IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

C. RICHARD DOBBINS, APPELLANT

VS. CASE NO. 2006-CA-02104

FREDRICK J. VANN, III, 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 the Supreme Court may evaluate possible disqualification or recusal.

1. Phil R. Hinton, W. Jett Wilson and Terry L. Wood, Attorneys for Appellant;
2. Robert G. Krohn and James E. Price, Jr., Attorneys for Appellee;
3. C. Richard Dobbins, Appellant;
4. Fredrick J. Vann, III, Appellee.

Respectfully submitted,

WILSON, HINTON & WOOD, P.A.

PHIL R. HINTON, MSB#[redacted]
ATTORNEY FOR APPELLANT
505 EAST WALDRON STREET
POST OFFICE BOX 1257
CORINTH, MS 38835
662-286-3366

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF ISSUES

I. THE COURT ERRED BY LIMITING RICHARD DOBBINS' QUESTIONS ABOUT INSURANCE DURING THE JURY SELECTION PROCESS.

II. THE TRIAL COURT ERRED BY REFUSING TO ACCEPT INTO EVIDENCE A WRITTEN SUMMARY OF WRITINGS THAT COULD NOT BE CONVENIENTLY EXAMINED IN COURT.

III. THE TRIAL COURT ERRED FOR REFUSING TO GRANT RICHARD DOBBINS A NEW TRIAL ON THE ISSUE OF DAMAGES OR FOR REFUSING TO AWARD AN ADDITUR CONSISTENT WITH THE OVERWHELMING WEIGHT OF THE CREDIBLE EVIDENCE.

IV. THE DAMAGES AWARDED BY THE JURY ARE SO INADEQUATE THAT IT EVINCES THAT THE JURY WAS INFLUENCED BY BIAS, PREJUDICE OR PASSION.

V. THE DAMAGES AWARDED BY THE JURY ARE CONTRARY TO THE OVERWHELMING WEIGHT OF THE CREDIBLE EVIDENCE.

STATEMENT OF THE CASE

This is a simple automobile accident which occurred on January 19, 2002, in Corinth, Mississippi. Richard Dobbins, Plaintiff below and Appellant here, was driving his daughter's automobile, travelling east on Wick Street. As he approached the intersection with Franklin Street, Fredrick J. Vann, III (generally referred to as "Fred"), Defendant below and Appellee here, was traveling north on Franklin Street and went through a stop sign without stopping. At that intersection, Wick Street was a "through street" with no stop signs. The front portion of Richard Dobbins' SUV collided with the driver's side of Fred Vann's pick-up truck, more or less in the center of the intersection. The collision occurred at approximately 11:00 a.m. on a clear day. Richard Dobbins was born on December 23, 1942, so he was 59 years of age at the time of the accident. (T. 67, 75, 76 & 78) and had a life expectancy of 18.1 years based on his age at the time of trial. (Jury Instruction C-11, R. 87)

Fred Vann was approximately 16 years old at the time of the accident (20 at the time of the trial four years later) and he admitted that he did not stop for the stop sign on Franklin Street (T. 73, 75 & 76). Although Fred was taken to the hospital by ambulance, he was not injured other than a small cut over his right eye. (T. 76)

As a result of the impact with Fred Vann's vehicle on January 19, 2002, Mr. Dobbins, who was restrained by a seatbelt, was thrown forward and to the right, "trapping" his right arm against the console and ramming both of his knees into the dashboard. (T. 89 & 90) Mr. Dobbins testified that he did not go to the emergency room in the ambulance that was called to the scene, because at the time of the accident, he was scheduled to sit with his mother, who was ill, and in a nursing home in Iuka, Mississippi. (T. 92 & 93)

Richard Dobbins filed his Complaint on December 31, 2002, seeking $500,000.00 in damages. Mr. Dobbins alleged that Mr. Vann failed to stop for a posted stop sign at the intersection of Franklin and Wick Street and that such negligence was the cause of the accident. Mr. Vann filed an Answer on February 18, 2004, denying that he failed to stop and generally denying any negligence. (R. 5-9) After extensive discovery and the taking of evidentiary depositions of physicians, the case was tried in the Circuit Court of Alcorn County, Mississippi, before Judge Paul Funderburk and a jury, beginning on July 24, 2006.

