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

BRIEF OF AXA RE PROPERTY AND CASUALTY INSURANCE COMPANY APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

AXA RE PROPERTY AND CASUALTY INSURANCE COMPANY **APPELLANT**

VS.

WILLIAM L. RIGGENBACH **APPELLEE**

In order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible disqualification or recusal, the undersigned counsel of record certifies that the following listed persons/entities have an interest in the outcome of this case:

AXA RE Property and Casualty Insurance Company, Appellant;

Clyde X. Copeland, III, Jan F. Gadow, Page, Kruger & Holland, P.A., Attorneys for Appellant;

Dewayne Henson, Appellant;

Robert L. Moore, Dawn Davis Carson, Heaton and Moore, P.C., Attorneys for Appellant;

William L. Riggenbach, Teresa K. Riggenbach, Appellees;

W. Stephen Cox, Vicki S. Wood, Merkel & Cocke, P.A., Attorneys for Appellees;

Honorable Andrew C. Baker, trial court judge.

THIS, the 18th day of December, 2006.

CLYDE X. COPELAND, III
JAN F. GADOW

ATTORNEYS FOR APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Appellant submits that the facts and legal arguments are adequately presented in the briefs and appellate record and the decisional process of this Court would not be significantly aided by oral argument. M.R.A.P. 34 (a)(3).

STATEMENT OF THE ISSUE

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

I. STATEMENT OF THE CASE

Initially, William and Teresa Riggenbach filed a Complaint against Dewayne Henson, Corey Campbell, and James Paris, seeking damages as a result of an automobile accident; William Riggenbach filed a separate Complaint against AXA, his automobile insurance carrier, for underinsured motorist proceeds. (C.P. 14, 653) These two matters were consolidated and the Riggenbachs settled their claim with Campbell and dismissed him from the suit. (C.P. 769, 155-56) After a bifurcated trial on the merits, the jury returned a verdict in favor of the Riggenbachs on their negligence claim against the individual defendants, awarded $10,000 damages to William Riggenbach and zero damages to Teresa Riggenbach, and apportioned liability fifty percent to Campbell, fifty percent to Henson, and zero to Paris. (C.P. 446-47) The jury then returned a verdict in favor of Henson on the issue of punitive damages and the trial court entered an Order on the verdict. (C.P. 448, 453-54)

The Riggenbachs subsequently filed a Motion for additur or, in the alternative, for a new trial. (C.P. 456) Henson filed a Motion for offset of the damages awarded by the amount of the Riggenbachs' settlement with Campbell. (C.P. 460-61) Following a hearing of these Motions, the trial court granted the Riggenbachs' Motion for additur and denied as moot Henson's Motion for offset. (T. 489; C.P. 621, 642) The Riggenbachs accepted the trial court's additur and Henson and AXA appealed. (C.P. 623, 625, 628)

II. STATEMENT OF THE FACTS

William Riggenbach was involved in an automobile accident on August 17, 2001, as a passenger in James Paris' van. (T. 276) Corey Campbell and Dewayne Henson each hit Paris' van in quick succession and, as a result, Riggenbach sued all three

drivers for damages and also sued AXA for underinsured motorist proceeds. (C.P. 14, 653)

William Riggenbach did not seek medical attention at the time of the accident, although an ambulance was called to the scene. (T. 274) Initially, he was just sore and stiff, but realized after a couple of weeks that the soreness would not work itself out, so he finally sought medical attention eighteen days after the accident, on September 4, 2001. (T. 245-46, 274-76) Although he contradicted himself at trial, when Riggenbach presented at Grenada Lake Medical Center on this date, he sought treatment for his neck and shoulder pain, but did not complain of back pain. (T. 245-46, 278; Ex. 9, Grenada Lake Medical Center records) Grenada Lake referred Riggenbach to Dr. Lee, who ordered an MRI. (T. 247, 276) Dr. Lee then referred Riggenbach to Dr. Field, at University Sports Medicine. (T. 247, 276) When he saw Dr. Field on September 25, 2001, Riggenbach again reported neck pain, but no back pain, and said his shoulder didn't really hurt. (T. 278-79) Dr. Field then referred Riggenbach to Dr. Eckman, who ordered a neck x-ray. (T. 248-49, 276-77) At this October 8, 2001 visit with Dr. Eckman, Riggenback again complained of neck pain only. (T. 280; Ex. 14-I, Eckman depo, p. 7-8)

