motion was fashioned as one in which Defendant sought relief generally under Rule 60(b). (Doc. 67). However, in its motion, Defendant specifically asserted that relief was warranted under Rule 60(b)(6), thereby foregoing other enumerated grounds for relief under Rule 60(b). (See Doc. 75 at p. 4).

to reflect policy limits included in the insurance contract between Defendant and Mr. Roberson.

II. STANDARD OF REVIEW

Defendant's motion requests that the Court reconsider its Ruling and Order entered June 17, 2016, which denied Defendant's request to add limiting language to a judgment rendered by the Court. Because Defendant's motion was filed within twenty-eight days of the challenged Ruling, it is properly and timely treated as a motion pursuant to Rule 59(e). *See Turner v. Chase*, No. 08-4951, 2010 WL 2545277, at *2 (E.D. La. June 16, 2010).

The Fifth Circuit has explained the purpose and application of Rule 59(e) as follows:

A Rule 59(e) motion calls into question the correctness of a judgment. This Court has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. Rather, Rule 59(e) serves the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.

Templet v. HydroChem Inc., 367 F.3d 473, 478–79 (5th Cir. 2004) (quotation marks, citations, and alterations omitted). “Because Rule 59(e) motions are subject to much more stringent time requirements than 60(b) motions, Rule 59(e) motions provide relief for the movant on grounds at least as broad as Rule 60 motions.” *Id.* “Relief under Rule 59(e) is also appropriate when there has been an intervening change in the controlling law.” *Schiller v. Physicians Res. Grp., Inc.*, 342 F.3d 563, 567 (5th Cir. 2003). “Rule 59(e), therefore, provides district courts with the power to

consider equitable factors and provide relief for ‘any ... reason justifying relief from the operation of the judgment.’” *Templet*, 367 F.3d at 483.

However, a litigant may not use a Rule 59(e) motion to raise “arguments that could, and should, have been made before the judgment issued.” *Advocare Int’l LP v. Horizon Labs., Inc.*, 524 F.3d 679, 691 (5th Cir. 2008). Such a motion is not intended to give parties a ‘second bite at the apple’ on the same issues previously addressed by the parties and the Court. *See Alvarado v. Texas Rangers*, No. EP-03-CA-0305-FM, 2005 WL 1420846, at *2 (W.D. Tex. June 14, 2005). The granting of a motion for reconsideration is “an extraordinary remedy that should be used sparingly.” *Templet*, 367 F.3d at 479. In determining whether to grant a motion to reconsider a prior judgment, courts must balance “the need to bring litigation to an end” and “the need to render just decisions on the basis of all the facts.” *Id.*

III. DISCUSSION

A. ARGUMENTS OF THE PARTIES

Defendant reasserts that the Louisiana Direct Action Statute, La. Rev. Stat. § 22:1269 *et seq.*, (“Direct Action Statute”), does not absolutely require insurers to prove policy limits at trial by placing the policy into evidence. (Doc. 78 at p. 8). Rather, Defendant argues that because the policy limits were placed into the record well before trial (*See* Doc. 8 at p. 3), no additional proof of the limits were required at trial. (Doc. 78 at p. 5). Additionally, because the extent of Defendant’s liability was not a contested issue at any point during the litigation, Defendant maintains that it was not required to offer proof of its limited liability under the Direct Action Statute. (Doc.

78 at p. 7). To that point, Defendant contends that if Plaintiff contested the policy limits, Plaintiff should have raised the issue in the pretrial order or at any other time before the case was put to the jury. (Doc. 78 at 7).

Defendant also asserts that any issue regarding the application of the policy limits is a matter to be resolved by the Court, not the jury. (Doc. 78 at p. 10). Because of this, Defendant states it was not required to put before the jury evidence of the applicable policy limits. (Doc. 78 at p. 10). This, Defendant urges, “would only serve to prejudice the insurer before the jury.” (Doc. 78 at p. 11). Defendant re-alleges the applicability of Rule 60(b), specifically asserting that its failure to introduce the insurance policy into evidence should be considered excusable neglect under Rule 60(b)(1). (Doc. 78 at p. 12). This position is appropriate, according to Defendant, because Plaintiff knew of the policy limits, Plaintiff did not dispute the policy limits, and Plaintiff was never otherwise misled or deceived about the policy limits. (Doc. 78 at 13). In addition, Defendant asserts that maintaining the current interpretation of the Final Judgment as requiring Defendant to pay in excess of the policy limits would be punitive in nature, which requires a finding of bad faith on the part of the insurer. (Doc. 78 at p. 14). As such, Defendant avers that preserving the current language of the Final Judgment would result in a deprivation of its property interest in the amount of \$690,000 without notice in violation of the Fifth Amendment’s Due Process Clause. (Doc. 78 at p. 16).

Plaintiff counters with a number of procedural objections. Plaintiff asserts that Defendant’s putative Rule 59(e) motion is actually a Rule 60(b)(1) motion subject to

a peremptory period of one year. (Doc. 80 at p. 3). Plaintiff also asserts that, to the extent the instant motion should be analyzed under Rule 60(b)(1), Defendant admitted this particular subsection of Rule 60(b) was not applicable in its last motion, which asked for relief under Rule 60(b)(6). (Doc. 80 at p. 5). Additionally, Plaintiff states that to the extent the Rule 59(e) motion is analyzed as such by the Court, it is untimely as the Final Judgment in this case was rendered on May 7, 2015. (Doc. 80 at p. 5).

Plaintiff adds that the Direct Action Statute cannot now impose restrictions to the extent of the policy limits because Defendant never submitted the policy into evidence, never raised the policy limits as an issue or defense prior to trial, and never stipulated to the amount of coverage for trial. (Doc. 80 at p. 6). More specifically, Plaintiff avers that because any references to Defendant's liability under the insurance policy stated that it would insure Mr. Roberson against and indemnify him for "the damages asserted herein," the limitations specifically featured in the policy do not protect Defendant. (Doc. 80 at p. 6).

