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.

BRIEF OF APPELLANT

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

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ORAL ARGUMENT REQUESTED

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DEWAYNE HENSON,	**Appellant,**
vs.	**NO. 2006-CA-0997**
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 refusal.

1. Honorable Andrew C. Baker
2. Clyde X. Copeland, III
3. W. Stephen Cox
4. Vicki S. Wood
5. Daryl Barney, Circuit Court Clerk, Yalobusha County
6. Dewayne Henson, Appellant
7. William L. Riggenbach, Appellee
8. Teresa K. Riggenbach, Appellee

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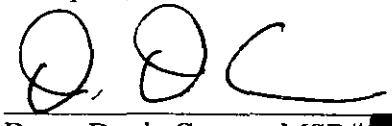

Dawn Davis Carson, MSB#[redacted]

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STATEMENT OF POSITION REGARDING ORAL ARGUMENT

The Appellant respectfully requests oral argument. This appeal presents complicated facts and legal issues, and an oral argument would be beneficial to this Court and to the parties. The Appellant therefore respectfully submits that oral argument would be appropriate in this case.

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

William L. Riggenbach and his wife, Teresa K. Riggenbach filed a Complaint for damages on April 19, 2004, against the defendants Dewayne Henson, Corey S. Campbell and James W. Paris. (Appellant R. E. 14). The Riggenbachs alleged that Mr. Riggenbach was injured as a result of an automobile accident occurring on August 17, 2001. Id. Ms. Riggenbach alleged that she suffered loss of consortium as a result of Mr. Riggenbach's injuries. Id. The complaint alleges that Mr. Riggenbach was a passenger in a vehicle being driven by Mr. Paris, and struck by the vehicles driven by Mr. Campbell and Mr. Henson. Id. The Riggenbachs request both compensatory and punitive damages. Id.

Mr. Henson answered denying he was guilty of any act or omission that proximately caused the injuries alleged in the Riggenbachs' complaint. (Appellant R. E. 13). Mr. Henson further alleged comparative fault against both Mr. Paris and Mr. Campbell alleging that "As Mr. Henson was proceeding in a northbound direction on Perry Road, the vehicle driven by Corey Campbell began to pass the vehicle driven by James Paris. Mr. Paris suddenly slowed and attempted to make a left hand turn, obstructing the roadway and causing a collision with Corey Campbell. The resulting collision caused an obstruction in the roadway which Mr. Henson could not avoid." Id.

This matter was set for trial for February 21, 2006, before a jury and the Honorable Andrew C. Baker. (R. Tran. Vol. I, p. 107). Voir dire of the jury occurred on February 9, 2006. (R. Tran. Vol. I, p. 28).

Liability was disputed by the two remaining parties, Henson and Paris. (R. Tran. Vol. I, 121, 122). Campbell had settled and did not participate in the trial. Evidence was provided to

the jury consisting of the testimony of Mr. Riggenbach, Mrs. Riggenbach, Dewayne Henson, James W. Paris, David Brick, John Tillman, Joan Hoop, James Latham, the deposition of Corey S. Campbell, the deposition of Dr. Walter Eckman and the deposition of Dr. John P. Howser. (R. Tran. Vol. I, p. 138, Vol. II, pp. 177, 206, 220, 225, 235, 295, 296, 376). At the close of plaintiffs' case directed verdicts were argued by both counsel for Paris and Henson. (R. Tran. Vol. III, p. 313). Counsel for Henson argued that the request for punitive damages should be dismissed, as there was no proof that Henson and Campbell were racing, and further that the matter should be dismissed as a matter of law. (R. Tran. Vol. III, p. 313). The court denied both motions, holding that it was a jury question. (R. Tran. Vol. III, p. 314). Counsel for Paris also argued that he should be dismissed as a matter of law. (R. Tran. Vol. III, p. 315). The court also denied this motion. (R. Tran. Vol. III, p. 315).