During voir dire, Mr. Vann objected to questions to the jury panel about those who might have purchased insurance from Fred Vann's father or grandfather. The Court sustained that objection. During a conference at the bench, Mr. Dobbins' attorney informed the Court that he planned to ask jurors additional questions about any connection they might have with the insurance business and insurance issues in general. The Court instructed Mr. Dobbins' attorney not to ask any questions of any type about insurance in response to Mr. Vann's objection. (T. 35-37, 56-58)

During his direct case, Richard Dobbins testified extensively about the medical treatment he had undergone and which he was still undergoing at the time of trial. He introduced into evidence medical bills totaling $38,627.85. (T. 121, Ex. 2, R.122-182) Additionally, by stipulation with Fred Vann, the jurors were informed that the expense for a knee replacement, which had not been performed at that time, would be $35,500.00. (T. 126-127) Through the depositions of two orthopedic surgeons and a chiropractor, the jury learned that Richard Dobbins continued to have, and would have in the future, other medical expenses. (T. 205, R. 268-269)

After the jury was instructed, including a preemptory instruction as to liability, confessed by Mr. Vann, and heard argument by the attorneys, the jury deliberated and returned a verdict for the Plaintiff in the sum of $50,000.00. (T. 315)

Richard Dobbins filed a motion seeking a new trial on damages or an additur. (R. 519-524) That motion was overruled by order entered on November 7, 2006. (R. 559 & 560) Feeling aggrieved, Richard Dobbins filed this appeal.

SUMMARY OF THE ARGUMENT

Fred Vann caused an automobile accident on January 19, 2002, which injured Richard Dobbins. There was no dispute as to liability and the evidence at trial was almost entirely related to damages. Mr. Vann was 16 years old at the time of the accident but his father and grandfather (Fred Joe Vann, Jr. and Fred Joe Vann, Sr., respectively) were and had been in the insurance business in Alcorn County for many years.

Mr. Dobbins attempted to question the jurors about whether or not they had purchased insurance from the Vann family and he desired to follow up and get the details about that relationship. He also intended to ask the jurors if they or their family or close friends were affiliated in any way with any liability insurance company. Mr. Vann objected to both lines of questions and both objections were sustained by the trial judge. Richard Dobbins was denied the right to a meaningful voir dire which would have enabled him to better decide which jurors might be challenged for cause or might be challenged peremptorily.

Richard Dobbins offered a written summary from his personal diaries and other documents which concisely presented relevant information to the jury which could not be obtained except by the jury's painstaking review of voluminous documents. Mr. Vann objected on the basis of the "best evidence rule," and the judge sustained that. There was no meaningful or efficient method to otherwise provide this information to the jury and have it available to them for their deliberations. Such summaries are not only essential to expedite trials but they are permitted by Rule 1006 of the Mississippi Rules of Evidence.

The jury was instructed that Richard Dobbins was entitled to recover for his medical expenses, past and future, lost income, past and future, pain and suffering, loss of

enjoyment of life and inconvenience. Richard Dobbins put on extensive evidence touching each element of damages, including $38,627.85 in past medical expenses and $56,685.25 of future medical expenses. No evidence was offered to refute the fact that the collision with Mr. Vann was the sole cause of Richard Dobbins' back injury and a contributing cause to all of his other physical injuries. Mr. Dobbins had undergone rotator cuff surgery and is expected to have knee replacement surgery. A jury verdict of $50,000.00 was contrary to the substantial weight of the evidence and a new trial as to damages should have been granted or an additur made.

ARGUMENT

I.

THE COURT ERRED BY LIMITING RICHARD DOBBINS' QUESTIONS ABOUT INSURANCE DURING THE JURY SELECTION PROCESS.

During voir dire the trial judge introduced Joe Vann, the father of the Defendant, as a potential witness and inquired generally if anyone was related to Mr. Joe Vann, by blood or marriage or considered him a close personal friend. Only three potential jurors identified themselves as friends of the Vann family. (T. 8-9 & 25) All were later excused for cause. During Plaintiff's opportunity to voir dire, Mr. Dobbins' attorney posed the following to the jury:

> "Now, there's already been some mention of Joe Vann, who's sitting in the back. He and his father, who is a namesake I believe for young Mr. Fred Vann, Fred Vann and Joe operated an insurance agency, it was right on this street, for many, many, many, years. I think Joe in fact is still in the insurance business. And I would like to know if any of you have been insured by one of these Vanns or one of the agencies?" (T. 35)

Fred Vann objected to this "line of questioning" and the Court sustained the objection. Richard Dobbins' attorney asked the only question he was permitted to ask which was whether or not any of the jurors had ever conducted any type of business with the Defendant's father, Mr. Joe Vann, or his grandfather, Mr. Fred Vann. (T. 36)

During a bench conference on Fred Vann's objection, Mr. Dobbins' attorney advised the Court that he planned to ask additional questions about the jurors' affiliation with the insurance industry or any other insurance issues in general. The Court instructed Mr. Dobbins' attorney not to ask any questions of any type about insurance. (T. 35-37, 56-58)

The trial court refused to allow Mr. Dobbins' attorney to ask any question except whether or not a juror ever conducted any type of business with Mr. Joe Vann or Mr. Fred Vann. When jurors responded that they had, no follow-up was authorized and the following exchange occurred:

"Mr. Hinton: Q. I'm going to start with you. You're Mr. ?

