IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2006-CA-0997

AXA RE PROPERTY AND CASUALTY INSURANCE COMPANY — APPELLANT

VS.

WILLIAM L. RIGGENBACH — APPELLEE

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

REPLY BRIEF OF AXA RE PROPERTY AND CASUALTY INSURANCE COMPANY APPELLANT

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF THE ISSUE

Whether the Trial Court Erred in Granting the Riggenbachs' Motion for Additur.

I. STATEMENT OF THE FACTS

The Riggenbachs submit that the debate over William Riggenbach's back injury is moot because the trial court's additur dealt solely with the injury to his cervical area. According to the Riggenbachs, there is "very little dispute" concerning William Riggenbach's neck injury. However, William Riggenbach did not seek medical attention at the time of the accident, although an ambulance was called to the scene. (T. 274) When he was still sore, he finally sought medical attention eighteen days after the accident, on September 4, 2001. (T. 245-46, 274-76)

Riggenbach's September 14, 2001 cervical MRI reveals indications of disc degeneration or spondylosis in his neck at C3-4 and C5-6 and moderate canal and foraminal stenosis at C5-6. (Ex. 14-I, Eckman depo, p. 11) Riggenbach's cervical spine films also show disc degeneration and straightening of a spinal curvature. (Ex. 14-I, Eckman depo, p. 11) However, Dr. Eckman testified that it was not very likely that these findings regarding Riggenbach's neck were a result of the August 17, 2001 accident, but, rather, that they were pre-existing degenerative problems. (Ex. 14-I, Eckman depo, p. 11-13) Dr. Eckman advised Riggenbach that neck surgery was something Riggenbach could pursue if his neck pain ever got bad enough to warrant it. (Ex. 14-I, Eckman depo, p. 14) Dr. Eckman did not impose any work restrictions, but advised Riggenbach to continue working as able, and prescribed no pain medication. (T. 255; Ex. 14-I, Eckman depo, p. 13)

From October 8, 2001 until May 12, 2004, when his attorney instructed him to see Dr. Eckman again, Riggenbach sought no medical treatment. (T. 277, 279, 280) When he returned to Dr. Eckman, on May 12, 2004, Dr. Eckman found no abnormalities following an examination of Riggenbach's *neck*, arms, back and legs. (T. 279-81; Ex.

14-I, Eckman depo, p. 16; Ex. 7-I, Howser depo, p. 57, 58) Again, at this May 2004 visit, Dr. Eckman advised Riggenbach he could continue to work as tolerated. (Ex. 14-I, Eckman depo, p. 19)

Riggenbach's attorney also sent him to see Dr. Howser to obtain an expert medical opinion. (T. 281, 282) Dr. Howser agreed with Dr. Eckman, that Riggenbach's neck disc degeneration was likely a pre-existing problem, *not caused by the subject accident.* (Ex. 7-I, Howser depo, p. 40-41, 55) And according to Dr. Howser, as of October 8, 2001, when Dr. Eckman had first examined Riggenbach, there was no evidence, complaint, or observation of a traumatic disc injury, and had such a condition existed it would have been evident in the medical test results in 2001 and in 2004. (Ex. 7-I, Howser depo, p. 41-48, 52, 56) All post accident x-rays showed no acute changes. (Ex. 7-I, Howser depo, p. 42)

David Brick, the occupational therapist who examined Riggenbach in November 2005, testified that Riggenbach did not need surgery to correct a disc bulge in either his neck or his back because Riggenbach suffered no functional impairment and no symptoms indicated the need for surgery. (T. 329, 350-51, 372-73) Moreover, the jury was able to observe Riggenbach at trial. (T. 374) From October 2001 to May 2004, Riggenbach never pursued surgery or any other medical treatment. (T. 277, 279, 280)