At the conclusion of the case, the jury found for the plaintiffs, Mr. and Mrs. Riggenbach. (Appellant R.E. 9). Damages were awarded in the amount of Ten Thousand Dollars ($10,000.00) to Mr. Riggenbach and zero ($0) to Mrs. Riggenbach. (Appellant R. E. 9). Fault was assessed against Mr. Henson at 50%, Mr. Campbell at 50% and Mr. Paris at 0%. Id. The Order on Jury Verdict was entered on March 23, 2006. (Appellant R.E. 4).

After the verdict was read, defendant, Henson, argued that there was not sufficient evidence for the issue of punitive damages to go to the jury. (R. Tran. Vol. IV, p. 472). The punitive damages phase began, as this portion of the case had been bifurcated. (R. Tran. Vol. IV, p. 470). At the punitive damages phase the only testimony elicited was that of Mr. Henson by his own counsel related to his financial net worth. (R. Tran. Vol. IV, p. 480). The jury after deliberating found for Mr. Henson, specifically finding:

"We, the jury, find for the plaintiff, William Riggenbach, in the amount of zero punitive damages"

"We, the jury, find for the defendant, Dewayne Henson, on the issue of punitive damages."

(R. Vol. IV, p. 486, Appellant R. E.10).

The Riggenbachs filed a Motion for Additur or, in the Alternative, for a New Trial on March 13, 2006. (Appellant R.E. 5). The Riggenbachs alleged that the amount awarded by the jury, $10,000 for Mr. Riggenbach and zero for his wife, was grossly inadequate and contrary to the overwhelming weight of the evidence. Id. The plaintiffs further stated that punitive damages should have been awarded. Id.

On March 13, 2006, defendant, Henson, filed a Motion to Alter or Amend Judgment, requesting that the judgment be reduced by the amount of the pre-payments made to the plaintiffs in the total amount of $10,000 by the co-defendant, Campbell. (Appellant R.E. 11). On March 13, 2006, Plaintiff filed a Motion for Additur, or in the alternative for New Trial requesting that the court increase the amount of the judgment or award a new trial. (Appellant R.E. 5). Defendant, Henson, filed a Response to Plaintiff's Motion for New Trial or Additur, on March 23, 2006, stating that plaintiffs' motion should be denied, based on the fact that the nature and extent of the plaintiff's injuries were disputed, along with liability and punitive damages, all of which were issues for the jury to decide. (Appellant R.E. 6). In his response, the defendant, Henson, listed four specific areas where the evidence presented sufficient information to the jury to support their finding, when you apply the law for determining if an additur should be awarded to the facts of this case Id. This is true because when all disputed testimony is resolved in favor of the defendant, Henson, when the defendant gets all inferences, when all countervailing proof is discarded (as it must be under the appropriate standard of review). Id. Henson listed the

following:

> **(1) the plaintiff is someone who, was in an automobile accident, but 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 perform 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; and**
>
> **(4) that when he next presented for a doctor's evaluation on May 12, 2004, he only went because his attorney told him to.**
>
> (Appellant R.E. 6).

Further, in his response, the defendant, Henson, noted that the issue in the case insofar as damages was concerned was the issue of causation. (Appellant R.E. 6). There was no question, but that the jury was appropriately instructed by the trial court on the issue of damages. (R.E. 6). The plaintiffs did not make any argument that the jury failed to follow the instructions of the trial court, or that they were swayed by, bias or prejudice. (Appellant R.E. 6). The only argument being made by the plaintiffs in their motion for additur is that the jury verdict is contrary to the weight of the evidence. (Appellant R.E. 6).