A. Bobo.

Q. I'm sorry. Yes, sir, Mr. Bobo.

Mr. Hinton: Your Honor, I'm at a loss now how I might proceed because I –

The Court: Mr. Bobo, have you done business in the past with the Vann family?

Juror Bobo: Yes. I've had auto and home insurance.

The Court: Is there anything about your having done business with them that would influence you one way or the other if you were chosen as a juror in this case?

Juror Bobo: I don't think so.

The Court: All right. Mr. Hinton.

Mr. Hinton: Thank you, Your Honor." (T. 36 & 37)

Following voir dire, Mr. Vann moved for a mistrial and the Court overruled that motion but the exchange memorialized a bit of what happened during the bench conference as follows:

"Mr. Krohn: Comes now the defendant and respectfully moves this court for a mistrial in this case on the grounds that the plaintiff has impermissibly interjected the question of insurance in this case.

The Court: The rule that you're referring to prohibits mention of insurance coverage for the defendant. That question was not interjected into this matter in the Court's opinion. The Vanns had, and still have as I understand it, an insurance agency, and the question was asked had any member of the jury panel I believe purchased insurance coverage from the Vann agency. There was an objection which was sustained, and the court instructed Mr. Hinton to

> ask a more general question, Had any member of the jury panel done any type of business with the Vanns, which would of course include insurance business and any other type business. So the motion for mistrial is denied. Anything the defense wishes to put on the record?" (T. 56 & 57)

Mr. Dobbins reminded the Court that during the same bench conference he had informed the Court that he wished to ask jurors other questions about their affiliation with any insurance business and that was refused. The Court ruled as follows:

> "All right. There's an objection by the defense to the plaintiffs' proposed question, Had any member of the panel been in the insurance business. That's not relevant and it's an attempt to interject insurance coverage into this case, and the Court did sustain the defendant's objection and prohibited plaintiffs' counsel from asking that particular question." (T. 57 & 58)

Our Supreme Court has held that, "it is the duty of the Court to see that a competent, fair and impartial jury is impaneled." *Marshall Durbin v. Tew,* 381 So.2d 152 (Miss. 1980) Additionally, "in order to insure a party's right to a fair trial and impartial jury, free of bias and prejudice, Mississippi law allows a broad latitude on voir dire." *Tighe v. Crosthwait,* 665 So.2d 1337 (Miss. 1995) at 1339. Although there are reasonable limitations on voir dire that have been set by the Supreme Court in various cases, the Supreme Court has consistently held that good faith questions about insurance are proper for voir dire. A Plaintiff is entitled to ask if potential jurors are close relatives and/or connected in any way with any liability insurance company, *Kennedy v. Little,* 2 So.2d 163, 191 Miss. 73 (1941); *Avery v. Collins*, 157 So. 695, 171 Miss. 636 (1934). They are also entitled to question jurors about their exposure to media campaigns on issues like tort reform, medical malpractice and the insurance crisis. 665 So.2d at 1341.

In the *Tighe* case, mentioned above, the Mississippi Supreme Court quoted from several cases from other jurisdictions with favor and held as follows:

> "So long as counsel acts in good faith, he may, 'in one form or another question prospective jurors respecting their interest in or connection with liability insurance companies.'" 572 S.W.2d at 844. "This inquiry is in line with purpose of voir dire examination 'to enable counsel to ascertain whether there is ground for a challenge of a juror for cause, or for preemptory challenge.'" Id; *Barrett vs. Peterson,* 868 P.2d 96 (Utah 1993)

Although the trial court did allow Mr. Dobbins' attorney to ask if any juror had done business of any type with the Vann family, no meaningful follow-up questions were permitted when a juror had responded that he had insurance. The Plaintiff was prohibited from talking about insurance and therefore, could not inquire as to how long the potential juror had insurance through the Vann Agency, whether a claim had ever been made, whether the Vann family assisted in resolving a claim. (T. 35-37)

II.

THE TRIAL COURT ERRED BY REFUSING TO ACCEPT INTO EVIDENCE A WRITTEN SUMMARY OF WRITINGS THAT COULD NOT BE CONVENIENTLY EXAMINED IN COURT.