B. LAW AND ANALYSIS

This Court has recognized that although the "Louisiana Direct Action Statute imposes solidary liability on an insurer up to the policy limits of its insured, the mechanism to place such policy limits before the Court is an evidentiary one that does not operate automatically." (Doc. 75 at p. 7). In the instant motion, Defendant has offered numerous reasons as to why this Court should retreat from that finding.

However, none of the reasons offered are sufficient under Rule 59(e) to warrant such a retraction.

As noted, Defendant's motion raises several new arguments in support of its assertion that it was not required to introduce evidence of the policy limitations at trial. The first is Defendant's assertion that it was not required to put on evidence of the policy limits because the application of the insurance policy limit under the Direct Action Statute is a question of law to be decided by the Court, not the jury. The second is that holding Defendant liable in excess of its policy limits in the amount of \$690,000 implicates its due process rights because such a finding is punitive in nature. These arguments present new legal theories that cannot be urged in a Rule 59(e) motion. *See Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990) (“[Motions for reconsideration] cannot be urged to argue a case under a new legal theory.”). Because there is no assertion—nor does the Court recognize on its own—that the arguments should be considered as a result of the discovery of new evidence concerning the aforementioned claims, relief under Rule 59(e) is not warranted on such basis. The Court will, however, consider Defendant's remaining arguments to the extent that the holdings are allegedly based on a manifestly erroneous interpretation of the law discussed in the Court's previous Ruling.

1. The Direct Action Statute's Requirement for Admission of the Policy Into Evidence

The Court declines to accept Defendant's contention that the Direct Action Statute does not absolutely require the admission of an insurance policy into evidence

for a judgment against an insurer to be rendered within the applicable policy limits. In its motion, the Defendant engages in a thorough discussion of various Louisiana cases—including *Williams v. Bernard*, 425 So.2d 719 (La. 1983), *Payton v. Colar*, 488 So.2d 1271 (La. App. 4 Cir. 5/12/86), and *Willis v. State Farm Mut. Auto. Ins. Co.*, 99-708 (La. App. 3 Cir. 11/3/99); 747 So.2d 682—which it argues create no requirement that the policy limits be placed into evidence at trial. (Doc. 78-1 at p. 8). However, in discussing these cases, Defendant fails to establish that this Court’s previous Ruling—specifically the finding that Louisiana courts and the Direct Action Statute do not, in and of themselves, limit an insurer’s exposure under a judgment when evidence of policy limits is not introduced—was based on a manifest error of law.

A “manifest error’ is not shown by the ‘disappointment of the losing party,’” rather it is the “wholesale disregard, misapplication, or failure to recognize controlling precedent.” *Shaw v. Broadcast.com, Inc.*, No. 98-cv-2017-P, 2005 U.S. Dist. LEXIS 34553, at *5 (N.D. Tex. Dec. 20, 2005) (quoting *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)); see also *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 325 (5th Cir. 2004) (defining “manifest error” in the appellate review context as “one that is plain and indisputable, and that amounts to a complete disregard of the controlling law” (citation and internal quotation marks omitted)).

Louisiana state courts have had the opportunity to address the precise question that confronts this Court in *Payton* and *Willis*. In *Payton*, the Louisiana Fourth Circuit Court of Appeal reversed the trial court’s decision to admit evidence of the policy limits nine months after trial had concluded and a judgment was entered.

During the seven-day trial, Insurors Indemnity tried but failed to introduce an acceptable copy of the insurance policy into evidence. *Payton*, 488 So.2d at 1272. At the trial's conclusion, the plaintiff recovered a personal injury judgment against Insurors Indemnity and its two co-defendants in the amount of \$711,000, plus interest from judicial demand and costs. *Id.* After the final judgment was rendered, Insurors Indemnity moved for a new trial and/or judgment notwithstanding the verdict and/or remittitur, all on the grounds that the amount of the judgment exceeded the applicable policy limits. *Id.* However, the motions were denied. *Id.* For several months after the final judgment was entered, Insurors Indemnity tried to introduce the policy into evidence. *Id.* Finally, by a judgment rendered ten months after the trial concluded, the trial judge permitted Insurors Indemnity to file its policy into trial record as an exhibit. *Id.* In holding that the trial judge's decision to admit the policy into evidence was erroneous, the Louisiana Fourth Circuit recognized that Insurors Indemnity had ample time prior to and during trial to introduce admissible evidence of the policy limits. *Id.* The court also noted that Insurors Indemnity could have proffered the policy or appealed the final judgment holding it liable in solido with its two co-defendants. *Id.* Because it appeared that by admitting the policy the trial court was merely "succumbing to months of persistent (sic) pleading by the insurer (sic)," the Fourth Circuit found the trial judge in error and held Insurors Indemnity liable in solido for the \$711,000 judgment. *Id.* at 1273.

Willis presented a set of facts slightly distinct from that in *Payton*. In *Willis*, State Farm—which was sued as the lone defendant under the Direct Action Statute—

was cast in judgment for personal injury damages in excess of its \$10,000 per person, \$20,000 per accident policy limits. *Willis*, 747 So.2d at 684. When State Farm filed a motion to correct the judgment on the grounds that the judgment did not reflect the policy limits, the trial judge granted the motion and ordered a new trial at which time the policy limits were introduced into evidence. *Id.* The trial judge thereafter entered a judgment recognizing the policy limits. *Id.* On appeal, the Louisiana Second Circuit Court of Appeal, after acknowledging the amount of discretion the trial judge had in determining whether to grant a new trial, affirmed the lower court's decision, recognizing that the trial court found State Farm's failure to introduce the policy limits into evidence as a technicality. *Id.* at 686.