A hearing on both motions was held before the Honorable Andrew C. Baker on May 4, 2006. (R. Tran. Vol. IV, p. 489). The court granted plaintiffs' Motion for Additur or New Trial, on May 19, 2006. (Appellant R.E. 2). Order on defendant, Henson's, Motion to Alter or Amend, was denied as moot on June 13, 2006. (Appellant R.E. 12). The plaintiffs accepted the court's additur by filing a Notice of Acceptance of Additur on May 23, 2006. (Appellant R.E. 8). Notice of Appeal was filed by defendant, Henson, on June 9, 2006, appealing the court's

granting of plaintiff's Motion for Additur or in the Alternative for a New Trial on Damages. (Appellant R.E. 3).

III.

RELEVANT FACTS

This matter involves an automobile accident that occurred on August 17, 2001. (Appellant R. E. 14). Three vehicles were involved in the automobile accident -- the vehicle being driven by Mr. Paris in which Mr. Riggenbach was a passenger, the vehicle being driven by Mr. Campbell and the vehicle being driven by Mr. Henson which made the second impact with Mr. Paris' vehicle. (Appellant R. E. 14, R. Tran. Vol. II, p. 268). Mr. Riggenbach was sitting in the front passenger seat of Mr. Paris' vehicle. (R. Tran. Vol. II, p. 274).

This accident occurred on Perry Road near the intersection of Lark Drive in Grenada, Mississippi. (R. Tran. Vol. I, p.144.). Mr. Paris attempted to make a left turn onto Lark Road when his vehicle was struck on the driver's side door by a white pickup being driven by Corey Campbell. (R. Tran. Vol. I, p. 144.). The roadway was then obstructed by Mr. Paris and Mr. Campbell's vehicles. (R. Tran. Vol. I, p.186.).

After the first impact between Mr. Paris' vehicle and Mr. Campbell's vehicle, a second impact occurred between Mr. Henson's car and Mr. Paris' van. (R. Tran. Vol. II, p.173, 174.). Although, plaintiffs alleged that Mr. Henson and Mr. Campbell were racing, it is denied by both Mr. Campbell and Mr. Henson. (R. Tran. Vol. II, p. 182., Dep. Cory Campbell, p. 30, Appellant R.E. 15.). Further there is no evidence from any witness that Henson or Campbell were racing. (R. Vol. II, p. 214.).

Mr. Paris admits that he did not look in his rear-view mirror immediately before making his turn, but did look for the last time as he was 500 feet away from Lark Drive. (R. Tran. Vol. I, p. 145.). Mr. Paris does not recall whether he used his blinker to signal to those behind him that he was planning to turn. (R. Tran. Vol. I, p. 145.). Mr. Paris did not feel the second impact

between Mr. Henson's vehicle and his vehicle. (R. Tran. Vol. I, p. 166.).

Mr. Riggenbach did not seek medical attention at the accident scene even though an ambulance was called, and was walking around the scene smoking. (R. Tran. Vol. II, p. 161.). He did not seek medical attention until September 4, 2001, some eighteen days after the automobile accident that is the subject of this lawsuit. (R. Tran. Vol. II, p. 274). Mr. Riggenbach sought medical treatment randomly from September 4, 2001 through October 8, 2001:

Grenada Lake Medical Center	9-4-01	$476.34
	9-14-01	$1362.75
	9-15-01	$144.90
University Sports Medicine	9-25-01	$60.00
Grenada Family Medicine Clinic	9-11-01	$78.00
Medical Imaging of Grenada		$297.00
Auroa Spine Center Dr. Eckman	10-8-01	$200.00

(Trial Ex. 5, R. Tran. Vol. II, p. 277). Mr. Riggenbach then did not seek any treatment from any medical provider after October 8, 2001, until May 12, 2004, when he was requested to return to see Dr. Eckman by his attorney. (R. Tran. Vol. II, p. 277). The total amount of medical treatment Mr. Riggenbach received through October 8, 2001, is $2,618.99. (Trial Ex. 5).

