IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEWAYNE HENSON AND AXA RE PROPERTY AND CASUALTY INSURANCE CO.	APPELLANTS
VERSUS	NO. 2006-CA-00997
WILLIAM L. RIGGENBACH and TERESA K. RIGGENBACH	APPELLEE

BRIEF OF APPELLEE

APPEALED FROM THE CIRCUIT COURT
OF YALOBUSHA COUNTY, MISSISSIPPI
CIVIL ACTION NO. CV-2004-0029-B-Y1

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APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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WILLIAM L. RIGGENBACH
and TERESA K. RIGGENBACH — **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate potential disqualifications or recusal:

1. Honorable Andrew C. Baker;
2. Clyde X. Copeland, III;
3. W. Stephens Cox;
4. Vicki S. Wood;
5. Daryl Burney, Circuit Court Clerk, Yalobusha County;
6. Dewayne Henson, Appellant;
7. William L. Riggenbach, Appellee;
8. Teresa K. Riggenbach, Appellee;
9. Robert L. Moore; and
10. Dawn Davis Carson.

Respectfully submitted,

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The Appellees believe that oral argument in this matter would be unnecessary. The record in this case is relatively small and the facts are not complicated. Furthermore, the issues are rather straightforward and therefore oral argument would be of little benefit to the Court.

I.

STATEMENT OF THE ISSUE

Whether the trial court abused its discretion in granting the Order of Additur or, in the Alternative, a New Trial.

II.

STATEMENT OF THE CASE

On April 19, 2004, William L. Riggenbach and his wife, Teresa K. Riggenbach (Appellees) filed a Complaint for damages against Dewayne Henson, Corey S. Campbell, and James W. Paris. (Appellant) (R.E. 14.) William Riggenbach sought damages for personal injuries he sustained on August 17, 2001, while riding as a passenger in a vehicle owned and operated by Paris. *Id.* Campbell and Henson approached the Paris vehicle from the rear in separate automobiles traveling at approximately 65 miles per hour in a 45-mile-an-hour speed zone. As Paris began to make a left-hand turn, Campbell, who was attempting to pass Paris at an intersection, struck the driver's side door. An instant later, Henson's vehicle struck the rear of the vehicle. *Id.* As a result, William Riggenbach sustained severe personal injuries for which he sought damages. Kay Riggenbach also sought damages for her loss of consortium claim. Riggenbach, who owned several vehicles, had uninsured motorist coverage with Axa Re: Property & Casualty Insurance Company. A separate lawsuit was filed against Axa Re: Property & Casualty Insurance Company. The two cases were later consolidated and tried at the same time. Prior to trial, the Riggenbachs settled with Campbell for his policy limits of $10,000.00. The Riggenbachs then proceeded to trial against Henson, Paris and Axa Re: Property & Casualty Insurance Company. The jury returned a verdict on February 23, 2006, finding Campbell 50% at fault, Henson 50% at fault and Paris 0% at fault, and assessed William Riggenbach's damages at $10,000.00 and Teresa Riggenbach's damages at $0. (T. 481) Upon a bifurcated trial for punitive damages against Henson, the jury awarded no damages. The Court then assessed the 50% fault of Henson against the verdict and on March 9, 2006, entered an Order in favor of

William Riggenbach against Henson in the amount of $5,000.00.

On March 8, 2006, the Riggenbachs filed a Motion for Additur or, in the Alternative, for a New Trial, claiming that the award made to William Riggenbach was inadequate and against the overwhelming weight of the evidence; that the jury's failure to award any damages to Teresa Riggenbach was against the overwhelming weight of the evidence and that the jury's failure to award punitive damages against Henson for his admitted careless and reckless driving was against the overwhelming weight of the evidence and indicated bias and prejudice on the part of the jury. (T. 456-459) On May 12, 2006, the Court, after having considered the Riggenbachs' Motion and after having heard oral arguments, entered an Order of Additur or, in the Alternative, for a New Trial, finding that the verdict was against the overwhelming weight of the evidence and reflected a bias or prejudice of the jury. The Court suggested a verdict for Teresa Riggenbach in the amount of $5,000.00; punitive damages in the amount of $10,000.00; and an additur for William Riggenbach in the amount of $30,000.00, for a total suggested additur of $45,000.00, or a new trial as to damages only. (T. 621-622) On May 18, 2006, the Riggenbachs filed their Notice of Acceptance of Additur and on June 8, 2006, Henson filed his Notice of Appeal from the Order of Additur or, in the Alternative, a New Trial. (T. 625-626) Axa Re: Property & Casualty Insurance Company has joined the appeal which is currently pending before this Court.