Dr. Eckman's inspection of Riggenbach's back, a routine part of Dr. Eckman's examinations, revealed normal flexion and tension, normal stability, no displacement, and normal muscle strength and tone. (T. 279; Ex. 14-I, Eckman depo p. 9-10) 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, Riggenbach still did not complain of back pain and 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) Despite Dr. Eckman's findings, Riggenbach testified that his shoulder was getting worse and that his back had been hurting for about a year before this May 2004 appointment. (T. 257-58) Riggenbach claimed that he did not report back pain to any of his medical providers because he "was trying to get one thing taken care of at a time." (T. 260)

Riggenbach's attorney then 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) Dr. Howser did, however, order another MRI and, according to Riggenbach, recommended a $40,000 or $50,000 surgery for his lower back[1]. (T. 262)

David Brick, an occupational therapist, also examined Riggenbach, at AXA's request, in November 2005. (T. 329) Brick's functional capacity evaluation revealed that Riggenbach met the medium to medium-heavy work requirement, meaning that he was able to functionally perform all physical activities required for such work, including construction and carpentry, and was able to lift in the fifty to seventy-five pound range; his range of motion was normal. (T. 317, 327, 341-44) Brick determined that Riggenbach could continue to perform most of the type of work he had done in the past, which was medium work range. (T. 327-28, 347-48) Brick he found no limitation on Riggenbach's physical abilities and, further, that he thought Riggenbach was exaggerating his symptoms of pain and disability. (T. 328, 332-338, 341-48) Brick also 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 indicating the need for surgery. (T. 350-51, 372-73)

During the three year period when he received no medical treatment, Riggenbach continued to work and provide for his family and also performed as a volunteer fireman, until he began to have back problems, using seventy-five pound jaws

1 Riggenbach apparently wisely decided to forego any claim for the allegedly necessary future back surgery, as evidenced by his failure to include any mention of same in his Motion for additur. (C.P. 456-58)

of life, a ditch witch, and sledge hammers. (T. 240, 270-71, 283-84, 289, 309) Riggenbach was still working at the time of trial, when he was fifty-one years old, and did not claim any lost wages, though he testified that after the accident he took longer to perform work tasks, his neck and shoulders hurt when he worked, and at times he experienced numbness in his left leg. (T. 236, 252-53, 282-83) Riggenbach also testified that he was unable to hammer or use his nail guns with his left hand[2] due to numbness, which had worsened significantly over the year and-a-half prior to trial, that he could no longer walk or sit for any length of time without pain, he was grumpier, and he had difficulty sleeping. (T. 260, 262-63, 265) The jury, however, was able to observe Riggenbach at trial. (T. 374)

Regarding future surgeries, Riggenbach testified that Dr. Eckman said he needed neck surgery at a cost of about $30,000.00. (T. 250-51) In fact, Dr. Eckman testified that this surgery was something Riggenbach could pursue *if* his neck pain ever got bad enough. (Ex. 14-I, Eckman depo, p. 14) However, Riggenbach did not attempt to see Dr. Eckman or any other medical provider at all between October 2001 and May 2004, and then only returned to Dr. Eckman on the advice of counsel; neck surgery was not discussed at this visit and, again, Riggenbach failed to report any back pain. (Ex. 14-I, Eckman depo, p. 16, 18) From October 2001 to May 2004, Riggenbach never pursued surgery or any other medical treatment. (T. 277, 279, 280)

Riggenbach testified that he was irritable, couldn't sleep at night, and briefly mentioned his lack of interest in sexual activities. (T. 266) Teresa Riggenbach testified as to her husband's pain and limitations, but as concerns her consortium claim she testified only that her husband was more irritable and could no longer wrestle with her

2 Riggenbach is left-handed.

after the accident and that they had enjoyed dancing, fishing, and playing horseshoes. (T. 298-99) She did not discuss loss of sexual relations at all, but did testify that her husband's post-accident problems had actually brought them closer. (T. 307-08)

Between his first medical visit on September 4, 2001 and the one on October 8, 2001, all of which were self-motivated, Rigenbach 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 Rigenbachs' 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. (C.P. 621-22) Only the first two claims are relevant to AXA and are addressed herein.