During his direct testimony, Richard Dobbins offered into evidence a summary which reflected the dates and hours he was away from his office for medical treatment as well as mileage, motel and meal expense. (R. 118-121, Exhibit 1) He testified that the summary covering over four years since the accident was made from diaries that he maintains on a daily basis. (T. 102-103, 107-109, 113-114, 119-120) He testified that those diaries show appointments, including client information, and activities for every business day. Mr. Vann objected to introduction of the summary and the Court sustained the objection, authorizing the use of the summary as a jury aid during argument but not allowing it into evidence as an exhibit to be used by the jury in their deliberations. (T. 109)

The summary was offered by Mr. Dobbins for two reasons. First, his diaries contained the names of clients and other privileged information. (T. 84-85) More importantly, the diaries containing over four years of daily appointments and it would have presented a daunting task for a jury to go through and ferret out the dates that Richard left his practice for medical treatment. They could have obtained the same information by going through medical bills, (R. 122-182, Exhibit 2) which would have been a big task as well. Even if the jury were invited to go through those records and actually complied, they still could have not have quickly pulled together all of the expense information offered in the summary prepared by Richard.

Mr. Dobbins properly authenticated the summary as required by Rule 1006 of the Mississippi Rules of Evidence which provide for admissibility of such summaries. If there is any doubt as to the clarity of the rule, the Supreme Court has clearly held that such summaries are admissible as evidence. *Wells v. State*, 604 So. 2d 271 (Miss. SCT 1992) See also *Sentinel Indus. Ontr. Corp. v. Kimmons Indus. Serv. Corp.*, 743 So.2d 954 (Miss. 1999) and *American Nat'l Ins. Co. v. Hogue*, 749 So. 2d 1254 (Miss. 2000).

III.

THE TRIAL COURT ERRED FOR REFUSING TO GRANT RICHARD DOBBINS A NEW TRIAL ON THE ISSUE OF DAMAGES OR FOR REFUSING TO AWARD AN ADDITUR CONSISTENT WITH THE OVERWHELMING WEIGHT OF THE CREDIBLE EVIDENCE.

IV.

THE DAMAGES AWARDED BY THE JURY ARE SO INADEQUATE THAT IT EVINCES THAT THE JURY WAS INFLUENCED BY BIAS, PREJUDICE OR PASSION.

V.

THE DAMAGES AWARDED BY THE JURY ARE CONTRARY TO THE OVERWHELMING WEIGHT OF THE CREDIBLE EVIDENCE.

No issue of liability went to the jury because Mr. Vann conceded that a preemptory instruction on that issue was appropriate. In fact, liability was conceded by Mr. Vann in his opening statement and his brief testimony when called by Mr. Dobbins as an adverse witness. (T. 67 & 75-76) Virtually all of the evidence offered in this case related to the issue of Mr. Dobbins' injuries and the damages that he suffered.

The proof that Richard Dobbins was injured in the automobile accident with Fred Vann, was absolutely undisputed. Three orthopedic surgeons who had treated Richard testified that he had pre-existing arthritic conditions in his shoulder and his left knee which were aggravated by the impact with Fred Vann's vehicle on January 19, 2002. (T198-200 & 290-321) No evidence to the contrary, whether by medical expert or layman, was offered to the contrary. It was also undisputed that Richard Dobbins had incurred medical expenses of almost $39,000.00 for treatment directly related to injuries sustained in the automobile accident. (T. 121, R. 122-182, Exhibit 2) Additionally, it was undisputed that a knee replacement would be required which would cost over $35,000.00 more. (T. 126-127) The lower back injury suffered by Richard was not an aggravation of a pre-existing condition but was instead a new injury. Part of the medical bills incurred, approximately $7,900.00, (R. 122-131 & 148-177) were for treatment of the back and those treatments were expected to continue into the future at the rate of almost $100.00 every two to four weeks. (T. 209-210) Again, none of that was disputed either.

Richard Dobbins testified that he was totally asymptomatic prior to the accident with Mr. Vann. He had not been treated in over 15 years for any problem with his left knee or his lower back. (T. 83-84) He had never been treated for right shoulder problems. According to Richard, his pre-existing arthritic condition was benign. The orthopedic

surgeons verified Richard's complaints of pain associated with the back, the shoulder and the left knee.