After reviewing the cases and the Defendant's argument, it is the Court's observation that the relevant facts in each case determine whether subsequent attempts to limit liability will be successful. In any event, these cases do not upset the Court's previous Ruling, which noted that policies of insurance must generally be introduced into evidence in order for insurers to avail themselves of policy limits contained therein under the Direct Action Statute. (Doc. 75 at p. 7). As such, the Court's interpretation of the jurisprudence was not a manifestly erroneous interpretation of controlling precedent or of the Direct Action Statute. *See, e.g., Guy*, 394 F.3d at 325.

2. The Pretrial Order

Defendant also argues that because the policy limits were placed into the record well before trial (Doc. 8 at p. 3), and because the extent of Defendant's liability

was not a contested issue at any point during the litigation, no additional proof of the limits were required at trial. (Doc. 78 at p. 5). In support of this assertion, Defendant relies heavily on *Perkins v. Carter*, 09-763, pp. 7 – 11 (La. App. 5 Cir. 12/29/09), 30 So.3d 862, asserting that “this case is nearly identical to *Perkins*, but with the roles reversed.” (Doc. 78-1 at p. 6). This Court is not persuaded by that reasoning.

In *Perkins*, the plaintiff sued United Services Automobile Association (USAA) following an automobile accident involving USAA’s alleged insured, Dr. Howard Woo. *Perkins*, 30 So.3d at 864. At the conclusion of the plaintiff’s case, USAA moved to dismiss on the basis that the plaintiff failed to satisfy his burden of proving that Dr. Woo was insured by USAA at the time of the accident. *Id.* at 864 – 865. On appeal, the plaintiff argued that he was not required to put on evidence regarding coverage because the pretrial order listed USAA as Mr. Woo’s insurer. *Id.* at 868. Because the pretrial order contained this stipulation, and because USAA did not otherwise put the question of coverage at issue, the Louisiana Court of Appeals for the Fifth Circuit held that the plaintiff was not required to put on evidence as to coverage to prevail in his claim against USAA. *Id.* at 870.

Here, Defendant asserts that the facts in front of this Court are identical to those presented to the court in *Perkins*. Specifically, Defendant relies on *Perkins* in arguing that because Plaintiff failed to include policy limits as a contested issue in the pretrial order, Defendant was not obligated to put forth evidence of the applicable policy limits. (Doc. 78 at p. 5). Put simply, by asking the Court to accept this characterization of *Perkins*, Defendant seeks to have this Court allow it to avoid

liability through its own failure 1) to identify a potentially contested issue for which it has the burden of proof at trial,² and 2) to subsequently omit evidence as to the potentially contested issue at trial. This position is troubling, as accepting Defendant's argument would put the onus on Plaintiff to place the issue of policy limits into contention, even though doing so would potentially be to his detriment by serving to limit his overall potential recover. The Court cannot place Plaintiff into such a position, and Defendant has failed to point to any cases or statutes that impose such a burden on Plaintiff.

Although the Fifth Circuit has held that a party need not offer proof as to a fact expressly stipulated to in the pretrial order, *Shell Oil v. M/T GILDA*, 790 F.2d 1209, 1215 (5th Cir. 1986), or as to a legal theory that differs from an expressly stipulated argument, *U.S. v. First National Bank of Circle*, 652 F.2d 882, 886 (5th Cir. 1981), to accept Defendant's assertion would be to take the law on this point out of context.

3. Excusable Neglect

Finally, Defendant argues that any failure to introduce policy limits should be considered by the Court as excusable neglect under Rule 60(b)(1) because Defendant

² The Court has previously noted that Louisiana courts have distinguished between stipulations reached as to coverage under an insurance policy and stipulations reached as to the limits of an insurance policy. (Doc. 75 at p. 7), *see also Malloy v. Vanwinkle*, 94-2060, pp. 2 – 4 (La. App. 4 Cir. 9/28/95, 662 So.2d 96, 99. One of the main distinctions between stipulations as to either concerns the required burden of proof. Specifically, Louisiana courts have consistently held that “in an action under an insurance contract, the insured bears the burden of proving the existence of policy and coverage. The insurer, however, bears the burden of showing policy limits or exclusions.” *Whitham v. Louisiana Farm Bureau Cas. Ins. Co.*, 45-199 at **4 (La. App. 2 Cir. 04/14/2010), 34 So.3d 1104, 1107.

genuinely believed that it was not required to introduce the policy.³ In *Pioneer Investment Servs. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380 (1993), the United States Supreme Court stated that the determination of “excusable neglect” is “at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission.” *Id.* In determining whether a party’s neglect was excusable, the Supreme Court took into account several circumstances, including “the danger of prejudice to the debtor” and “whether the movant acted in good faith.” *Id.* at 396. Though *Pioneer* concerned the bankruptcy rules, it has been applied to requests for relief under Rule 60(b)(1). See *Silvercreek Mgmt., Inc. v. Banc of America Sec., LLC*, 534 F.3d 469, 472 (5th Cir. 2008).

Here, the factual circumstances are such that the Court cannot readily dismiss the actions—or inaction—of Defendant on the basis of excusable neglect. Defendant had the opportunity to limit its potential liability to Plaintiff at numerous stages of the trial and after the Final Judgment was rendered. Although Defendant did file a post-trial motion and appeal the Court’s Final Judgment, neither of these steps were done in an attempt to invoke the contractual protections provided by way of its policy limits. As such, the Court finds Defendant’s failure to introduce evidence of its policy limits was not excusable neglect.

³ In his response to this assertion, Plaintiff argues that the Court is unable to review Defendant’s Rule 60(b)(1) argument because the Court already considered Defendant’s argument under Rule 60(b)(6). However, the Court will consider the argument, as the Fifth Circuit has held that “[b]ecause Rule 59(e) motions are subject to much more stringent time requirements than 60(b) motions, Rule 59(e) motions provide relief for the movant on grounds at least as broad as Rule 60 motions.” *Templet v. HydroChem Inc.*, 367 F.3d 473, 478–79 (5th Cir. 2004). Thus, the Court can include in its considerations under Rule 59(e) whether Defendant’s failure to include the policy limitations in evidence constitutes “excusable neglect” under Rule 60(b)(1).