III. SUMMARY OF THE ARGUMENT

The trial court abused its discretion in granting the Riggenbachs' Motion for additur. Pursuant to Miss. Code Ann. §11-1-55, a court has authority to grant additur when the damages are inadequate because the jury was influenced by bias, passion or

prejudice or when the damages awarded are contrary to the overwhelming weight of credible evidence. In the case at hand, neither the damage award for William Riggenbach's personal injuries nor the zero damage award for Teresa Riggenbach's loss of consortium claim is inadequate. These damage awards do not indicate that the jury was influenced by bias, passion or prejudice nor are the awards contrary to the overwhelming weight of the credible evidence. Instead, the record evidence fully supports the jury's verdict. Consequently, the trial court erred in finding the damages inadequate in the first instance and, therefore, abused its discretion in awarding an additur. This Court must reverse.

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

A. Standard of Review and Applicable Law

A motion for additur is a variant of the motion for new trial, going solely to the issue of damages, and this Court reviews a trial court's grant of additur under the same standard applied to review of a motion for new trial – abuse of discretion. ***Colville v. Davidson,*** 934 So. 2d 1028, 1031 (¶ 8) (Miss. App. 2006); ***Milburn v. Vinson,*** 850 So.2d 1219, 1226 (¶ 23) (Miss. App. 2002) (citing ***Odom v. Roberts,*** 606 So.2d 114, 121 (Miss. 1992)); ***Cade v. Walker,*** 771 So.2d 403, at 407 (¶ 9) (Miss. 1992) (citing ***Odom,*** 606 So.2d at 119). A court's authority to grant additur is found in Miss. Code Ann. § 11-1-55:

> The supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence.

Milburn, 850 So.2d at 1225-26 (¶ 22). The two bases on which a court can grant an additur – the damages awarded are contrary to the overwhelming weight of the evidence or the jury was influenced by bias, prejudice, or passion – are essentially one and the same. ***Cade,*** 771 So.2d at 407 (¶ 11) (citing ***Odom,*** 606 So.2d at 119-20 n.5). *See also* ***Milburn,*** 850 So.2d at 1224 (¶ 13) (citations therein omitted). This Court determines whether the verdict shocks the conscience, evidencing a bias, passion and prejudice on the part of the jury. ***Gatewood v. Sampson,*** 812 So.2d 212, 223 (¶ 23) (Miss. 2002) (citations therein omitted). Evidence of such passion, prejudice or bias of the jury is also found in an inference to be drawn from contrasting the amount of the verdict with the amount of damages. ***Wal-Mart Stores, Inc. v. Frierson,*** 818 So.2d 1135, 1144 (¶ 21) (Miss. 2002) (quoting ***Detroit Marine Eng'g v. McRee,*** 510 So. 2d 462, 471 (Miss. 1987) (citing ***Biloxi Elec. Co. v. Thorn,*** 264 So.2d 404, 405 (Miss. 1972))). *See also* ***Gatewood,*** 812 So.2d at 222 (¶ 22) (citations therein omitted). When the size of the jury's damage award in comparison to the actual amount of damages does not shock the conscience, denial of a motion for additur is proper. *See* ***Frierson,*** 818 So.2d at 1145 (¶ 22).

It is the primary province of the jury to determine the amount of damages to award. ***Colville,*** 934 So. 2d at 1032 (¶ 14) (citing ***Burge v. Spiers,*** 856 So.2d 577, 580 (¶ 9) (Miss. App. 2003). In a compensatory damages case such as this, losses are not compensable if not caused by the wrong or injury or when the cause is uncertain. ***Purdon v. Locke,*** 807 So.2d 373, 378 (¶ 13) (Miss. 2001) (quoting ***Richardson v. Canton Farm Equip., Inc.,*** 608 So.2d 1240, 1250 (Miss. 1992)); ***Parker Tractor & Implement Co., Inc. v. Johnson,*** 819 So.2d 1234, 1239 (¶ 24) (Miss. 2002) (citations therein omitted). Plaintiffs must prove a causal connection between the alleged