III.

RELEVANT FACTS

This appeal involves an automobile accident that occurred on August 17, 2001. On the date in question, Paris had picked up Riggenbach and Tillman and proceeded to a friend's home. Paris was driving the vehicle with Riggenbach sitting in the right front seat wearing his seatbelt with Tillman sitting in the middle of the second seat of the mini-van. (T. 144-150) They were proceeding down Perry Road, which is a two-lane rural highway, which had a speed limit of 45 miles per hour. (T. 145) They had slowed to make a left-hand turn onto Lark Drive. The traffic traveling Perry Road was the through-highway with the traffic entering from Lark Drive being controlled by a stop sign. (T. 147) Riggenbach was turned to his left in the seat talking to Tillman and Paris when he noticed out of the corner of his eye a vehicle rapidly approaching. By that time, Paris had begun to make his left turn. Riggenbach yelled that they were about to be hit and an instant later, Campbell's vehicle, who was passing Paris on the left, collided with the driver's door of the mini-van, knocking it back to the right. (T. 150) An instant later, Henson's vehicle slammed into the back of the mini-van spinning it around in the road and off into the ditch, where it landed with a hard jolt. (T. 151) The second impact by Henson caused Riggenbach to slam into the passenger side window and door frame with his elbow, busting out the passenger side window and his left shoulder bending the door frame. (T. 154, 243, 289) As a result of the impact, all of the doors to the mini-van were jammed, requiring that the three passengers exit through the windows. (T. 244) All three vehicles were totaled as a result of this accident. None of the individuals involved in the accident at that time felt that they had sustained any significant injuries and therefore declined medical treatment at the scene. That evening,

Riggenbach began to notice that he was getting sore and the next day, the soreness increased. (T. 245) After two weeks of not getting any better, his wife convinced him that he needed to go to a doctor. He presented himself to the Grenada Lake Hospital Emergency Room, where he reported his primary discomfort being with his neck and shoulder with some mild discomfort with his back. (T. 246) The hospital then referred him to Dr. Lee, an internist, where he made similar complaints. As reflected in Dr. Lee's medical records in three different places, Riggenbach also complained of back pain. (Trial Exhibit 6) Dr. Lee ordered an MRI of his neck and shoulder region and then referred him to Dr. Field in Oxford, who is an orthopaedic surgeon. (T. 247) Dr. Field examined him, as well as the MRIs, and concluded that he needed to be treated by a neurosurgeon and referred him to Dr. Eckman in Tupelo. (T. 248) Prior to referring him to Dr. Eckman, however, Dr. Field indicated that he felt surgery would be necessary on Riggenbach's neck based on the findings of the MRI. (T. 248) Dr. Eckman then saw Riggenbach, at which time he reviewed the MRI and conducted a physical examination of Mr. Riggenbach. He, like Dr. Field, concluded that he needed surgery on his neck, which would require entry from the front of the neck and the removal of the affected material and a fusion of his spine. (T. 250) Riggenbach was told that this type of surgery would cost $30,000.00 and that he had the option of having the surgery performed once he was in a position to pay for it or could simply endure the pain. (T. 251) Riggenbach, not having any health insurance and making on average $100.00 per day, elected not to have the surgery. (T. 252, 290) His primary complaints to Dr. Eckman and Dr. Field were of the neck and shoulder region, even though he was having discomfort in his lower back.