Richard testified that within the three years prior to the accident on January 19, 2002, he visited doctors a handful of times for physicals and for minor ailments, such as a sinus condition. (T. 85-86) After the accident, his office diary revealed that he missed 326.5 hours from work because he was seeking treatment for the injuries associated with his accident. (R. 118-121)

Immediately following the accident, Richard Dobbins declined an ambulance ride to the hospital because he was scheduled to sit with his mother in the nursing home that evening. However, later that night, he began feeling the effects of the accident and called upon someone to relieve him at his mother's nursing home. (T. 92-94)

The date of the accident was Saturday, and he did not go to the emergency room that day or the following day, Sunday. On Monday, Mr. Dobbins phoned for appointments with two physicians, Dr. Andrew Kerby, a neurologist, and Dr. Randall Frazier, an orthopedic surgeon. Because of their schedules, he was unable to see Dr. Kerby until a week later, the following Monday, and Dr. Frazier until eight days after his call, on a Tuesday. Mr. Dobbins complained of a sore ankle, sore knees and problems with his back, neck and right shoulder. He also had a "strange" headache, located in the back of his head. (T. 93-95) Mr. Dobbins consulted with Dr. Kerby for his headache, back and neck pain, and consulted with Dr. Frazier for his knee and ankle pain. He did not mention his right shoulder pain to either because the pain had subsided somewhat and he thought it might go away. (T. 95 & 96)

Dr. Tom Budny, a local chiropractor, testified that he began treating Richard on September 4, 2002, just over seven months after the accident. The patient was referred by Dr. Andrew Kerby. Dr. Budny saw Richard primarily for lower back pain, which he had complained about since the collision with Mr. Vann, but also treated him for a painful right shoulder. According to Dr. Budny, the history given was for right shoulder pain dating to the accident of January 19th. (R. 196-205)

Dr. Budny testified that he was continuing to treat Richard for his low back pain, that he felt surgery for the lower back was not an option and that the lower back pain was a chronic condition which would not go away. Dr. Budny said he was seeing Richard every two or three weeks and that each consultation cost $99.84. Dr. Budny testified that he expected to see Richard in the future every two weeks or once a month. Dr. Budny also identified his prior medical bills which were introduced into evidence as a portion of Exhibit 2. (T. 206-210) The chiropractic bills through the date of trial were $7,900.16. (R.122-131, 148-177)

Dr. Randall Frazier, an orthopedic surgeon practicing in Corinth, Mississippi, testified that he saw Richard Dobbins as a patient on January 29, 2002, just ten days after the automobile accident. (R. 312-313) According to Dr. Frazier, Richard complained of pain in both knees and pain in his right ankle. On examination, he noted an "antalgic gait" meaning Richard gave to both knees when he walked and he found abrasions over the front of both knees. (R. 313-314) Dr. Frazier again saw Richard on February 12, 2002, for continuing knee pain so he injected the knees with cortizone and a numbing medication. (R. 316)

Dr. Frazier testified that the automobile accident of January 19, 2002, did, to a reasonable degree of medical certainty, aggravate the pre-existing arthritis in Richard's left knee. He based his opinion on the history of the automobile accident given to him and the physical findings when he examined Richard ten days after the accident. (R. 319-321) Dr. Frazier testified that he had not, prior to January 29, 2002, treated Richard Dobbins for any knee or shoulder problems. (R. 312-319)

In January of 2003, Dr. Budny referred Richard to an orthopedic for his continuing right shoulder problem and also for a left knee evaluation. Richard went back to Dr. Frazier, who had previously seen him for his knee and ankle problems. He saw Richard on May 9, 2003, for right shoulder pain. Dr. Frazier examined Richard and took x-rays, but provided no further treatment. (R. 316-318)

On December 15, 2003, Richard Dobbins consulted for the first time with Dr. Felix Savoie, an orthopedic surgeon in Jackson, Mississippi. He saw Dr. Savoie for continued pain in his right shoulder. Dr. Savoie testified that he diagnosed an impingement, that x-rays revealed bone spurs and that he and the radiologist thought that there may be a small tear in the rotator cuff. According to Dr. Savoie, Richard gave a history of right shoulder pain beginning with an automobile accident in January of 2002. Richard gave no history of any prior problems with his right shoulder. Dr. Savoie treated Richard conservatively with a cream and shoulder injections and physical therapy exercises to be done at home. Dr. Savoie continued to see Richard and to treat the shoulder conservatively until April 25, 2005. Although he recommended surgery at that time, the doctor explained that Mr. Dobbins delayed the surgery because of his wife's illness. He performed the shoulder surgery on July 13, 2005. (R. 185-197)