negligence and the asserted damages. ***Flightline v. Tanksley,*** 608 So. 2d 1149, 1163 (Miss. 1992). It is also within the jury's province to determine whether the defendant's negligence was the proximate cause of the plaintiff's injuries. ***Burge,*** 856 So. 2d at 580 (¶ 10). The plaintiffs also have the burden of proving their injuries and damages; on review, this Court views the evidence in the light most favorable to the party in whose favor the jury decided, giving that party all favorable inferences that reasonably may be drawn therefrom. ***Odom,*** 606 So.2d at 118 (citations therein omitted). *See also* ***Williams v. Gamble,*** 912 So. 2d 1053, 1058 (¶ 21)(Miss. App. 2005); ***Burge,*** 856 So. 2d at 579 (¶ 6); ***Hubbard v. Canteberry,*** 805 So. 2d 545, 548-49 (¶ 8) (Miss. App. 2000); ***Haywood v. Collier,*** 724 So. 2d 1105, 1107 (¶ 6) (Miss. App. 1998). This is in accord with the tenet that it is for the jury to determine "'the weight and worth of testimony and the credibility of witnesses at trial'". ***Burge,*** 856 So. 2d at 580 (¶ 9) (quoting ***Odom,*** 606 So. 2d at 118). Consequently, with respect to all amounts claimed by the plaintiffs over and above the verdict, this Court will presume the jury found for the defendants and the defendants may be stripped of this verdict only to the extent that it is contrary to the overwhelming weight of the evidence. ***Odom,*** 606 So.2d at 120.

Jury verdicts and damage awards are not merely advisory and must not be set aside unless "'so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous.'" ***Colville,*** 934 So.2d at 1031 (¶8) (quoting ***Rodgers v. Pascagoula Pub. Sch. Dist.,*** 611 So. 2d 942, 945 (Miss. 1992)). *See also* ***Burge,*** 856 So. 2d at 580 (¶ 9). It follows that additurs should only be granted with great caution because they constitute a court's usurpation of the jury's province. ***Colville,*** 934 So.2d at 1031 (¶8)(citations therein omitted); ***Burge,*** 856 So. 2d at 579-80 (¶ 6) (quoting ***Gibbs v. Banks,*** 527 So. 2d 658, 659 (Miss. 1988)). If

there is sufficient evidence to support the jury's verdict, an additur is not warranted. ***Colville,*** 934 So. 2d at 1032 (¶¶ 15-16).

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

Instruction P-11 advised the jury to consider Riggenbach's injuries and duration; past, present and future physical pain and suffering and resulting mental anguish; reasonable and necessary medical expenses already incurred and those reasonably probable to be incurred in the future; and any future disability or impairment reasonably probable to occur. (C.P. 349-50) The jury awarded Riggenbach damages in the amount of $10,000.00. (C.P. 446, 453) The trial court granted an additur of $30,000.00 for Riggenbach's neck injuries to compensate him for future surgery, based on a determination that the verdict of $10,000.00 is contrary to the overwhelming weight of the credible evidence and reflects bias or prejudice. (C.P. 621)

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. First, the trial court erred in finding that the requirements of Miss. Code Ann. § 11-1-55 were established, giving it authority to grant additur in the first instance, because the damages awarded by the jury in this case are not inadequate for any reason. ***Milburn,*** 850 So. 2d at 1225-26 (¶ 22).

Viewed most favorably to the individual defendants, the evidence reflects that Riggenbach did suffer an injury that caused him to seek medical treatment for a duration of at least one month and that he experienced some past and present pain and

suffering. However, any pain he experienced was not sufficient to prompt him to seek medical treatment after October 2001 and the occasional Tylenol PM is Riggenbach's pain medication. There is minimal evidence tending to show that Riggenbach may experience any future disability or impairment. The sticking point, however, is Riggenbach's reasonable and necessary medical expenses.

Mississippi statutory law clearly provides that

> Medical, hospital, and doctor bills paid and incurred because of any illness, disease or injury shall be prima facie evidence that such bills so paid were necessary and reasonable.

Miss. Code Ann. §41-9-119. But the presumption created by §41-9-119 is rebuttable. ***Clarke v. Deakle,*** 800 So. 2d 1227, 1230 (¶13) (Miss. App. 2001); ***Jackson v. Brumfield***, 458 So. 2d 736, 737 (¶ 1) (Miss. 1984). "[T]he Defendant can rebut such damages by putting forward *proper evidence* tending to negate the necessity and reasonableness of the expenses." ***Cassibary v. Schlautman,*** 816 So. 398, 401 (¶11) (Miss. App. 2001) (citing ***Jackson,*** 458 So. 2d at 737; ***Moody v. RPM Pizza, Inc.,*** 659 So. 2d 877, 886 (Miss. 1995)).

Riggenbach indisputably 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 remaining evidence concerning Riggenbach's damages is contradicted and less clear.

