IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEWAYNE HENSON,	Appellant,
vs.	NO. 2006-CA-0997
WILLIAM L. RIGGENBACH and TERESA K. RIGGENBACH,	Appellee.

REPLY BRIEF OF APPELLANT

APPEALED FROM THE CIRCUIT COURT
OF YALOBUSHA COUNTY, MISSISSIPPI
CIVIL ACTION CV-2004-0029-B-Y1

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I.

RELEVANT ADDITIONAL FACTS

In correlation to the facts as previously set forth in Mr. Hanson's brief, he provides limited additional fasts to assist the court.

There was no claim of lost wages presented by plaintiffs' at trial. (R. Trans. Vol. II, p. 283). Mr. Riggenbach was able to continue to work and provide for his family. (R. Tran. Vol. II, p. 283). Further as to loss wages the testimony provided was that Mr. Riggenbach continued to work after the accident and was not placed on restrictions. (R. Tran. Vol. II, p. 283). Further there was no testimony concerning plaintiff's ability or inability to obtain health insurance, as this would be improper testimony. (R. Tran. Vol. II, pp. 252, 290).

Dr. Eckman testified that the findings in Mr. Riggenbach's neck were probably not very likely caused by the wreck. (Appellant R.E. 16, Depo. Eckman 12). Mr. Riggenbach was not instructed by Dr. Eckman that he should limit his work. (Appellant R.E. 16, Depo. Eckman 13). Further Dr. Field was not deposed and there is no evidence Dr. Fields recommended surgery. (R. Tran. Vol. II, p. 248). There was no testimony by plaintiffs that Dr. Fields recommended surgery. (R. Tran. Vol. II, p. 248).

Mr. Riggenbach sought no medical treatment with any medical provider until his attorney sent him back to Dr. Eckman on May 12, 2004. (R. Tran. Vol. II, p. 279). The reason for his return was evidenced by both Mr. Riggenbach's own testimony and Dr. Eckman's note which states "His attorney is still working on M.V.A. case and told the patient to come back for reevaluation." (R. Tran. Vol. II, p. 279). Mr. Riggenbach admitted that the "only reason you went to see Dr. Eckman is because your lawyer sent you." (R. Tran. Vol. II, p. 280). This was of course almost three years after his first visit to Dr. Eckman on October 8, 2001, and during

which by Mr. Riggenbach's own testimony he had been using the jaws of life (weighing approximately 75 pounds), a ditch digger or witch and a sledge hammer. (R. Tran. Vol. II, pp. 270, 271).

When Mr. Riggenbach did go back to Dr. Eckman on May 12, 2004, he did not make any complaints of back pain. (R. Tran. Vol. II, p. 281). Dr. Eckman examined his back and found no complaints of low back abnormalities. (Depo. Eckman 16). Dr. Howser testified that the only changes present on the September 14, 2001 MRI were degenerative, long standing changes. (*see* Trial Exhibit 7, Depo. Howser 41). These changes on the September 14, 2001 MRI were not caused by the automobile accident on August 17, 2001. Id. When questioned concerning Mr. Riggenbach's medical visit of August 11, 2001 and October 8, 2001, Dr. Howser stated that if Mr. Riggenbach had had a blown-out disc, their would have been evidence of it, but there is no evidence within the records of a blown disc and no complaints or observations of a blown disc. (Trial Exhibit 7, Depo. Howser 48, 52). Dr. Howser further confirmed for the jury that the finding of Dr. Eckman, a trained neurosurgeon of neck pain, cervical stenosis and cervical spondylosis and retrolisthesis at the C5-C6 level are all preexisting degenerative problems that Mr. Riggenbach had before the accident and were not caused by the car wreck. (Trial Exhibit 7, Depo. Howser, 55). Finally, Dr. Howser confirmed that Dr. Eckman's examination of Mr. Riggenbach's neck, arms, back and legs all on May 12, 2004 when if he had a blown-out disc that it would be evidenced on exam, that Dr. Eckman's exam provided a reading of normal. (Trial Exhibit 7, Depo. Howser, 57, 58).

During the bifurcated punitive damages trial, plaintiffs' counsel failed to ask one question of the defendant Henson. (R. Tran. Vol. IV, p. 479). Plaintiffs' counsel specifically stated "Your Honor, I don't know if Ms. Carson does, but I don't want to put on additional proof." (R.

Tran. Vol. IV, p. 479-480). The information the jury was provided was Mr. Henson's net worth only. (R. Tran. Vol. IV, p. 480). The jury found punitive damages should not be awarded against Mr. Hanson. (R. Tran. Vol. IV, p. 480).

II.

ARGUMENT

"Awards which are set by juries are not merely advisory and usually will not be set aside unless the award is so unreasonable as to strike mankind as being beyond all measure, unreasonable in amount and outrageous." Rodgers v. Pascagoula Pub. Sch. Dist., 611 So.2d 942, 945 (Miss. 1992). "An appellate court must review the evidence in a light most favorable to the defendant, giving him the benefit of all favorable inferences that may reasonably be derived therefrom." Guillory v. McGee, 922 So.2d 823, 827 (¶13) (Miss. Ct. App. 2006); *See* Rodgers, 611 So. 2d at 945. The trial court abused its discretion in granting the additure.

A. THE FACTS AS PRESENTED AT TRIAL DO NOT SUBSTANTIATE AN ADDITUR

Mr. Riggenbach should not be entitled to an additur on either the basis of neck and/or back injuries. It appears from plaintiffs' brief that the issue of relating the back injury to the automobile accident has now been abandon and the concentration is primarily on the neck area. A casual connection must be made between the automobile accident and the alleged injury. Plaintiff has the burden to prove this to the jury and failed.