During surgery, Dr. Savoie found and removed bone spurs and he also found and repaired a partial tear in the rotator cuff. Dr. Savoie testified that, to a reasonable degree of medical certainty, the automobile accident of January 2002 aggravated a pre-existing condition. The automobile accident did not cause the bone spurs, which would have pre-dated the accident, but it either caused the tear in the rotator cuff or aggravated that tear. Dr. Savoie could not apportion the shoulder injury and problems between the pre-existing condition and the contribution made by the automobile accident. (R. 197-201) Since Dr. Savoie's testimony was taken on July 19, 2005, less than a week subsequent to the shoulder surgery, he testified as to the anticipated recovery period, including follow-up and therapy. He also testified that Richard could expect an anatomical impairment in the range of 6% to 20% to the arm in accordance with the AMA Guide to Permanent Impairment, 5th Edition. (R. 204)

Dr. James O'Mara, another orthopedic surgeon, who practices with Dr. Savoie, also testified. He too first saw Richard Dobbins on January 15, 2004, but for complaints about his left knee. According to the history given, Mr. Dobbins said his problem began in a motor vehicle accident on January 19, 2002. He also disclosed his old injury to the knee in July 1979. On physical examination, he observed a grinding sensation in the knee consistent with arthritis and he also observed limitations in extension and flexion of his knee. He prescribed an anti-inflammatory and followed up with Richard on May 23, 2005. Richard gave his symptoms as pain, primarily with activity. The pain was estimated at seven on a scale of zero to ten. Dr. O'Mara pursued a series of viscosupplementation injections. He continued to follow Richard, giving him a series of three injections with the last being on June 6, 2005. (R. 250, 253-261)

Dr. O'Mara testified that the final diagnosis was osteoarthritis of the left knee. He testified that the knee injury in 1979 contributed significantly to the problems with Richard's knee. However, he also testified, to a reasonable degree of medical certainty, that the automobile accident of January 19, 2002, did exacerbate or contribute to the knee injury. He also testified that he could not apportion between the two accidents as they related to the knee injury. Dr. O'Mara was of the opinion that Richard would require a left knee replacement but had recommended that Richard put off that surgery as long as he could because of his age and the expected life of the prosthetic knee. That is, he considered Richard young and unless he delayed the surgery, he might require an additional replacement prior to the end of his life expectancy. (R. 263-278, 290 & 291)

Richard Dobbins testified to an active lifestyle prior to the accident with Fred Vann. He walked three miles several days a week and he cared for horses there at his home. He testified that at the time of the accident, he owned approximately 14 horses and that, as a result of his injuries, he was no longer able to ride. For that reason, he sold all of those horses except one, which belonged to his daughter. Richard Dobbins also practiced his accounting profession full-time and he provided care for his wife, who suffered from numerous illnesses. (T. 114-120)

Richard's son-in-law, Tim Mitchell, testified that he rode horses with Richard several times prior to the accident with Vann, and that Richard had no problem riding or caring for his horses. He testified that he had not ridden horses with Richard, nor seen Richard ride a horse, since that accident and that Richard had in fact called on him to assist with the care of those animals subsequent to the accident on January 19, 2002. (T. 162- 167.) John McCarter, a friend of Richard's, testified that he is in the horse business and that he

assisted Richard with caring for his horses after the automobile accident of 2002. After the accident, Mr. McCarter bought some of those horses and sold the balance at Richard's request. (T.174 -176)

Fred Vann did not testify again in his direct case and the only witness he called was his father, Joe Vann. Joe Vann testified that his son had very minor injuries as a result of the accident and that he had spoken with Richard Dobbins or his wife, Peggy, by telephone on two occasions since the accident. He said on both occasions he inquired as to how Richard was doing and he was told that he was fine. (T. 216-217)

Fred Vann did not introduce any medical witnesses to refute the testimony offered by any of the three orthopedic surgeons that testified nor the chiropractor who testified. He did not put on any evidence that Richard Dobbins suffered from a debilitating left knee condition which required knee replacement, low back pain of any type, or a tear in the right rotator cuff, prior to January 19, 2002. In fact, Mr. Vann admitted when testifying as an adverse witness that he was not claiming that Mr. Dobbins was lying about his injuries nor contending that Mr. Dobbins needed a knee replacement prior to the accident in 2002.

There is simply no evidence to contradict Richard Dobbins' substantial proof that he was in good health and active prior to the accident with Mr. Vann, that he was injured in the accident with Mr. Vann, and that he incurred and stood to incur substantial medical expenses, exceeding $73,000.00. Proof of pain and suffering, loss of enjoyment of life and the inconvenience of visiting doctor and hospital for treatment was clear and likewise undisputed. Based on that evidence, and clear liability, the verdict of the jury was against the overwhelming weight of the evidence and evinces bias, prejudice or passion.