Riggenbach did not see the need for further medical treatment after October 2001 and, in fact, sought no additional treatment until May 2004, when he again saw Dr. Eckman and first saw Dr. Howser, both on the advice of counsel, and incurred another $5,000.00+ in medical bills. No doctor imposed work restrictions on Riggenbach and he

continued to work after the accident and also continued to perform as a volunteer fireman for a period of time following the accident. Brick's functional capacity exam revealed that Riggenbach was capable of medium to heavy work, including lifting fifty to seventy-five pounds. Riggenbach never complained of back pain to any of his doctors in 2001 or in 2004. Dr. Eckman determined that Riggenbach's degenerative disc neck condition was not likely caused by the subject accident and Dr. Howser agreed.

Consequently, the later set of medical bills 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. Miss. Code Ann. § 41-9-119. In this case, the record plainly reflects sufficient proper evidence for the jury to find not only that the defendants rebutted the statutory presumption of reasonableness as to at least $5,000+ of medical expenses, in part with Riggenbach's own testimony, 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.

Regarding damages for future neck surgery, there is ample evidence to suggest 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, this compilation shows that 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. In other words, Riggenbach failed to prove a causal connection or, at best, causation is uncertain, so the cost of future neck surgery is not compensable. ***Flightline,*** 608 So. 2d at 1163; ***Purdon,*** 807 So. 2d at 378 (¶ 13). 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 with 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,*** 850 So. 2d at 1225-26 (¶ 22).

This case is similar, factually, to the case of ***Clarke v. Deakle,*** 800 So. 2d 1227 (Miss. App. 2001). In that case, plaintiff was involved in a motor vehicle accident where her vehicle was rear-ended by the defendant. The plaintiff did not call an ambulance to the scene, but at the end of the day she presented at the emergency room with complaints of head and neck pain and was diagnosed with cervical muscle strain with headache. ***Id.*** at 1228 (¶¶ 2-3). Physical therapy was prescribed and the plaintiff began treatment with a local chiropractor. ***Id.*** at 1228-29, (¶¶ 4, 5). She was then referred to an orthopedic surgeon who diagnosed her as having a disc bulge at C5-6. In the interim, between her accident and her trial, the plaintiff was involved in a second

accident. ***Id.*** at 1229 (¶¶ 6, 9). At trial, the plaintiff claimed medical specials in the amount of $11,488.45; the jury awarded damages in the amount of $12,000.00. ***Id.*** at 1228, 1229 (¶¶ 1, 10). Because there was some $500.00+ awarded for pain and suffering, the award did not strike this Court as unreasonable. Instead, this Court stated that "even though this amount may not be what this Court would have awarded, that is not how this Court views these cases." ***Id.*** at 1231 (¶17) (citing ***American National Ins. v. Hogue,*** 749 So. 2d 1254 at (¶ 27) (Miss. App. 2000)). So, even assuming *arguendo* that all $8,000+ of Riggenbach's claimed medicals was proven reasonable and necessary, the jury's award of $10,000 would still provide some amount for pain and suffering, so would not be unreasonable. ***Clarke,*** 800 So. 2d at 1231 (¶17). But especially considering that Riggenbach proved reasonable and necessary medicals of only $2,618.99, the jury's award of $10,000 is not inadequate by any standard. Miss. Code Ann. § 11-1-55.

Further, it is within the jury's province to determine the amount of damages to award. ***Colville,*** 934 So. 2d at 1032 (¶ 14) (citing ***Burge,*** 856 So. 2d at 580 (¶ 9)). Riggenbach's claimed losses for the later incurred $5,000+ medicals and the $30,000.00 future neck surgery are not compensable if not caused by the alleged negligence or if the cause is uncertain. ***Purdon,*** 807 So. 2d at 378 (¶ 13); ***Parker Tractor,*** 819 So. 2d at 1239 (¶ 24). Viewed in the light most favorable to the individual defendants, as this Court must, and giving them all favorable inferences that reasonably may be drawn therefrom, 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 these asserted

damages[3]. ***Flightline,*** 608 So. 2d at 1163; ***Odom,*** 606 So. 2d at 118. *See also* ***Williams,*** 912 So. 2d at 1058 (¶ 21); ***Burge,*** 856 So. 2d at 579, 580 (¶¶ 6, 10); ***Hubbard,*** 605 So. 2d at 548-49 (¶ 8); ***Haywood,*** 724 So. 2d at 1107 (¶ 6). 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 is contrary to the overwhelming weight of the evidence. ***Odom,*** 606 So. 2d at 120. As previously addressed, 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.