Additionally, the law recognizes that ignorance or misapprehension of the law is not a justifiable basis for modifying a judgment under Rule 60(b)(1). *Edward H. Bohlin Co., Inc. v. Banning Co., Inc.*, 6 F.3d 350, 357 (5th Cir. 1993). Because of this, Defendant's contention that it did not know that introduction of the policy limits into evidence was required does not justify the Court modifying the previous Ruling. Thus, the Court is not convinced that Defendant's failure to introduce evidence of the policy limits at trial constitutes excusable neglect.

IV. CONCLUSION

The Court reiterates that Defendant had numerous opportunities during the course of litigation to attempt to limit its liability with respect to Plaintiff, but failed to do so. Although the Court recognizes Defendant's discontent with the Final Judgment, such discontent is not a basis upon which to overturn a Judgment that has been rendered final. This Court is guided by the language in *Williams v. Bernard*, which recognized that "[a]fter coverage has been stipulated, an insurer cannot remain silent on extent of coverage and then complain when a jury awards an amount in excess of the policy limit." *Williams*, 413 So.2d 198 (La. App. 4 Cir. 04/07/1982).

Accordingly,

IT IS ORDERED that the **Motion to Alter or Amend a Judgment Pursuant to Fed. R. Civ. P. 59(e) (Doc. 78)** filed by Defendant Auto-Owners Insurance Company is hereby **DENIED**.

IT IS FURTHER ORDERED that the **Motion for Oral Argument** on **Defendant Auto-Owner Insurance Company's Motion to Alter or Amend a Judgment Pursuant to Fed. R. Civ. P. 59(e) (Doc. 79)** is **DENIED**.

Baton Rouge, Louisiana, this 26th day of October, 2016.

A handwritten signature in blue ink, appearing to read "B.A. Jackson", written over a horizontal line.

**BRIAN A. JACKSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA**

7. Final Pretrial Order

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MARCUS BERRY

CIVIL ACTION

VERSUS

NO. 3:13-cv-00145-BAJ-RLB

LEON ROBERSON, ET AL

FINAL PRETRIAL ORDER

This matter is scheduled to come before the Court at a pretrial conference to be held on July 10, 2014, pursuant to Fed. R. Civ. P.16, with Jeffrey N. Rabb to appear as counsel for Plaintiff and Douglas K. Foster and Christopher A. D'Amour to appear as counsel for Defendants, the following actions are to be taken:

(A) Nature of Action

This is an action for personal injury and the jurisdiction of the court is invoked under 28 USC. §1332. Jurisdiction is not disputed.

Plaintiff, Marcus Berry, has made a claim against Leon Roberson, Auto Owners Insurance Company and Progressive Paloverde Insurance Company, for personal injuries arising out of an automobile collision that occurred on February 15, 2012.

(B) Abandoned Claims

No waivers of claims or defenses have been abandoned by either party at this time.

(C) Relief Sought

Plaintiff's Itemized Statement of Special Damages

Sonnier Chiropractic Clinic	\$ 3,987.00
Spine Diagnostic and Pain Treatment Center	\$ 7,480.00
Imaging Center of Louisiana	\$ 950.00
Baton Rouge Fluoroscopic	\$ 1,500.00
Baton Rouge Anesthesia	\$ 1,694.00
NovaMed Surgery Center	\$16,600.00
Future Medicals	\$
PLAINTIFF'S TOTAL SPECIALS	\$32,211.00

Plaintiff's Future Medical Expenses

Dr. Turnipseed has opined that Mr. Berry will likely suffer with lower back pain on a chronic basis. He recommended future facet neurotomies that would likely need to be repeated annually for a period of up to seven years, but quite possibly longer.

Dr. Joseph, Defendants' independent medical examiner, has also conceded that Mr. Berry may require 2-3 neurotomies in the future.

Dr. Randy Rice, Plaintiff's expert economist, has calculated the cost of a neurotomy as follows:

Fluoroscopy	\$500.00
Sedation	\$500.00
Physician Fee	\$2,400.00
Facility Fee	\$4,220.00
TOTAL	\$7,620.00/per procedure

Plaintiff's Evidentiary Material Concerning Damages

Witnesses:

1. Plaintiff, Marcus Berry
2. G. Randolph Rice, Ph.D., expert economist
3. Joseph Turnipseed, M.D., pain management specialist
4. J.C. Sonnier, B.S., D.C., Chiropractor
5. A representative of Imaging Center of Louisiana

Exhibits:

1. Certified records and bills from the following medical providers:
 - a. Sonnier Chiropractic Clinic
 - b. Spine Diagnostic and Pain Treatment Center
 - c. Imaging Center of Louisiana
 - d. Baton Rouge Fluoroscopic
 - e. Baton Rouge Anesthesia
 - f. NovaMed Surgery Center
2. Expert Report of economist, G. Randolph Rice, Ph.D.;
3. Medical expense recapitulation

Defendants, Leon Roberson/Auto-Owners Insurance Co.' Evidentiary Material Concerning Damages

Witnesses

1. Dr. Allen Joseph

Exhibits

1. Certified records and bills from all plaintiff's medical providers resulting from the accident sued upon and any and all records and bills for plaintiff's medical providers prior to the accident sued upon;
2. IME Report of Dr. Allen Joseph; and
3. Deposition Transcripts of the relevant providers.

(D) Discovery

All discovery deadlines have passed (February 3, 2014) including deadline for deposition of expert witnesses. However, the parties will continue to supplement the discovery responses as provided by law.

