IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CIVIL CAUSE NO.: NO. 2007-TS-00404

WILLIAM JENNINGS,
APPELLANT

VS.

RUDOLPH L. MCCELLEIS,
APPELLEE

APPELLANT'S REPLY BRIEF IN SUPPORT OF APPEAL

ORAL ARGUMENT REQUESTED

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I. ARGUMENT

1. The Appeal is Timely.

The Order entered by the lower court on February 21, 2006 ordered that each of the parties may participate in discovery under the same cause number; that the case against McCelleis proceed on the previous scheduling order, otherwise severed for separate trial, independent of the insurance issues. (R.E. 10). State Farm insured both Jennings and McCelleis. Jennings filed suit against the McCelleis for personal injuries arising out of the automobile accident, and against State Farm Insurance Company for bad faith, breach of fiduciary duty and conflict of interest arising out of its actions or inactions in the automobile accident.

A jury verdict is a final judgment for purposes of appeal. The comment to M.R.C.P. 54(b) defines different stages, not specifically described in the rule itself, that lead to the creation of a final and appealable judgment. The comment to the rule defines the first distinction as between the adjudication and judgment entered thereon. The adjudication is defined as that being by a decision of the court, or by a jury verdict. "...the rendition of judgment is the pronouncement of that decision and the act that gives it legal effect." *Comment, M.R.C.P. 54.* The second distinction is between the judgment and the filing or entry of the judgment. "A judgment is the final determination of an action and thus has the effect of terminating the litigation; it is 'the act of the court.'" *Id.* The Final Judgment of the jury was entered in this cause on January 10, 2007 and docketed in Book 603 at Page 151. Pursuant to Miss.R.Civ.P. 58: "Every judgment shall be set forth on a separate document which bears the title of 'Judgment.' A judgment shall be effective only when entered as provided in M.R.C.P. 79(a)." *Id.* The Final Judgment entered on January 10, 2007 is a separate document bearing the title of "Judgment" as required by Rule 58, and it has been entered onto the general

docket as required by Miss.R.Civ.P. 79(a). (R.E. 5). Therefore, this is a final appealable judgment.

2. Additur or New Trial.

Again, the $5,000 verdict awarded to the Plaintiff is not only contrary to the overwhelming weight of the evidence, but is so inadequate as to strike mankind at first blush as being unreasonable and outrageous as well as shocking the conscious.

In the case of *Maddox v. Muirhead*, 738 So.2d 742 (Miss. 1999), cited by the Defendant, the Court found that the trial court abused its discretion in refusing to grant an additur. The Court found that the jury verdict was grossly inadequate and against the overwhelming weight of the evidence. The Court ordered a new trial on damages unless the defendants accepted an additur of $10,000.

The case of *City of Jackson v. Ainsworth*, 462 So.2d 325 (Miss. 1984) cited by the Defendant actually upheld the trial court's decision to grant additur and a new trial when defendant refused to accept additur, stating that the jury clearly failed to take into account properly compensable elements of damages supported by uncontradicted credible evidence in plaintiff's action against city.

The case of *Jackson v. Brumfield*, 458 So.2d 736 (Miss. 1984) cited by the Defendant "that a party may rebut the necessity and reasonableness of medical bills and the ultimate question is then for the finder of fact to determined whether the bills incurred were necessary and reasonable." (Appellee's Brief, P. 7). *Jackson* also states "by proper evidence" the opposing party may rebut the necessity and reasonableness of bills. *Id.* The Defendant has outlined what it believes to be proper evidence on cross-examination of the Plaintiff to call into question the reasonableness and necessity of the Plaintiff's medical expenses. However, these questions do not establish any proof that the medical expenses were unnecessary or unreasonable. The Defendant only tried to question the extent of Jennings' damages by attempting to create inferences by attacking the credibility of the Plaintiff

and his witnesses. McCelleis failed to present any testimony that showed that the medical bills were neither fair, reasonable, nor necessary. *See Boggs ex rel. Boggs v. Hawks*, 772 So.2d 1082, 1086 (Miss. App. 2000). Defendant produced no witnesses or evidence at trial to the contrary of the evidence presented by Plaintiff regarding his medical diagnosis and medical expenses. Medical treatment expenses totaling $11,172.76 were admitted into evidence without objection from the Defendant. The diagnosis of his injuries, the treatment modalities, and the disability were not contested, disputed or rebutted, therefore, such evidence went to the jury without any conflict or contradiction. (Tr.185-192, R.E. 207-214). The jury's verdict did not even account for half of the Plaintiff's medical expenses.