There are gaps in Mr. Riggenbach's medical treatment from August 17, 2001 to October 8, 2001, and from October 8, 2001 to May 12, 2004. (R. Tran. Vol. II, p. 277). During the gap from October 8, 2001 through May 12, 2004, Mr. Riggenbach sought no medical treatment. (R. Tran. Vol. II, p. 277). Mr. Riggenbach was treated by Grenada Lake Medical on September 4, 2001, making no complaints of back pain. (R. Tran. Vol. II, p. 278). Mr. Riggenbach also

treated with Dr. Fields on one visit before October 8, 2001, at which time his complaints were of neck pain, not back pain. (R. Tran. Vol. II, p. 279). On Mr. Riggenbach's visit of October 8, 2001, to Dr. Eckman, the records provided that the inspection of Mr. Riggenbach's back was normal; flexion and tension was normal; stability, normal, no displacement; muscle strength and tone, normal. (R. Tran. Vol. II, p. 279).

Dr. Eckman, a neurologist, testified that on Mr. Riggenbach's visit of October 8, 2001, his chief complaint was neck pain, and did not make any complaint of lower back pain. (Appellant R.E. 16, Depo. Eckman, p. 7-8). In his examination Dr. Eckman did not find any abnormalities in Mr. Riggenbach's lower back. (Appellant R.E. 16, Depo. Eckman, p. 9-10). In reviewing the cervical MRI scan, dated September 14, 2001, it showed indications of disc degeneration or spondylosis at C3-4 and C5-6, and moderate canal and foraminal stenosis at C5-6. (Appellant R. E. 16, Depo. Eckman 11). Cervical spine films also showed disc degeneration and straightening of his curvature of his spine. Id. When asked where the findings in the neck were a result of the accident on August 17, Dr. Eckman testified it's probably not very likely that they would be. (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).

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). Then, Mr. Riggenbach's attorney sent him to Dr. Howser. (R. Tran. Vol. II, p. 281). Mr. Riggenbach did not see Dr. Howser for treatment for his alleged injuries, but for an opinion. (R. Tran. Vol. II, pp. 281, 282). The payment for the opinion was provided by Mr. Riggenbach's lawyers. (R. Tran. Vol. II, p. 282).

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. Dr. Howser further testified that all x-rays performed after the accident showed no acute changes. (Trial Exhibit 7, Depo. Howser 42). 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).

Co-defense counsel for Axa offered the testimony of David Brick, an occupational therapist who had examined Mr. Riggenbach at defendant's request. (R. Tran. Vol. III, p. 317). Mr. Brick performed a functional capacity evaluation on Mr. Riggenbach. (R. Tran. Vol. III, p. 323). Mr. Brick found that Mr. Riggenbach met the medium or heavy work requirement, lifting in the 50 to 75 pound range. (R. Tran. Vol. III, p. 327).

During the functional evaluation, Mr. Brick measured Mr. Riggenbach's range of motion, all of which was normal. (R. Tran. Vol. III, p. 341.). Mr. Brick found he could go back to most types of work that he performed in the past, medium-work range jobs. (R. Tran. Vol. III, p. 348.).

No allegations of lost wages were made by the plaintiffs. (R. Tran. Vol. II, p. 283). Mr. Riggenbach was able to continue to work and provide for his family. (R. Tran. Vol. II, p. 283).

Mr. Riggenbach testified his injuries have brought him and his wife closer together. (R. Tran. Vol. II, p. 307). Ms. Riggenbach has not talked with her husband about finding a less strenuous job. (R. Tran. Vol. II, p. 310). They do not talk about the activities he can or cannot do. (R. Tran. Vol. II, p. 310).

The trial on punitive damages was bifurcated. (R. Tran. Vol. IV, p. 479). After bifurcation, plaintiffs' counsel had an opportunity to provide evidence to the jury, but failed to even ask one question of Mr. 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. (R. Tran. Vol. IV, p. 480).

The jury found for Mr. Henson, and awarded no punitive damages. (R. Tran. Vol. IV, p. 480).

IV.