(E) Motions

There is currently a pending Motion for Summary Judgment on liability and causation of damages filed by Plaintiff. Defendants have conceded the portion of the summary judgment on liability. Plaintiff will be supplementing the summary judgment with excerpts of the recent depositions of Drs. Turnipseed and Joseph. However, pursuant to the scheduling ordered entered for this matter, the deadline to file motions *in limine* is **July 21, 2014**. The deadline to file any responses to motions *in limine* is **August 11, 2014**.

(F) Undisputed Facts

- (1) A collision occurred on February 15, 2012 on Perkins Road at its intersection with Old Perkins Place Street.
- (2) Defendant concedes that he is at fault and is 100% responsible for the subject collision.
- (3) The vehicles and parties involved were a 2002 Honda Accord operated by the Plaintiff, Marcus Berry and a 2000 Chevy Blazer operated by Leon Roberson.
- (4) Defendant, Leon Roberson, was heading eastbound on Perkins Road attempting to execute a left turn under an unguarded green light.

- (5) At the time of the collision, there was a policy of liability insurance (policy #48-378-494-01) provided by Defendant Auto Owners Insurance Company to policy holder Judy Roberson, under the terms of which it agreed to insure and indemnify Defendant, Leon Roberson, for the damages asserted herein.
- (6) Progressive Paloverde Insurance Company provided UM coverage for the vehicle driven by Marcus Berry subject to the terms, conditions and limitation of its policy which has been pled in defendant's Answer to Petition or Original Complaint.

(G) Disputed Issues of Fact

1. The nature, extent and source of the injuries alleged by the plaintiff; and
2. All those inherent in the pleadings on file, and those related to the contested issues of fact above;
3. The dollar value of any damages to which the plaintiff may be entitled to recover.

(H) Disputed Legal Issues

1. Causation for alleged severity of plaintiff's injuries; and
2. Damages sustained as the result of accident sued upon.

(I) Exhibits

Plaintiff's Exhibits

(1) All Exhibits

1. Certified records and bills from the following medical providers:
 - a. Sonnier Chiropractic Clinic
 - b. Spine Diagnostic and Pain Treatment Center
 - c. Imaging Center of Louisiana
 - d. Baton Rouge Fluoroscopic
 - e. Baton Rouge Anesthesia
 - f. NovaMed Surgery Center
2. Expert Report of economist, G. Randolph Rice, Ph.D.;
3. Medical expense recapitulation;
4. Any photographs, diagrams, sketches, etc. of vehicles, accident scene, Plaintiff's injuries, etc.;
5. Any and all documentation /contracts regarding loss of wages or

potential wages of Plaintiff, including but not limited to W-2's or tax returns;

6. Property damage estimate of Plaintiff pertaining to the trial of this matter;
7. Insurance policy(ies) covering the vehicles/parties to this matter;
8. Uniform Motor Vehicle Traffic Crash Report;
9. Any documents or things listed by any other party.

(2) Possible Demonstrative Exhibits

1. Blow-ups of photographs, diagrams sketches, etc. of vehicles accident scene, Plaintiff's injuries, etc.

Defendant, Progressive Paloverde Insurance Co.'s Exhibits

1. The record of this proceeding, including all responsive pleadings and discovery contained herein;
2. All depositions and discovery obtained in this case;
3. Any exhibits listed or used by any other party;
4. Various photographs, submitted or obtained through discovery and/or pretrial disclosures;
5. Certified or true copies of any and all insurance policies issued to or by the parties in this lawsuit;
6. Demonstrative evidence (blackboard, diagrams, etc.);
7. Any and all medical bills, reports, x-rays, results of diagnostic studies, etc., pertaining to the treatment received by plaintiff whether prior to or subsequent to the accident sued upon;
8. Property damage estimates, repair invoices, etc.;
9. Plaintiff's employment records;
10. Impeachment evidence, including surveillance tapes, if any;
11. Independent Medical Expert Reports, if any; and

12. Police Accident Report.

Defendants, Leon Roberson/Auto-Owners Insurance Co.'s Exhibits

1. The record of this proceeding, including all responsive pleadings and discovery contained herein;
2. All depositions and discovery obtained in this case;
3. Any exhibits listed or used by any other party;
4. Various photographs, submitted or obtained through discovery and/or pretrial disclosures;
5. Certified or true copies of any and all insurance policies issued to or by the parties in this lawsuit;
6. Demonstrative evidence (blackboard, diagrams, etc.);
7. Any and all medical bills, reports, x-rays, results of diagnostic studies, etc., pertaining to the treatment received by plaintiff whether prior to or subsequent to the accident sued upon;
8. Property damage estimates, repair invoices, etc.;
9. Plaintiff's employment records;
10. Impeachment evidence, including surveillance tapes, if any;
11. Independent Medical Expert Reports, including any records, studies, diagnostic tests, or similar documents relied on by the expert;
12. Listing and history of all cases and scope of expert opinions offered by Dr. Joseph Turnipseed; and
13. Police Accident Report.