Between his first medical visit on September 4, 2001 and the one on October 8, 2001, all of which were self-motivated, Riggenbach incurred medical bills of $2,618.99. (T. 277; Ex. 5) At trial, Riggenbach claimed he had incurred reasonable and necessary medical bills of $8801.99. (T. 265; Ex. 5) The bulk of this claimed total was incurred as a result of medical visits pursued on the advice of counsel. (T. 280, 281)

As memorialized in the trial court's Judgment and Order on the Verdict, the jury returned a verdict awarding $10,000.00 to William Riggenbach for his injuries and $0.00 to Teresa Riggenbach for her consortium claim, to be apportioned evenly between Dewayne Henson and Corey Campbell. (C.P. 446, 453) The Riggenbachs' Motion for additur claims that the jury verdict is against the overwhelming weight of the evidence and reflects bias and prejudice as to the amount of William's damages because they did not award damages for future surgery, the lack of any damages awarded to Teresa on her loss of consortium claim, and the lack of any punitive damages award against Henson. (C.P. 457-58) The trial court agreed and ordered an additur of $30,000 for William Riggenbach's damages, $5,000 for Teresa Riggenbach's loss of consortium claim, and $10,000 for punitive damages[1]. (C.P. 621-22)

II. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING THE RIGGENBACHS' MOTION FOR ADDITUR.

A. The Jury's Damage Award to William Riggenbach is Neither Against the Overwhelming Weight of the Evidence nor Indicative of Bias, Passion or Prejudice.

The Riggenbachs claim that the jury's verdict is grossly inadequate based upon the uncontroverted evidence and that it reflects bias, passion and prejudice because it barely covers William Riggenbach's past medical expenses. However, even when viewed in the light most favorable to the individual defendants, it is clear that the damages awarded by the jury are not against the overwhelming weight of the credible evidence and do not reflect bias, passion or prejudice; therefore, the trial court abused its discretion in granting the Riggenbachs' Motion for additur as to William's neck injury damages.

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1 The punitive damages element of the additur does not impact AXA.

Riggenbach undeniably suffered damages and presented reasonable and necessary medical bills of $2,618.99 for the medical treatment he sought and received, because of his injury, from September 2001 to October 2001. The evidence supporting these medicals is credible and not legitimately disputed by any party. However, the later medical bills comprising Riggenbach's additional $5,000+ damages were incurred *not* because of Riggenbach's illness, disease, or injury, but because his attorneys instructed him to see Dr. Eckman and Dr. Howser before trial. In other words, the record plainly reflects sufficient proper evidence for the jury to find not only that the defendants rebutted § 41-9-119's presumption of reasonableness as to at least $5,000+ of medical expenses, but that the overwhelming weight of the evidence supports a finding that the later incurred $5,000+ of medical expenses were neither necessary nor reasonable.

Furthermore, regarding damages for future neck surgery, the evidence shows that Riggenbach had no intention of seeking surgery and that neck surgery was neither reasonable nor necessary, to wit: the length of time that passed between his October 2001 visit with Dr. Eckman and his May 2004 visit; that the May 2004 visit was prompted not by Riggenbach's injury or desire for medical treatment or surgery, but on the advice of counsel; that Dr. Eckman imposed no work restrictions on Riggenbach either in October 2001 or in May 2004; that Dr. Eckman left the decision about surgery to Riggenbach, as an option to be considered *if* his neck pain became severe; and Brick's testimony concerning Riggenbach's functional capacity examination and the lack of the need for surgery as supported by his findings from data collected during Riggenbach's examination. Viewed in the light most favorable to the individual defendants, the overwhelming weight of the evidence is that future neck surgery was neither necessary nor reasonable and that Riggenbach had no intention of pursuing any

such surgery. *Further, Dr. Eckman and Dr. Howser agreed that Riggenbach's degenerative disc neck condition was not likely caused by the subject accident.* (Ex. 14-I, Eckman depo, p. 11-13; Ex. 7-I, Howser depo, p. 40-48, 52, 55, 56) This means that Riggenbach failed to prove a causal connection or, at best, causation is uncertain, so the cost of future neck surgery is not compensable. ***Flightline v. Tanksley,*** 608 So. 2d 1149, 1163 (Miss. 1992); ***Purdon v. Locke,*** 807 So. 2d 373, 378 (¶ 13) (Miss. 2001).