SUMMARY OF THE ARGUMENT

The trial court abused its discretion in granting Mr. and Mrs. Riggenbach's Motion for Additur or in the Alternative a New Trial. In considering a Motion for Additur, the trial court must disregard any evidence on the part of the movant which is in conflict with the most reasonable evidence in favor of the opponent. The trial court is required to consider the testimony on behalf of the opposing party in the light most favorable to the opposing party, giving all reasonable inferences concerning the evidence to the opposing party.

The burden is heavy for the movant in a motion for additur and if the trial court grants the motion then the ruling is stating 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. When the jury awarded the plaintiff $10,000.00, it obviously was compensating the plaintiff for what the jury believed to be the extent of the plaintiff's injuries, and not what the plaintiff believed to be the extent of his injuries.

An award of punitive damages was rejected by the jury. The court in granting punitive damages did not provide an additur, but provided a verdict that was contrary to that of the jury. Further, there was no evidence presented to the jury at the punitive damages phase by the plaintiff to receive an award of punitive damages.

The plaintiff does not claim that the trial judge was guilty of any error. He does not claim that adverse counsel was guilty of any act of wrongdoing. He has no evidence that the jury was influenced by bias, prejudice or passion. In short, he admits that he received a fair trial and complains only about the result.

V.

ARGUMENT

This Court's standard of review regarding a trial court's grant or denial of an additur is abuse of discretion. Rodgers v. Pascagoula Pub. Sch. Dist., 611 So.2d 942, 945 (Miss. 1992). "Additurs represent a judicial incursion into the traditional habitat of the jury, and therefore should never be employed without great caution." Gibbs v. Banks, 527 So.2d 658, 659 (Miss.1988). "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, 611 So.2d at 945. "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.

A. THE PLAINTIFF'S LEGAL BURDEN IS INSURMOUNTABLE ON A MOTION FOR ADDITUR.

The plaintiff sought an additur presumably pursuant to Miss. Code Ann. §11-1-55. Under this code section, the trial court has the authority to deny a motion for new trial upon the condition of an additur, but only 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, passion or that the damages awarded were contrary to the overwhelming weight of the credible evidence."

Id.

That standard, as this Court is no doubt aware, is a test of the legal sufficiency of the evidence. In considering the motion, the trial court must disregard any evidence on the part of

the movant which is in conflict with the most reasonable evidence in favor of the opponent. Mongeon v. A & V Enter., Inc., 697 So.2d 1183, 1997 WL 441937, *2 (Miss. 1997) (*withdrawn from volume pending hearing*) (*citing* Bruner v. Univ. of Southern Miss., 501 So.2d 1113, 1116 (Miss. 1987)). In order to grant such a motion, 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)).

When one considers the heavy burden facing the plaintiffs in their motion for additur, it is not surprising that the plaintiffs did not move for directed verdict on this issue at the close of all of the proof. The standard is identical, after all, and if there had been such an utter failure on the part of the defense to present proof to create a jury issue, it is difficult to understand why this motion was not presented at that time. No motion was made at that time because there is no merit to the motion then or now.

The plaintiff in their motion for additur before the trial court, failed to provide proof that the jury was influenced by "bias, prejudice or passion." The plaintiff's argument, as best it can be understood, was that the jury rejected "the overwhelming weight of credible evidence" when it returned its verdict, and because the jury's verdict must have been influenced by "bias, prejudice or passion." The plaintiff failed to provide any proof of this.

A trial court, when determining if an additur is appropriate, must again look at the evidence in the light most favorable to the party in whose favor the jury decided, granting that

party any favorable inferences that may be reasonably drawn from the proof. Lewis v. Hiatt, 683 So.2d 937 (Miss. 1996). For this reason, the burden facing the plaintiff seeking an additur is identical to the burden facing the plaintiff who seeks a new trial or judgment notwithstanding the verdict.