(J) Witnesses

Plaintiff's Witnesses

Will-Call Witnesses

1. Plaintiff, Marcus Berry
2100 College Drive
Apt 27
Baton Rouge, LA 70808

Re: Facts of collision, injuries, damages and limitations

2. Constance Newsome
337 Bagdad Loop
Colfax, LA 71417
Re: Injuries, damages and limitations of Plaintiff

2. Defendant, Leon Roberson
9985 Kenilworth Park Apt. 224
Baton Rouge, LA 70820
Re: Facts of the collision

3. Officer Scott Johnson, P1285
Baton Rouge Police Department
704 Mayflower Street
Baton Rouge, LA 70802
Re: Investigation of the incident

4. G. Randolph Rice, Ph.D., expert economist
Randolph Rice & Associates
7048 Moniteau Court
Baton Rouge, LA 70809
Re: Plaintiff's future medical expenses

6. Joseph Turnipseed, M.D., pain management specialist
Spine Diagnostic and Pain Treatment Center
5408 Flanders Drive
Baton Rouge, LA 70808
Re: Plaintiff's injuries and treatment (including future)

7. J.C. Sonnier, B.S., D.C.
Sonnier Chiropractic Clinic
Chiropractor
143 Lee Drive, Suite 1
Baton Rouge, LA 70808
Re: Plaintiff's injuries and treatment

8. Imaging Center of Louisiana
8338 Summa Ave.
#100
Baton Rouge, LA 70809

May-Call Witnesses

1. A representative of Auto Owners Insurance Company;

2. A representative of Progressive Paloverde Insurance Company;
3. A representative from Baton Rouge Fluoroscopic;
4. A representative from Baton Rouge Anesthesia;
5. Any other physician(s), on cross-examination, hired by the defendants to examine Plaintiff.
6. Any witnesses obtained through discovery, re: facts;
7. Any witnesses needed to testify about the earnings of the Plaintiff and his activities before and after the accident;
8. Any witnesses needed for impeachment and rebuttal evidence allowed by the discovery, or listed by another party;
9. Any witness(es) necessary to authenticate any exhibit revealed through
10. Any witness(es) listed or called by any other party herein;
11. Any witness necessary for the introduction of an exhibit;
12. Any witness needed to identify any medical exhibit.

Defendant, Progressive Paloverde Insurance Co's May Call Witnesses

1. Progressive adjuster(s);
2. Leon Roberson - Regarding facts surrounding the accident;
3. Plaintiffs - cross examination;
4. Any doctor, nurse, chiropractor, physical therapist, or other health care provider who has seen or treated the plaintiffs, whether prior to or subsequent to the accident sued upon;
5. Any witness listed or called by any other party;
6. Investigating officer(s);
7. Impeachment witnesses, if any;
8. Independent Medical Doctors, if any;

9. Plaintiff's employer(s); and
10. Any witnesses necessary for the authentication or introduction of any exhibit.

Defendant reserves the right to supplement this witness list upon giving notice to opposing counsel prior to trial of this matter.

Defendants, Leon Roberson/Auto-Owners Insurance Co.'s May-Call Witnesses

1. Auto-Owners' adjuster(s);
2. Leon Roberson – Regarding facts surrounding the accident;
3. Plaintiff – cross examination;
4. Any doctor, nurse, chiropractor, physical therapist, or other health care provider who has seen or treated the plaintiff, whether prior to or subsequent to the accident sued upon;
5. Any witness listed or called by any other party;
6. Investigating officer(s);
7. Impeachment witnesses, if any;
8. Independent Medical Doctors;
9. Plaintiff's employer(s); and
10. Any witnesses necessary for the authentication or introduction of any exhibit.

Defendant reserves the right to supplement this witness list upon giving notice to opposing counsel prior to trial of this matter.

(K) Expert Witness Stipulation

Plaintiff's Expert Witnesses

1. Joseph Turnipseed, M.D.
Spine Diagnostic and Pain Treatment Center
5408 Flanders Drive
Baton Rouge, LA 70808
Re: Plaintiff's injuries and treatment (including future)
2. J.C. Sonnier, B.S., D.C.
Sonnier Chiropractic Clinic

Chiropractor
143 Lee Drive, Suite 1
Baton Rouge, LA 70808
Re: Plaintiff's injuries and treatment

3. G. Randolph Rice, Ph.D., expert economist
Randolph Rice & Associates
7048 Moniteau Court
Baton Rouge, LA 70809
Re: Plaintiff's future medical expenses

Defendant, Progressive Paloverde Insurance Co's Expert Witnesses

1. Dr. Allen Joseph, independent medical examiner; and,
2. Ken Boudreaux, expert economist.

Defendant, Leon Roberson/Auto-Owners Insurance Co.'s Expert Witnesses

1. Kenneth J. Boudreaux, Ph.D.
Forensic Economist
1424 Bordeaux Street
New Orleans, Louisiana 70115
2. Larry Stokes, Ph.D.
Stokes & Associations
5020 Utica Street
Metairie, Louisiana 70006
3. James Butler, M.D.
Southern Spine Care
1570 Lindberg Drive, Suite 4
Slidell, Louisiana 70458
4. Allen S. Joseph, M.D.
The NeuroMedical Center
10101 Park Rowe Avenue, Suite 200
Baton Rouge, Louisiana 70810
5. Curtis Pardington, M.D.
Imaging Center of Louisiana
8338 Summa Avenue, Suite 100
Baton Rouge, Louisiana 70809

(L) Depositions

At this time, Plaintiff has no depositions to enter into evidence. However, it is possible that one or more of Plaintiff's treating physicians may appear live at trial or by video trial deposition. If the latter, the video will be played for the jury and the original deposition transcript will be entered into evidence at the start of trial.

(M) Disputed Evidentiary Issues

None at this time.

(N) Proposed Voir Dire Questions

Plaintiff will submit proposed Voir Dire Questions, Jury Instructions and Jury Verdict Form within the delays set forth in the Scheduling Order (8/29/2014).

(O) Trial Briefs

Plaintiff will submit a Trial Brief within the delays set forth in the Scheduling Order (8/29/2014).

(P) Trial

Trial of this case is expected to be tried before a jury and take four (4) days. The parties recommend that twelve (12) jurors be selected at the commencement of the trial.

(Q) Bifurcation, Separate Trial of Issues

The parties agree that the issues of liability and damages should not be bifurcated for trial. On motion of any party or on motion of the Court, bifurcation may be ordered in either a jury or a non-jury trial.

(R) Consent to Proceed Before a United States Magistrate Judge

The parties do not consent to this case being reassigned to a magistrate judge for trial.