In addition to instructing the jury that the Defendant was liable, the Court also instructed the jury that it could consider the following elements of damage:

> "Noneconomic damages" means subjective, nonpecuniary damages, if any, arising from pain, suffering, inconvenience, physical impairment and loss of the enjoyment of life. (Instruction No. C-14, R. 90)

Those elements of damage were permitted because there was evidence for each of them.

The case *sub judice* is similar to a line of cases in which the Mississippi Appellate Courts have ordered additurs or new trials as to damages because the award by a jury was contrary to the overwhelming weight of the evidence or, under the circumstances, convinced the Court that the verdict was the product of bias, prejudice or passion. One early example is the case of *Pham v. Welter,* 542 So.2d 884 (Miss. 1989). There, a jury awarded Pham the amount of his medical expenses plus approximately $1,300.00 to cover his pain and suffering. The Supreme Court in Mississippi reviewed the extensive medical treatment provided to Pham, including his twelve-day hospitalization in ICU and at least two surgeries. The Court also noted that more surgery would be required in the future. In Pham's case, like the present case, there was no dispute as to the amount of medical expenses. Pham also had permanent partial disability as a result of a leg injury, just as Richard Dobbins has permanent partial impairment as a result of his shoulder injury. The Supreme Court concluded that the $1,300.00 over and above actual medical expenses and actual lost wages was not adequate to compensate for Pham's future impairment and his pain and suffering, past and future, based upon the extent of those elements of damage and the fact that they were undisputed. The Supreme Court awarded a $30,000.00 additur to Pham, stating the following:

> "this Court is persuaded by Pham's evidence supporting his claim of past and future pain and suffering and permanent partial disability. The jury verdict for

> Pham was "so grossly inadequate as to shock the conscience;" therefore, we order an additur of $30,000 to Pham's jury finding or in the event he declines to accept it, a new trial on the question of damages only." Id at 894.

In the case of *Rodgers V. Pascagoula Public School District,* 611 So.2d 942 (Miss. 1992), the issue of damages only was submitted to the jury. The jury awarded the Plaintiff, who had been hit by a school bus, $11,762.50 in damages, which was exactly the amount of his medical expenses. Rodgers sought an additur or a new trial on damages which were rejected by the trial judge. The Supreme Court again ordered an additur and pertinent portions of the opinion are as follows:

> Rodgers argues that he put on proof of damages amounting to $ 11,762.50 in present medical expenses as well as pain and suffering and permanent impairment totaling 40% of the whole body. The jury awarded Rodgers the exact amount of his medical expenses, $ 11,762.50. Rodgers asserts that this award is not sufficient because it does not include pain and suffering or the permanent impairment. Thus, claims Rodgers, the meagerness of the award when contrasted with the other actual damages evinces bias, passion and prejudice on the part of the jury.
>
> * * * *
>
> We find that the jury's verdict in favor of Rodgers was against the overwhelming weight of the evidence. Rodgers gave testimony about his experience during the collision when his body was thrown against the window of the automobile. According to trial testimony, Rodgers was prescribed pain medication on at least six occasions and was treated by at least seven doctors. While there is dispute as to the extent of injuries that Rogers received, there is no dispute in the record that Rodgers did suffer from some pain, even if only headaches, and that Rogers did experience some type of head injury, even if only a contusion. A jury verdict awarding damages for medical expenses alone is against the overwhelming weight of evidence. [**11] Rodgers put on proof that his damages included not only medical expenses but also [*946] some pain and suffering. Therefore, we grant the additur as requested by Rodgers. Id at 945 and 946.

The Rodgers case is very similar to the case at hand. It is apparent from the opinion in Rodgers that the Defendant questioned the extent of the Plaintiff's injuries during

trial but was unable to put on evidence to establish that he had no legitimate injuries.

In still another case where there was no issue of liability, the Supreme Court was confronted with an additur awarded by the trial judge over the objection of the Defendant. In that case, *Scott Prather Trucking, Inc. v. Clay,* 821 So.2d 819 (Miss. SCT 2002), the Plaintiff proved over $24,000.00 in medical expenses and $800.00 in lost wages. The jury awarded $35,800.00 and the trial judge awarded an additur which brought the judgment to a total of $150,000.00. The Supreme Court of Mississippi affirmed and reviewed some important law, including the Rodgers case mentioned above. The Supreme Court stated generally as follows:

> "A plaintiff has the burden of proving damages, injuries, and loss of income. When determining whether that burden has been met, the evidence is to be viewed in the light most favorable to the party in whose favor the jury decided. ***Odom,*** *606 So. 2d at 118* (citing ***Motorola Communications & Elecs., Inc. v. Wilkerson,*** *555 So. 2d 713, 723 (Miss. 1989)).* [**6] That party is given all favorable inferences that can reasonably be drawn from that evidence. ***Id.*** If that evidence is contradicted, we "will defer to the jury, which determines the weight and worth of testimony [*822] and the credibility of the witness at trial." Id at 821-822.