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. The plaintiffs must prove the causal connection between negligence and the damages. Flightline v. Tanksley, 608 So.2d 1149 (Miss. 1992). The plaintiffs failed to prove the causal connection between the alleged injuries and the automobile accident.

B. THE PLAINTIFF FAILED TO CARRY THE FACTUAL BURDEN OF PROOF AT TRIAL

The party seeking an additur has the burden of proving his injuries, loss of income, and other damages. Gaines v. K-Mart, 860 So.2d 1214, 1220 (¶21) (Miss. 2003). When you apply the law stated above to the facts of this case, it becomes very plain that the plaintiffs' motion should have been denied. This is true because when all disputed testimony is resolved in favor of the defendant, when the defendant gets all inferences, when all countervailing proof is discarded (as it must be under the appropriate standard of review).

Miss. Code Ann. § 41-9-119 allows a plaintiff to testify that medical bills were incurred without the need for a doctor to verify these bills. It is well known to the court and most jurors that medical expenses can be increased by continued complaints of a patient, whether the complaints are true or not. Therefore plaintiff also has the burden to prove that the medical

expenses incurred or will incur are a result of the negligence of the defendant. This is what Mr. Riggenbach obviously failed to prove to the jury.

"It is primarily the province of the jury to determine the amount of damages to be awarded and the award will normally not 'be set aside unless so unreasonable in amount as to strike mankind at first blush unreasonable as being beyond all measure, unreasonable in amount and outrageous." Burge v. Spiers, 856 So.2d 577, 580 (¶6) (Miss. Ct. App. 2003) (*quoting* Harvey v. Wall, 649 So.2d 184, 187 (Miss. 1995)). The main issue is not whether the medical expenses were reasonable and necessary, but whether the medical expenses were for injuries that resulted from the defendant's negligence. Cassibry v. Schlautman, 816 So.2d 398, 401 (¶12) (Miss. Ct. App. 2002). Damages must be reasonably certain in respect to the cause, therefore the plaintiff has the burden of proof by a preponderance of evidence to show that there is a causal connection between the defendant's action and the plaintiff's alleged injuries. Id. (*citing* Jackson v. Swinney, 244 Miss. 117, 124, 140 So.2d 555, 557 (Miss. 1962)).

In Mississippi like most other jurisdictions, the jury determines the weight of evidence and testimony and the credibility of witnesses. Burge, 856 So.2d at 580 (¶9). The jury, based on the testimony and evidence, determines the amount of damages. Id. It is in the discretion of the jury to determine whether or not the defendant was the proximate cause of the plaintiff's injuries. Id.

In Burge, a case with facts very similar to the case that is before this Court, the plaintiff sued the defendant as a result of a rear-end automobile collision. 856 So.2d at 579. The defendant admitted liability, but disputed that the plaintiff's injuries were a result of the automobile accident. Id. at (¶2). The plaintiff made claim of $2,787.00 in incurred medicals, plus future medicals of $30,000. Id. at (¶3). The jury awarded the plaintiff $2,137.00 in

damages. Id. (¶4). The plaintiff made a motion for additur or in the alternative motion of new trial, but the trial court denied the plaintiff's motion. Id. at (¶4). This denial of the motion for additur was upheld by the Court of Appeals, on the basis that the defendant had impeached the plaintiff as to causation, and there was sufficient evidence to support the jury verdict. Burge, 856 So.2d at 580 (¶ 10).

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 perform 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.

The jury instructions very plainly stated that the plaintiff, William L. Riggenbach, had the burden of proof in showing damages. There is no question but that the jury was appropriately instructed by the Court on the issue of damages. There is no argument that the jury failed to follow these and other instructions. The argument as presented to the trial court, as best it can be understood, is that the jury verdict is contrary to the weight of evidence. Under the law, all of this evidence must now be accepted as true. All inferences from this evidence must be given to the defendant. All evidence to the contrary must be discarded.