(S) Settlement

Possibility of settlement of this case was considered by the parties. Counsel for Plaintiff sent defense counsel a demand package on September 12, 2012.

This Order will control the course of the trial and may not be amended except by consent of the parties and with leave of Court, or by order of the Court to prevent manifest injustice.

The foregoing admissions, having been made by the parties, and the parties having specified the foregoing issues of fact and law that remain to be litigated, this Pretrial Order shall supplement the pleadings and govern the course of the trial in this matter unless modified to prevent manifest injustice.

IT IS SO ORDERED.

/s/ Jeffery N. Rabb / 6-23-2014
Attorney for Plaintiff / Date

/s/ Douglas K. Foster / 6-23-2014
Attorney for Defendant, / Date
Progressive Paloverde Insurance Co.

/s/ Christopher A. D'Amour / 6-23-2014
Attorney for Defendants, / Date
Auto Owners Insurance Co. and
Leon Roberson

BRIAN A. JACKSON
United States District Judge

**8. Initial Disclosures of Auto-Owners
and Leon Roberson**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

MARCUS BERRY

VERSUS

LEON ROBERSON, AUTO-OWNERS
INSURANCE COMPANY, and
PROGRESSIVE PALOVERDE
INSURANCE COMPANY

*
*
*
*
*
*
*

CIVIL ACTION NO.: 3:13-cv-00145

INITIAL DISCLOSURES OF AUTO-OWNERS INSURANCE COMPANY
AND LEON ROBERSON, INDIVIDUALLY

NOW INTO COURT, through undersigned counsel, come Defendants, AUTO-OWNERS INSURANCE COMPANY (“Auto-Owners”) and Leon Roberson, Individually (“Roberson”), who make the following Initial Disclosures pursuant to Federal Rule of Civil Procedure 26(a)(1). Defendants Auto-Owners and Roberson reserve the right to supplement this disclosure.

DISCLOSURE NUMBER 1

Pursuant to Rule 26(a)(1)(A)(i), Defendants Auto-Owners and Roberson provide the identity of the persons likely to have discoverable information in support of their claims:

1. Marcus Berry
2100 College Drive, Apt. 27
Baton Rouge, LA 70808
facts
2. Leon Roberson
1666 County Road 83
Clanton, AL 35045
facts
3. Officer Scott Johnson
Baton Rouge Police Department
704 Mayflower Street
Baton Rouge, LA 70802
facts

4. Any and all of the plaintiff's treating healthcare providers;
5. Any expert witnesses regarding causation;
6. Any expert witness regarding damages;
7. Any person needed to authenticate any document at trial;
8. Any witness not yet identified but comes forward at a later date with information regarding the accident that is the subject matter of this proceeding;
9. Any other experts that may be needed to testify about any additional matter not yet disclosed;
10. Any witness listed by any other party to this litigation;

Defendants reserve their right to supplement this list as dictated by additional discovery.

DISCLOSURE NUMBER 2

Pursuant to Rule 26(a)(1)(A)(ii), Defendants Auto-Owners and Roberson hereby provide a description by category, of all documents, data compilations, intangible things in their possession, custody or control that are relevant to disputed facts that are presently available:

1. Certified Copies of Insurance Policy;
2. Certified Copies of all medical records of plaintiff received pursuant to discovery;
3. Expert reports;
4. Accident report;
5. Any photographs and/or video taken from the scene;
6. Any and all discovery propounded in this proceeding, including any depositions;
7. Any and all documents obtained through the use of a subpoena; and
8. Any and all exhibits listed by any other party to this proceeding

Defendants reserve their right to supplement this list as dictated by additional discovery

DISCLOSURE NUMBER 3

None

DISCLOSURE NUMBER 4

Owners Insurance Company Policy No. 48-378-494-01, issued to Leon and Judy Roberson, which was in effect at the time of this accident, has a \$100,000 per person/\$300,000 per occurrence policy limit and was in effect at the time of the accident that is the subject matter of this proceeding.

Defendants Auto-Owners and Roberson reserve the right to supplement these initial disclosures as discovery commences and continues in this matter.

Respectfully submitted:

ADAMS AND REESE LLP

/s/Scott M. Levy

SCOTT M. LEVY (#33243)
450 Laurel Street, Suite 1900
Baton Rouge, Louisiana 70801
Telephone: (225) 378-3257
Facsimile: (225) 336-5143

and

CHRISTOPHER A. D'AMOUR (#26252) T.A.
701 Poydras Street, Suite 4500
New Orleans, Louisiana 70139
Telephone: (504) 581-3234
Facsimile: (504) 566-0210

*Counsel for Defendants Leon Roberson
and Auto-Owners Insurance Company*

Certificate of Service

I hereby certify that on the 2nd day of August, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to all CM/ECF participants.

/s/Scott M. Levy

Scott M. Levy

9. Declarations Pages Showing Policy Limits

Owners

Page 1

19020 (10-80)
Issued 07-11-2011

INSURANCE COMPANY
6101 ANACAPRI BLVD., LANSING, MI 48917-3999

AGENCY **DAVIS & DAVIS INSURANCE AGENCY INC**
17-0078-00 17 MKT TERR 040 (205) 755-1200

INSURED **LEON ROBERSON**
JUDY ROBERSON

ADDRESS **1666 COUNTY ROAD 83**
CLANTON AL 35045-7400

AUTOMOBILE POLICY DECLARATIONS
GROUP RATING
Renewal Effective 08-17-2011

POLICY NUMBER 48-378-494-01
Company Use 38-16-AL-1008

Company Bill	POLICY TERM	
	12:01 a.m.	12:01 a.m.
	to	
	08-17-2011	02-17-2012

In consideration of payment of the premium shown below, this policy is renewed. Please attach this Declarations and attachments to your policy. If you have any questions, please consult with your agent.