The $10,000.00 awarded by the jury is, therefore, more than adequate to compensate Riggenbach for his reasonable and necessary past medical expenses of $2,618.99, leaving more than $7,000.00 to compensate Riggenbach for his pain and suffering. Restated, the jury's award of $10,000 is fully supported by the overwhelming weight of the credible evidence rather than contrary to it. ***Milburn v. Vinson,*** 850 So. 2d 1219, 1225-26 (¶ 22) (Miss. App. 2002).

Riggenbach not only failed to meet his burden of proving that all of his claimed injuries and damages are reasonable and necessary, but, further, failed to prove a causal connection between the alleged negligence and certain of his asserted damages[2]. ***Flightline,*** 608 So. 2d at 1163; ***Odom v. Roberts,*** 606 So. 2d 114, 118 (Miss. 1992). *See also* ***Williams v. Gamble,*** 912 So. 2d 1053, 1058 (¶ 21) (Miss. App. 2005); ***Burge v. Spiers,*** 856 So. 2d 577, 579, 580 (¶¶ 6, 10) (Miss. App. 2003); ***Hubbard v. Canteberry,*** 805 So. 2d 505, 548-49 (¶ 8) (Miss. App. 2000); ***Haywood v. Collier,*** 724 So. 2d 1105, 1107 (¶ 6) (Miss. App. 1998). This Court must presume that, as to all amounts claimed by Riggenbach over the amount of the verdict, the jury found for the individual defendants, who may be stripped of the verdict only to the extent that it

2 For the later incurred $5,000+ medicals and the future neck surgery.

is contrary to the overwhelming weight of the evidence. ***Odom,*** 606 So. 2d at 120. The jury verdict is not only *not* contrary to the weight of the evidence, but is fully *supported* by the overwhelming weight of the evidence.

The evidence supports only $2,618.99 in reasonable and necessary medical expenses; therefore, an award of $10,000 does not shock the conscience. ***Gatewood v. Sampson,*** 812 So. 2d 212, 223 (¶ 23) (Miss. 2002). There is no evidence of passion, prejudice or bias of the jury in an inference to be drawn from contrasting the $10,000.00 verdict with the $2,618.99 of reasonable and necessary medical expenses and this comparison does not shock the conscience. ***Wal-Mart Stores, Inc. v. Frierson,*** 818 So. 2d 1135, 1144 (¶ 21) (Miss. 2002); ***Gatewood,*** 812 So. 2d at 222 (¶ 22); ***Frierson,*** 818 So. 2d at 1145 (¶ 22). The jury's verdict is not so unreasonable in amount as to strike mankind at first blush as being beyond all measure and outrageous; therefore, the trial court erred in usurping the jury's province by granting an additur. ***Colville v. Davidson,*** 934 So. 2d 1028, 1031 (¶ 8) (Miss. App. 2006); ***Burge,*** 856 So. 2d at 579-80 (¶ 6). There is ample evidence to support the jury's $10,000.00 verdict for Riggenbach's damages, so an additur is not warranted and the Riggenbachs' Motion for additur should have been denied. ***Colville,*** 934 So. 2d at 1032 (¶¶ 15-16); ***Frierson,*** 818 So. 2d at 1145 (¶¶ 22, 24). With adequate damages awarded by the jury in the first instance, the trial court abused its discretion and erred in finding it had authority to grant an additur in accord with Miss. Code Ann. § 11-1-55. This Court must reverse.

B. The Jury's Zero Damage Award to Teresa Riggenbach is Neither Against the Overwhelming Weight of the Evidence nor Indicative of Bias, Passion or Prejudice.