C. THE JURY WAS GENEROUS UNDER THESE CIRCUMSTANCES

"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 jury's verdict of $10,000.00 obviously represented compensation for the plaintiff's alleged injuries. When judged in that light, the award was fair. 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.

D. THE COURT ERRONEOUSLY GRANTED PUNITIVE DAMAGES WHEN THE JURY FOUND FOR THE DEFENDANT AT THE PUNITIVE DAMAGES PHASE

The trial court in providing a punitive damage award on plaintiffs' motion for additur did not increase the amount of punitive damages, but instead reversed the jury's award by granting punitive damages, and then awarding the amount of $10,000. This award of punitive damages was not appropriate upon plaintiff's motion for additur and/or new trial. The trial court's ruling is analogous to the jury finding for Mr. Henson at the liability phase, but upon motion for additur the trial court changing the jury's verdict and granting an amount of money where the jury did not.

"Mississippi law does not favor punitive damages; they are considered an extraordinary remedy and are allowed with caution and within narrow limits." 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)). "As a general rule, exemplary or punitive damages are 'added damages' and are in addition to the actual or compensatory damages due because of an injury or wrong. The kind of wrongs to which punitive damages are applicable are those which, besides the violation of a right or the actual damages sustained, import insult, fraud, or oppression and not merely injuries, but injuries inflicted in the spirit of wanton disregard for the rights of others." Bradfield v. Schwartz, 936 So.2d at 937 (¶17) (*quoting* Summers ex rel. Dawson v. St. Andrew's Episcopal School, Inc., 759 So.2d 1203, 1215 (Miss. 2000) (*citing* Fowler Butane Gas Co. v. Varner, 244 Miss. 130, 150-51,141 So.2d 226, 233 (1962)). "In order to warrant the recovery of punitive damages, there must enter into the injury some element of aggression or some coloring

of insult, malice or gross negligence, evincing ruthless disregard for the rights of others, so as to take the case out of the ordinary rule." Id. (*citing* 15 Am.Jur., Damages, Sec. 265, p. 698).

In the case presently before this Court, there is simply no evidence of ruthless disregard for the rights of others, malice or gross negligence, 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.

Although, the matters of liability/compensatory and punitive damages were bifurcated, there was no evidence at the punitive damages phase other than the financial networth of

defendant, Henson. There was no evidence of Mr. Henson's conduct at the punitive damage phase, and the plaintiff did not even put on any proof at this stage in the litigation and specifically declined to do so.

The trial court abused its discretion in awarding punitive damages upon the plaintiff's motion for additur for many reasons, including the following:

1. The jury denied punitive damages to the plaintiff and found for Mr. Henson
2. Mr. Henson's conduct did not warrant punitive damages
3. There was no evidence presented at the punitive damages phase by plaintiff to warrant punitive damages.

The trial court's ruling should be reversed.

VI.

CONCLUSION

Obviously, from the jury's award, it was clear that the jury decided that Mr. Riggenbach should only be compensated for his treatment through October 8, 2001. The plaintiffs failed to carry the burden providing the causal connection between the automobile accident and any treatment received after October 8, 2001.

The plaintiffs' attorney then asked the trial court to declare, by judicial fiat, what the jury expressly rejected with their verdict. The jury was provided evidence through witness testimony and allowed to give each witness the credibility they thought that the witness deserved. Mr. Riggenbach was clearly impeached through cross-examination.

It is obvious by the jury's responses in finding no punitive damages against Mr. Henson that it was their conclusion that punitive damages were not appropriate and Mr. Riggenbach had been properly compensated. The trial court by its order did not provide an additur as to punitive damages, but ruled that punitive damages should be awarded where the jury did not. There is no evidence ever alleged that the jury was swayed by bias or prejudice.

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

I do hereby certify that a true and exact copy of the foregoing document has been mailed, by United State mail, postage prepaid, to the following:

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Dated this the 19th day of October, 2006.

_____
Dawn Davis Carson