Two and a half years after the accident, he consulted an attorney, who recommended that

he be re-evaluated by Dr. Eckman for the purpose of getting an updated opinion regarding his condition. (T. 256, 257, 159) Inasmuch as Mr. Riggenbach had never been treated with respect to his lower back, his attorney likewise recommended that he go see Dr. Howser, who was a retired neurosurgeon, who performed independent medical examinations and would render an expert opinion. (T. 257, 261) Upon being seen by Dr. Howser, it was recommended that an MRI be performed of the lumbar area since none had previously been done. (T. 261) An MRI was subsequently performed and Riggenbach returned to Dr. Howser with the MRI films. Dr. Howser, upon reviewing the films, noted that he had a herniated disc in the lumbar area and recommended surgery to alleviate his pain. (T. 262)

Mr. Riggenbach was described by his wife as having been a workaholic prior to the accident. (T. 303) He was a person who had many talents, including carpentry, welding, electrician, plumber and mechanic. (T. 142, 238) In addition, he was a volunteer fireman who held a number of certificates. Paris, who had known Riggenbach for ten years, testified that prior to the accident, he had never seen Riggenbach have any difficulty performing any task and had never heard him complain regarding his neck, shoulder or back. (T. 139, 143) He had on numerous occasions fought fires with him and had witnessed him lift heavy objects, including the Jaws of Life, with no difficulty. (T. 142, 143) Following the accident, Paris testified that Riggenbach was a changed man and was no longer able to work like he had prior to the accident and ultimately quit being a volunteer fireman because he was unable to perform the task. (T. 156-158) Even though Paris was a Defendant in the lawsuit, he testified that in his opinion, Riggenbach had in fact been injured in the accident and deserved to be compensated. (T. 157, 160, 176) He also testified, however, that unfortunately as a result of the litigation, that their

friendship had ended. (T. 162)

Riggenbach testified that he was basically in constant pain in his neck, shoulder and back area and found it extremely difficult to sleep or perform the tasks that he had done prior to the accident. (T. 258-260, 263) Even though he was in constant pain, he refused to take any type of prescription medication. (T. 255) He testified that on previous occasions when he had been injured such as on one occasion when he had badly cut his hand, he simply took a needle and thread and sewed up his own wound without going to a hospital or taking any type of pain medication. (T. 253) On another occasion when he had cut his leg with a chainsaw, he had likewise simply sewed up his own leg. (T. 254) He was obviously a person who could endure a great deal of pain without medication. Following the accident, he continued to work since he was the only means of support for the family. (T. 252) His ability to work, however, was considerably restricted by his injuries. (T. 303) His wife described him as a changed man as a result of these injuries and that he was now much more irritable and was unable to do many of the things that he had done prior to the accident. (T. 301, 305)

At trial, there was considerable debate over whether or not his lower back injury was a result of this accident simply because he had not sought significant treatment for this injury. Regardless of this debate, it is somewhat of a moot point because the additur which was granted dealt solely with the injury to his cervical area, about which there was very little dispute. Dr. Eckman testified that Riggenbach had a central disc herniation at C5-6, which was reflected on the MRI and that he needed a cervical fusion at a cost of $30,000.00 to remedy the problem. (Dep. Dr. Walter Eckman, p. 19) He was also of the opinion that if Riggenbach had no history of pain prior to the accident that a traumatic event such as the accident could be the triggering cause