DESCRIPTION OF ITEM INSURED	TERRITORY
1. 2007 CHEV C1500 SILVERADO VIN: 1GCEC19X27Z648531	042 Chilton County, AL

COVERAGES	LIMITS	PREMIUM
Bodily Injury	\$ 100,000 person/\$ 300,000 occurrence	[REDACTED]
Property Damage	\$ 100,000 occurrence	
Uninsured and Underinsured Motorist	\$ 25,000 person/\$ 50,000 occurrence	
Medical Payments	\$ 1,000 person	
Comprehensive	Actual Cash Value - \$ 500 deductible - Full Glass	
Collision	Actual Cash Value - \$ 500 deductible (with waiver)	
Road Trouble Service	\$ 100 occurrence	
Additional Expense	\$ 30/Day, \$ 900 Maximum	
TOTAL		

Interested Parties: None

Additional Forms For This Item:	79300 (07-10)	79402 (07-94)	79527 (06-92)
79536 (07-94)	79537 (06-92)	79299 (03-99)	79939 (03-05)
89023 (07-06)	89024 (07-06)		

ITEM DETAILS: Automobile driven for pleasure use by a 58 year old operator.
Cost Symbol: 11-3B-11-3B-62.
5% ABS Discount applies to BI, PD, and Coll premiums.
Multi-Car Discount applies.
Premier Credit applies.
30% Air Bag Discount applies to Med Pay premium.
Rate Effective Date 03-11-2011

150

0125

certific that the policy was assembled from multiple records as a representation of coverage that was in effect for the policy period shown.

Dawn Shaefer

Date 3/8/13 AO-000082-16-31139.329

R.E.60

Exhibit B

OWNERS INS. CO.

19020 (10-80)
Issued 07-11-2011

AGENCY DAVIS & DAVIS INSURANCE AGENCY INC
17-0078-00 17 MKT TERR 040

Company POLICY NUMBER 48-378-494-01
Bill Company Use 38-16-AL-1008

INSURED LEON ROBERSON

Term 08-17-2011 to 02-17-2012

2. 2000 CHEV BLAZER
VIN: 1GNCS13W8Y2303158

042
Chilton County, AL

COVERAGES	LIMITS	PREMIUM
Bodily Injury	\$ 100,000 person/\$ 300,000 occurrence	[REDACTED]
Property Damage	\$ 100,000 occurrence	
Uninsured and Underinsured Motorist	\$ 25,000 person/\$ 50,000 occurrence	
Medical Payments	\$ 1,000 person	
Comprehensive	Actual Cash Value - \$ 500 deductible - Full Glass	
Collision	Actual Cash Value - \$ 500 deductible (with waiver)	
Road Trouble Service	\$ 100 occurrence	
Additional Expense	\$ 30/Day, \$ 900 Maximum	
TOTAL		

Interested Parties: None

Additional Forms For This Item:	79300 (07-10)	79402 (07-94)	79527 (06-92)
79536 (07-94)	79537 (06-92)	79730 (07-06)	79299 (03-99)
89023 (07-06)	89024 (07-06)		79939 (03-05)

ITEM DETAILS: Automobile driven for pleasure use by a 66 year old operator.
Cost Symbol: 10-6B-10-6B-62.
5% ABS Discount applies to BI, PD, and Coll premiums.
Multi-Car Discount applies.
Premier Credit applies.
30% Air Bag Discount applies to Med Pay premium.
Rate Effective Date 03-11-2011

150

0125

Owners

Page 3

19020 (10-80)
Issued 07-11-2011

INSURANCE COMPANY
6101 ANACAPRI BLVD., LANSING, MI 48917-3999

AGENCY DAVIS & DAVIS INSURANCE AGENCY INC
17-0078-00 17 MKT TERR 040 (205) 755-1200

INSURED LEON ROBERSON
JUDY ROBERSON

ADDRESS 1666 COUNTY ROAD 83
CLANTON AL 35045-7400

AUTOMOBILE POLICY DECLARATIONS
GROUP RATING
Renewal Effective 08-17-2011

POLICY NUMBER 48-378-494-01
Company Use 38-16-AL-1008

Company Bill

POLICY TERM	
12:01 a.m.	12:01 a.m.
to	
08-17-2011	02-17-2012

In consideration of payment of the premium shown below, this policy is renewed. Please attach this Declarations and attachments to your policy. If you have any questions, please consult with your agent.

DESCRIPTION OF ITEM INSURED	TERRITORY
3. 1999 CHEV C1500 SILVERADO VIN: 1GCEC14T9XE112820	042 Chilton County, AL

COVERAGES	LIMITS	PREMIUM
Bodily Injury	\$ 100,000 person/\$ 300,000 occurrence	TOTAL
Property Damage	\$ 100,000 occurrence	
Uninsured and Underinsured Motorist	\$ 25,000 person/\$ 50,000 occurrence	
Medical Payments	\$ 1,000 person	
Comprehensive	Actual Cash Value - \$ 500 deductible - Full Glass	
Collision	Actual Cash Value - \$ 500 deductible (with waiver)	
Road Trouble Service	\$ 100 occurrence	
Additional Expense	\$ 30/Day, \$ 900 Maximum	
TOTAL		

Interested Parties: None

Additional Forms For This Item: 79300 (07-10) 79402 (07-94) 79527 (06-92)
79536 (07-94) 79537 (06-92) 79730 (07-06) 79299 (03-99) 79939 (03-05)
89023 (07-06) 89024 (07-06)

ITEM DETAILS: Automobile driven for pleasure use by a 58 year old operator.
Cost Symbol: 08-3B-08-3B-66.
5% ABS Discount applies to BI, PD, and Coll premiums.
Multi-Car Discount applies.
Premier Credit applies.
30% Air Bag Discount applies to Med Pay premium.
Rate Effective Date 03-11-2011

150

0125

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2016 an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Matthew J. Paul