Burge, another rear-ender case, is also instructive to the case at bar. In ***Burge,*** the defendant admitted liability for the accident, but disputed that the plaintiff's injuries were caused by the accident. The plaintiff claimed $2,787.00 in incurred medicals and $30,000.00 in future medicals; the jury awarded damages of $2,137.00. ***Burge,*** 856 So. 2d at 579 (¶¶ 1-4). The trial court denied the plaintiff's motion for additur and the Court of Appeals affirmed, finding that the defendant had impeached the plaintiff as to causation and the evidence was sufficient to support the jury's verdict. ***Burge,*** 856 So. 2d at 580 (¶ 10).

Similarly, there is sufficient evidence in the record before this Court for the jury to have permissibly concluded that the medicals incurred by Riggenbach after October 2001 and the future medicals were neither reasonable nor necessary and that they were not caused by any negligence of the individual defendants. As in ***Burge,*** there is also sufficient evidence to support the jury's award of $10,000.00, with $2,618.99 for reasonable and necessary medical bills and the remainder for associated claims of pain

3 For the later incurred medicals and the future neck surgery.

and suffering. This amount is more than adequate to compensate Riggenbach for these elements of damage; therefore, the trial court erred in finding it had authority to grant an additure pursuant to Miss. Code Ann. § 11-1-55.

With the evidence supporting only $2,618.99 in reasonable and necessary medical expenses, an award of $10,000 does not shock the conscience. ***Gatewood,*** 812 So. 2d at 223 (¶ 23). No evidence of passion, prejudice or bias of the jury can be found 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,*** 818 So. 2d at 1144 (¶ 21); ***Gatewood,*** 812 So. 2d at 222 (¶ 22); ***Frierson,*** 818 So. 2d at 1145 (¶ 22). In no way can it be said that the jury's verdict is 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,*** 934 So. 2d at 1031 (¶ 8); ***Burge,*** 856 So. 2d at 579-80 (¶ 6). There is ample evidence to support the jury's generous $10,000.00 verdict for Riggenbach's damages, so an additur is not warranted and the Riggengachs' 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 erred in finding it had authority to grant an additur in accord with Miss. Code Ann. § 11-1-55. Thus, the trial court abused its discretion in granting an unwarranted additur and this Court must reverse.

C. 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.

Instruction P-15 advised the jury to consider Teresa Riggenbach's loss of companionship, society, love and affection, loss of aide, services, and physical

assistance provided by her husband, loss of sexual relations, and loss of participation together in activities, duties, and responsibilities of making a home. (C.P. 359) The jury awarded Teresa Riggenbach no damages, but the trial court granted additur in the amount of $5,000.00 for Teresa's loss of consortium, finding that the zero damages award is contrary to the overwhelming weight of the evidence and reflects bias or prejudice. (C.P. 446, 453, 621-22)

When viewed in the light most favorable to the individual defendants, Teresa Riggenbach's zero damage award is not against the overwhelming weight of the credible evidence. Consequently, the trial court abused its discretion in granting the Riggenbachs' Motion for additur as to Teresa's damages. The trial court first erred in finding that the requirements of Miss. Code Ann. § 11-1-55 were met because zero damages for Teresa Riggenbach's consortium claim is not inadequate for any reason, is not contrary to the overwhelming weight of the credible evidence, and does not indicate bias, prejudice, or passion of the jury. ***Milburn,*** 850 So. 2d at 1225-26 (¶ 22). Rather, a zero verdict on Teresa Riggenbach's loss of consortium claim is in accord with the record evidence.

As this Court has observed, even where the only evidence on the issue of consortium damages is the spouse's testimony, the jury is free to disbelieve her. ***Alldread v. Bailey,*** 626 So. 2d 99, 102 (Miss. 1993). Although a loss of consortium claim is derivative of a personal injury claim, it is nonetheless a separate and distinct claim; therefore, the jury may award damages to one party for his personal injuries, yet award nothing to the spouse for a consortium claim. ***Alldread,*** 626 So. 2d at 102. "[N]ot every verdict against the non-injured spouse claiming a loss of consortium is

inconsistent as a matter of law with a verdict in favor of the injured spouse." ***Id.*** As the ***Alldread*** Court said:

> The evidence on the consortium issue was not contradicted, and the jurors were free to evaluate the witnesses, the testimony and the evidence produced to determine if the appellant husband was damaged due to the loss of consortium. In the negligence action, the jury awarded the wife a small amount over the documented special damages. The jury could have determined that the appellant wife's injuries were such that her husband suffered no compensable damage for loss of consortium.