On this issue, the Riggenbachs simply state that the jury's failure to award Teresa Riggenbach any damages is a reflection of bias and prejudice, is against the

overwhelming weight of the evidence, and that it is obvious she sustained a loss of consortium claim. Instead, AXA posits that a zero verdict on Teresa Riggenbach's loss of consortium claim is in accord with the record evidence.

The award for loss of consortium must be limited to Teresa Riggenbach's own loss, and not that of her husband. Consequently, William Riggenbach's testimony concerning his inability to enjoy certain physical and sexual activities with his wife relate to his own claims, not to Teresa Riggenbach's damages for loss of consortium. ***Coho Resources, Inc. v. McCarthy,*** 829 So. 2d 1, 21 (¶63) (Miss. 2002). The only evidence on the issue of consortium damages is testimony of Teresa Riggenbach, who said her husband was more irritable, could no longer wrestle with her, and no longer danced, fished or played horseshoes with her. (T. 298-99,307) Teresa concluded her testimony by stating that *she and her husband had actually grown closer since his accident.* (T. 307-08) There is simply no evidence in the record tending to show that Teresa suffered loss of companionship, society, love, affection, aid, services, physical assistance, sexual relations, duties, or responsibilities of making a home and, accordingly, the Riggenbachs have pointed to no such evidence.

While Teresa Riggenbach did provide minimal testimony about a loss of participation in activities, the weight and worth of her testimony and her credibility were for the jury to determine. ***Burge,*** 856 So. 2d at 580 (¶ 9). The jury was free to simply disbelieve Teresa's testimony. ***Alldread v. Bailey,*** 626 So. 2d 99, 102 (Miss. 1993). Whether and how much to award Teresa for her consortium claim was properly decided by the jury. ***Alldread,*** 626 So. 2d at 103. Given the zero damage award, the jury obviously rejected Teresa's testimony as either irrelevant or unconvincing. ***Williams,*** 912 So. 2d at 1059 (¶ 27).

As to any loss of consortium damages claimed by Teresa Riggenbach, the jury without question found for the individual defendants, who may be stripped of the verdict only to the extent that it is contrary to the overwhelming weight of the evidence. ***Odom,*** 606 So. 2d at 120. The jury verdict is not contrary to the weight of the evidence, but is instead fully supported by the overwhelming weight of the evidence, specifically including Teresa's testimony that she and her husband grew closer after his accident.

With no evidence supporting Teresa Riggenbach's loss of consortium claim and, in fact, her own testimony to the contrary, an award of zero damages does not shock the conscience. ***Gatewood,*** 812 So. 2d at 223 (¶ 23). There is no evidence of passion, prejudice or bias of the jury found in an inference to be drawn from contrasting the zero damages verdict with the lack of damages proven and this comparison does not shock the conscience. ***Wal-Mart,*** 818 So. 2d at 1144 (¶ 21); ***Gatewood,*** 812 So. 2d at 222 (¶ 22); ***Frierson,*** 818 So. 2d at 1145 (¶ 22). Viewed in the light most favorable to the individual defendants, particularly including Teresa Riggenbach's testimony that she and her husband grew even closer after the accident, the jury's verdict is not unreasonable and does not strike mankind at first blush as being beyond all measure and outrageous; therefore, the trial court erred in usurping the jury's province by granting an additur and this Court must reverse. ***Colville,*** 934 So. 2d at 1031 (¶ 8); ***Burge,*** 856 So. 2d at 579-80 (¶ 6).

V. CONCLUSION

For all of the above and foregoing reasons, this Court should reverse the trial court's Order granting Additur and render an Order reinstating the jury's verdict.

Respectfully submitted, this the 31st day of January, 2007.

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CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellant, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing Reply Brief of Appellant to:

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DATED: This the 31st day of January, 2007

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