The testimony of all physicians is clear, Mr. Riggenbach had degenerative changes within his spine that were not acute and not related to the automobile accident. The degenerative changes were evidenced in the x-rays and MRIs performed. There is no testimony by any physician that either Mr. Riggenbach's alleged neck or back pain was a result of the automobile accident, but on the contrary that the degenerative or structural changes within Mr. Riggenbach's neck and back pre-dated the automobile accident.

In order to grant a motion for additur, the court must find, as a matter of law, that the

non-moving party's evidence is so lacking that reasonable jurors would be unable to reach a verdict in favor of that party. Turnbough v. Steere Broad. Corp., 681 So.2d 1325, 1326 (Miss. 1996). "An additur should never be applied without taking great caution, for an additur represents 'a judicial incursion into the traditional habitat of the jury.'" Burge v. Spiers, 856 So.2d 577, 579 (¶6) (Miss. Ct. App. 2003) (*quoting* Gibbs v. Banks, 527 So.2d 658, 659 (Miss. 1988)).

On the facts of this case, the issue of causation was THE issue in the case insofar as damages was concerned. When the jury awarded the plaintiff $10,000.00, it obviously was compensating the plaintiff for what it believed to be the extent of the plaintiff's injuries and not what the plaintiff believed to be the extent of his injuries.

"It is the jury who determines the weight of the testimony and the credibility of the witnesses at trial and it is the primary province of the jury to determine the amount of damages to award." Colville v. Davidson, 934 So.2d 1028, 1032 (¶14) (Miss. Ct. App. 2006), *citing* Burge v. Spiers, 856 So.2d 577, 589 (¶9) (Miss. Ct. App. 2003). The plaintiffs failed to prove the causal connection between the alleged injuries and the automobile accident.

In the present case the evidence presented to the jury provided the following:

(1) the plaintiff did not seek medical attention until eighteen days after the accident;

(2) the plaintiff was well enough that he continued to work following the accident and performed volunteer fire activities;

(3) that during the time when the plaintiff's alleged injuries should have been at their zenith, he received no treatment whatsoever from any doctor for his injuries from October 8, 2001, until May 12, 2004;

(4) that when he next presented for a doctor's evaluation on May 12, 2004, he only went because his attorney told him to;

(5) **functional capacity examination revealed he was capable of medium to heavy work, lifting 50 to 75 pounds;**

(6) **made no complaints of back pain at either visit to Dr. Eckman, October 8, 2001 and May 12, 2004;**

(7) **testimony of Dr. Eckman findings of diagnostic testing as to neck "probably not very likely" caused by automobile accident and**

(8) **Dr. Eckman never placed Mr. Riggenbach on work restrictions.**

Obviously, from the jury's verdict the plaintiff failed to make the causal connection between the accident and the medical treatment received by Mr. Riggenbach. Like Burge, the plaintiff was impeached along with the medical testimony, preventing the plaintiff from making the necessary causal connection between his injuries and the automobile accident. It is the plaintiff's burden to prove that the accident was the sole cause of the injuries and/or medical expense, and they failed to do so.

The plaintiff failed to show that the plaintiffs were due any further damage award including Mrs. Riggenbach's claim for loss of consortium. The trial court abused its discretion when it granted plaintiffs' motion for additur, or in the alternative motion for new trial.

B. THE COURT ERRED IN GRANTING PUNITIVE DAMAGES OVER THE DECISION OF THE JURY, AND FAILED TO USE THE PROPER PROCEDURE DURING THE PUNITIVE DAMAGES PHASE

The trial court erred in reversing the jury's denial of punitive damages and failed to follow the proper procedure during the bifurcation. Punitive damages are considered an extraordinary remedy and are only allowed with caution. Bradfield v. Schwartz, 936 So.2d 931, 937 (¶17) (Miss. 2006) (*quoting* Life & Cas. Ins. Co. of Tenn. v. Bristow, 529 So.2d 620, 622

(Miss.1988)).

In the case presently before this Court, there is simply no evidence to support an award of punitive damages. Further there was no evidentiary hearing for this determination. Mississippi law pursuant to statute governing punitive damage awards specifically sets forth the procedural elements of when and how a trier of fact may consider punitive damages. Miss.Code Ann. § 11-1-65(1)(a)-(e) provides the evidentiary process by which a trial court proceeds when punitive damages have been asserted by the plaintiff:

> (1) In any action in which punitive damages are sought:
> (a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.
> (b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.
> (c) ***If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.***
> (d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.

Miss.Code Ann. § 11-1-65(1) (*emphasis added*).

The requirements of this statute must be followed meticulously, including the bifurcation of the issues of liability/compensatory damages and punitive damages. Bradfield, 936 So.2d at 937 -938, (¶21). Punitive damage evidence must be presented separately after an award for compensatory damages has been awarded at a subsequent evidentiary hearing. Id.

The procedure during the punitive damages phase was not followed, and the court erred in granting punitive damages to the plaintiffs. The trial court's ruling should be reversed.

III.

CONCLUSION

The trial court is compelled to accept all of the above facts as true, disregard any countervailing fact that might favor the plaintiffs and then give all reasonable inferences to the jury verdict, it is plain that the jury award should not be disturbed by way of additur, and the trial court's ruling should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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Dated this the 30th day of June, 2007.

Dawn Davis Carson