Id. (quoting ***Everette Anderson v. Mutert,*** 619 S.W. 2d 941, 945 (Mo. App. 1981)). Whether and how much to award for loss of consortium damages is a question properly left to the jury. ***Alldread,*** 626 So. 2d at 103 (citing ***Everette Anderson,*** 619 S.W. 2d at 946).

> The question quite simply is whether based on the evidence presented the jury had to award damages for a loss of consortium. A spouse's right of recovery on this claim is limited to loss of society and companionship, interference with conjugal rights and providing previously unnecessary physical assistance. [citation omitted] When the jury awarded no loss of consortium damages, they rejected as either irrelevant or unconvincing the . . . testimony concerning [the husband's] [loss of consortium] damages.

Williams, 912 So. 2d at 1059 (¶27) (quoting ***Hogue***, 749 So. 2d 1254 (¶29)).

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). Damages for William Riggenbach's loss of enjoyment of life are not available to Teresa Riggenbach.

> Justice Diaz cites the following evidence, **elicited from Bobby Stroo's testimony**, as proof of Patty's loss of consortium: (1) because of pain, Bobby wakes up constantly at night; (2) Bobby cannot play with his children as he used to; and (3) Bobby can no longer do the yard work. With all due respect, Bobby waking up at night, not being able to play with his children, and not being able to do the yard work, without more, is not sufficient to draw inferences of damages personal to Patty. Further,

> Bobby has already been awarded $1,500,000.00 (reduced to $840,000.00 by the judge) for his injuries. One can only assume that an award that size could have included his loss for not being able to do these previously mentioned activities. To award Patty damages for the same loss would result in impermissible double payment for the same injury.

Coho Resources, 829 So. 2d at 22 (¶ 65). "It is speculative and contrary to precedent to allow the jury to infer that Bobby's limitations, as shown generally by the evidence before the jury, affected his relationship with Patty such that she has suffered a compensable injury". ***Id.*** at (¶ 67).

Likewise, it would be impermissible to award Teresa Riggenbach damages as a result of William Riggenbach's testimony about his own losses and physical limitations that he claims are a result of the accident in question. The award for loss of consortium must be limited to Teresa Riggenbach's own loss, and not that of her husband. As Teresa Riggenbach clearly testified that her relationship with her husband had strengthened since the accident, the jury had more than enough evidence to support its decision to award Teresa Riggenbach nothing for her claimed loss of consortium. ***Colville,*** 934 So. 2d at 1032 (¶ 15-16).

The only evidence on the issue of consortium damages is that 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. 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,*** 626 So. 2d at 102.

Because Teresa's loss of consortium claim is separate and distinct from William's personal injury claim, though derivative, there is not necessarily an inconsistency between an award of damages for William's personal injury claim and a zero verdict for Teresa's loss of consortium claim. ***Alldread,*** 626 So. 2d at 102. The jury could simply have determined that William's injuries were such that Teresa suffered no compensable damages for loss of consortium. ***Alldread,*** 626 So. 2d at 102. Whether and how much to award Teresa for her consortium claim was properly decided by the jury. ***Alldread,*** 626 So. 2d at 103. By virtue of the zero damage award, the jury 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. However, the jury verdict is not contrary to the weight of the evidence, but, rather, is 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, including Teresa Riggenbach's testimony that she and her husband grew even closer after the accident, the jury's verdict is not in the least unreasonable and certainly 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. ***Colville,*** 934 So. 2d at 1031 (¶ 8); ***Burge,*** 856 So. 2d at 579-80 (¶ 6).

There is sufficient evidence to support the jury's zero damages verdict for Teresa Riggenbach's unsupported loss of consortium claim, so an additur is not warranted and the Motion for additur should have been denied. ***Colville,*** 934 So. 2d at 1032 (¶¶ 15-16); ***Frierson,*** 818 So. 2d at 1145 (¶ 24). With no basis on which to grant an additur pursuant to Miss. Code Ann. § 11-1-55, the trial court erred in finding otherwise and abused its discretion in granting the Riggenbachs' Motion for additur. This Court must reverse.

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 18th day of December, 2006.

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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 Brief of Appellant to:

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DATED: This the 18th day of December, 2006.

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