of the pain that he was experiencing. (Dep. Dr. Walter Eckman, p. 22-23) Dr. Howser, who likewise reviewed the MRIs, was of the opinion that he needed to have an anterior disc and fusion at C5 and a removal of the ruptured disc at L3 on the left side. (Dep. Dr. John Howser, p. 15) It was his opinion that the cost of the back surgery would be between $8,000.00 to $12,000.00 for the neurosurgeon; $2,000.00 to $5,000.00 for the anesthesiologist; and $10,000.00 for the hospital bill. (Dep. Dr. John Howser, p. 23) He further testified that the cost for the removal of the anterior disc and fusion in the neck would be $15,000.00 for the neurosurgeon; $10,000.00 for the hospital; and $2,000.00 to $5,000.00 for the anesthesiologist. (Dep. Dr. John Howser, p. 24) He also gave him an 8% anatomical disability rating to the body as a whole for the cervical problem alone. (Dep. Dr. John Howser, p. 24) Howser was also of the opinion that if you simply ignore the lumbar problem that the problems that Riggenbach had with the cervical area alone would have prevented him from being able to do his job as a carpenter. (Dep. Dr. John Howser, p. 28) The aforesaid medical testimony of Dr. Eckman and Dr. Howser was unrefuted by any medical expert.

The evidence presented at trial clearly reflects that Campbell and Henson were racing at the time of the accident. Henson testified that they had left his home heading to Grenada for the purpose of hanging out in a parking lot. (T. 180) Henson had left his driveway and turned one direction and Campbell turned the other. (T. 180) They met back up again on Perry Road, where Campbell was in the lead. (T. 181) Paris testified that approximately 500 feet from the intersection, he had looked in his rear-view mirror and saw no vehicles approaching from the rear. (T. 145) Joan Hoop, who knew none of the parties involved in the accident, was proceeding in the opposite direction. She testified that she saw the Campbell and Henson

vehicles approaching down the highway behind the Paris vehicle and that they were side-by-side on the two-lane road. (T. 206) She further testified that it appeared to her that they were racing. (T. 209) She had to bring her vehicle to a stop so that one of the vehicles could get back into the right-hand lane to keep from hitting her car. (T. 206) After they had passed, she proceeded on a short distance when she heard the collision with the Paris vehicle behind her. She looked in her rear-view mirror and saw the vehicles spinning around in the road. (T. 207) Henson admitted that they were going at least 65 miles an hour in a 45-mile-an-hour speed zone, which he described as a residential area. (T. 182-184) He testified that he was anywhere from one-half of a car length to one and a half car lengths behind the Campbell vehicle just prior to the collision. (T. 182) He further testified that he had traveled this road hundreds of times and was aware of the fact that Lark Drive entered Perry Road. (T. 178, 194) He testified that since he was so close behind the Campbell vehicle that he could not actually see the Paris vehicle until the last instant when Campbell attempted to pass the Paris vehicle. (T. 185) He stated that he did not have time to apply his brakes and slammed into the van going 65 miles per hour. (T. 185) He further admitted that he was driving carelessly and recklessly. (emphasis added) (T. 182-184)

Henson also had agreed that had he been going the speed limit of 45 miles per hour, it would have given him more time to react. In addition, he admitted that if he had been three to five car lengths behind Campbell's car that he would have had time to apply his brakes and avoid hitting the van. (T. 186)

Based upon the foregoing facts, it is obvious that Campbell and Henson were racing and collided with the Paris vehicle at a high rate of speed. It is equally obvious that Riggenbach

sustained significant injuries in this accident and that he was not adequately compensated by the jury.

ARGUMENT

The issue presented on appeal is whether or not the trial judge abused his discretion in awarding an additur. MISS. CODE ANN. § 11-1-55 (1972) grants the trial court the authority to award an additur if the jury was influenced by bias, prejudice or passion or that the damages awarded were contrary to the overwhelming weight of the credible evidence. This Court has held in these circumstances that in reviewing a trial court's grant or denial of an additur that this Court's standard of review is limited to an abuse of discretion. *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So. 2d 942, 945 (Miss. 1992); *State Highway Comm. v. Warren*, 530 So. 2d 704, 707 (Miss. 1988). An additur may be awarded: (1) if the Court finds that the jury was influenced by bias, prejudice or passion or (2) if the damages are contrary to the overwhelming weight of the credible evidence. *McIntosh v. Deas*, 501 So. 2d 367, 369-370 (Miss. 1987).