The phrase, "if that evidence is contradicted," is important. There was no dispute in the present case which would require this Court to defer to the decision of the jury.

In the Clay case, the Supreme Court quoted from Rodgers with favor and held as follows:

> "While there is dispute as to the extent of injuries that Rogers [sic] received, there is no dispute in the record that Rodgers did suffer from some pain, even if only headaches, and that Rogers [sic] did experience some type of headache, even if only a contusion. *A jury verdict awarding damages for medical expenses alone is against the overwhelming weight of evidence.* Rodgers put on proof that his damages included not only medical expenses but also some pain and suffering." Id at 822. *(Emphasis added by the Supreme Court)*

In a recent case, our Supreme Court offered an alternative version of its prior holding regarding the issue at hand:

> "Stated differently, we will not set aside a jury's verdict and order a new trial unless we are convinced that the verdict was contrary to the substantial weight of the evidence so that justice requires that a new trial be granted. ***Jesco,*** *451 So. 2d at 714* (Robertson, J., specially concurring)." *Poole v. Avara;* 908 So.2d 716 (Miss. SCT 2005) at 727.

Richard Dobbins offered lay and expert testimony as to pain and suffering, inconvenience, physical impairment and loss of enjoyment of life. He also testified as to the interruption of his professional practice and a reduction in income totaling $57,137.50 between the time of the accident and trial. (T. 112-114 & 119-120) The jury awarded him $50,000.00 to cover all of that, plus almost $39,000.00 worth of medical expenses already incurred, over $35,000.00 worth of medical expenses facing him for knee replacement and a minimum of $21,685.25 anticipated to treat his back injury in the future.

The Defendant never disputed this evidence and never offered any evidence to assist the jury in apportioning between the medical problems caused by Mr. Vann and the pre-existing condition. In fact, no lay or expert testimony of any type was offered to guide the jury in apportionment except that offered by the Plaintiff and his lay witnesses. That is, Richard Dobbins was an active, healthy individual wearing many hats prior to the accident. He was a full-time certified public accountant, he was the caretaker for an ill spouse and he loved to ride and care for his horses. He walked several miles a week and had no limitations on his normal activities. He routinely sat with his mother at night in the nursing home. Subsequent to Mr. Vann running the stop sign and causing this collision, Richard was forced to give up much of what had previously made up his life.

CONCLUSION

The trial court limited Richard Dobbins' voir dire of the jury to the extent that it prevented Richard Dobbins from obtaining a fair trial. The questions which Richard Dobbins sought to ask the potential jurors, as well as follow-up questions that would have been appropriate based on responses they gave, were prohibited by the trial court based upon the objection of the Defendant, Fred Vann. An exhibit offered by Dobbins was also rejected by the Court over the objection of Mr. Vann. That exhibit was a summary of detailed information related to damages which could not otherwise be presented to the jury in meaningful form. The documents underlying the summary were voluminous and would have required an inordinant amount of time and dedication by the jurors to accumulate on their own. A portion of the documents were not even appropriate for disclosure because they contained some private information not relevant. The result was that the jurors did not have this exhibit during their deliberations and it would be fanciful to believe that they could recall all of the information included in that document.

The jury awarded Richard Dobbins less than one-half of the medical expenses he has incurred and will incur as a result of injuries sustained in the automobile accident of January 19, 2002. No provision whatsoever has been made for pain and suffering, impairment, loss of enjoyment of life, inconvenience or lost income. Mr. Dobbins' damages were not disputed and no contradictory proof was offered. The verdict of the jury was against the overwhelming weight of the evidence and justice requires a new trial on the issue of damages.

At the very least, this Court should alternatively award a reasonable additur of not less than $200,000.00.

Respectfully submitted,

WILSON, HINTON & WOOD, P.A.

PHIL R. HINTON, MSB[redacted]
ATTORNEY FOR APPELLANT
505 EAST WALDRON STREET
POST OFFICE BOX 1257
CORINTH, MS 38835
662-286-3366
662-286-3368-Fax

CERTIFICATE OF SERVICE

I, the undersigned attorney of record for the Appellant in the above referenced cause, do hereby certify that I have this day served a true and complete copy of the foregoing BRIEF OF THE APPELLANT, by first class mail, postage pre-paid, upon the following:

Honorable Robert G. Krohn
Price & Krohn, Llp
P.O. Box 549
Corinth, MS 38835-0549

THIS the 3rd day of July, 2007.

PHIL R. HINTON