The facts in the instant case clearly reflect that the verdict of the jury was grossly inadequate based upon the uncontroverted evidence. Based upon the testimony of Mr. and Mrs. Riggenbach, Dr. Howser, Dr. Eckman, and the admission of Paris, Riggenbach sustained injuries to his neck which will require surgery at a cost of $30,000.00. In addition, he has already incurred past medical expenses of $8,801.99. (T. 265) The award of the jury would barely pay for the past medical expenses and would give him nothing for future medical expenses nor for pain and suffering and loss of enjoyment of life. The trial court took all of this into consideration in granting its Order of Additur for William Riggenbach. It was also obvious that Mrs. Riggenbach had sustained a loss of consortium claim and for that reason, the trial judge granted

an additur of $5,000.00 to compensate her for her losses. It could easily be argued that the additur itself is inadequate based upon similar cases which have been affirmed by this Court. For instance, in the case of *Rogers v. Rausa*, 871 So. 2d 748 (Miss. 2003), the plaintiff sustained a disc bulge caused by an accident and incurred medical expenses of $8,357.00, with future estimated medical expenses of $1,000.00 a year for the next 44 years. There was testimony of his permanent injuries, physical pain and suffering, emotional distress, future disability, and loss of enjoyment of life. This Court in that instance held that the evidence supported a $100,000.00 verdict. The case at bar is substantially similar and easily supports the additur of the trial court. This Court also, in a similar case where a zero verdict was rendered, found that the verdict was the result of bias, prejudice or passion on the part of the jury and remanded it for a trial on the issue of damages only. *Knight v. Brooks*, 881 So. 2d 294 (Miss. 2004). Likewise, in the case of *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So. 2d 942 (Miss. 1992), this Court found that the jury's award of $11,762.50, which was the value of the medical expenses, was grossly inadequate to sufficiently compensate the plaintiff for the pain and suffering and permanent impairment and evidenced bias, passion and prejudice on the part of the jury. They found that a jury verdict awarding damages for medical expenses alone is against the overwhelming weight of the evidence and therefore granted an additur. In this particular instance, the jury's award of $10,000.00 to Mr. Riggenbach barely covered his past medical expenses and clearly reflects bias, passion and prejudice on the part of the jury and was against the overwhelming weight of the evidence. Likewise, the jury's failure to award Mrs. Riggenbach any damages was a reflection of bias and prejudice and was against the overwhelming weight of the evidence. The trial court

who heard all of the evidence and observed the witnesses, clearly did not abuse his discretion in awarding the additur.

With respect to the punitive damage claim, it is equally difficult to fathom how a jury under these circumstances could not have awarded punitive damages. Henson, by his own admission, was driving carelessly and recklessly by driving at a rate of 65 miles per hour in a 45-mile-per-hour speed zone in a residential area while being only a half a car length to one and a half car lengths from the vehicle with which he was racing. MISS. CODE ANN. § 63-3-1201 (1972) provides:

> Any person who drives any vehicle in such a manner as to indicate either a willful or wanton disregard for the safety of persons or property is guilty of reckless driving. Reckless driving shall be considered a greater offense than careless driving.

The converse of this would be that if a person is driving reckless, then that in and of itself is indicative of willful or wanton disregard for the safety of persons. Inasmuch as Mr. Henson admitted that his driving was careless and reckless, then the Plaintiff, as a matter of law, is entitled to punitive damages. It can only be assumed that the jury did not award punitive damages because of bias and prejudice and hence the verdict was against the overwhelming weight of the evidence. The trial court obviously acted well within its discretion to award nominal punitive damages to deter others from acting in a similar fashion and for the overall good of society in general.

CONCLUSION

Given the facts of this case, there is no question that the trial court did not abuse its discretion in awarding the additurs given the obvious bias and prejudice of the jury and the fact that the overwhelming weight of the evidence supported a verdict considerably larger than

awarded by the jury or the additur awarded by the trial court. For these reasons, the ruling of the trial court should be affirmed, with all costs of appeal assessed to the Appellants.

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