In a multiplicity of cases cited by both the Appellant and the Appellee, the Court has either upheld an additur or found that the trial court abused its discretion in not granting an additur where the plaintiff's medical bills exceeded the amount of the jury verdict. In so doing, the Court found that there has been a lack of responsiveness to the evidence by the jury; the jury ignored the evidence; the jury failed to take into account properly compensable elements of damages supported by uncontradicted credible evidence; and uncontradicted medical bills as well as no allowance for pain and suffering by the jury. *See Gaines v. K-Mart Corp.*, 860 So.2d 1214 (Miss. 2003); *Scott Prather Trucking, Inc. v. Clay*, 821 So.2d 819 (Miss. 2002); *Maddox v. Muirhead*, 738 So.2d 742 (Miss. 1999); *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So.2d 942 (Miss. 1992); *Pham v. Welter*, 542 So.2d 884 (Miss. 1989); *City of Jackson v. Ainsworth*, 462 So.2d 325 (Miss. 1984); and *Jackson v. Brumfield*, 458 So.2d 736 (Miss. 1984).

Excluding non-economic actual damages, the evidence presented supports a claim for special or out-of-pocket damages well in excess of the $5,000 award by the jury. Therefore, it was error for

the court not to grant an additur or new trial because the award by the jury was inadequate.

3. Testimony of Dr. Noland.

Defendant does not cite any cases in support of its argument that the trial court properly excluded the opinion of Dr. Robert Noland regarding Plaintiff's percentage of disability.

Since Dr. Noland was qualified as an expert witness, who was the long term primary treating physician, he should have been allowed to give an opinion as to Jennings percentage of disability. Dr. Noland's opinion as to the Plaintiff's prognosis and disability was corroborated by an MRI study performed by an independent radiologist. Dr. Noland testified within a reasonable degree of medical certainty what Jennings physical limitations were, thus he is able to give a disability rating.

The case law generally speaks to the weight, worth and credibility of the expert and in this case there is no evidence to dispute or contradict the disability rating made by Dr. Noland. *Flight Line, Inc. v. Tanksley*, 608 So.2d 1149 (Miss. 1992).

As outlined in Appellant's Brief, *Kramer Service v. Wilkins*, 186 So. 625 (Miss. 1939) states: "in all other than the exceptional cases now to be mentioned, the testimony of medical experts, or other experts, is advisory only; but we repeat that where the issue is one which lies wholly beyond the range of experience or observation of layman and of which they have no appreciable knowledge, courts and jurors must of necessity depend upon and accept the undisputed testimony of reputable specialists, else there would be no substantial foundation upon which to rest a conclusion." *Id.* This case represents an area completely within the practice realm of doctors and completely outside the knowledge of layman, therefore, the court was required to allow this evidence to be presented to the jury.

4. Jury Instruction on Loss of Future Income.

The Defendant cites the case of *Coleman v. Lehman*, 649 F.Supp. 363 (N.D. Miss. 1986) incorrectly stating that the Mississippi Supreme Court found a lack of proof of loss of future earnings significant in determining whether loss of future wages could be presented to the jury. However, this is a Northern District Federal Court decision and the court therein recognized that "Mississippi cases that hold that the uncertainty as to the amount of damages will not preclude an award when the proximate cause of the damage is reasonably certain, provided that the damages are reasonably certain and are not purely speculative." *Id.* (internal citations omitted). The court went on further to state that the Supreme Court of Mississippi has held that the "finder of fact should consider the direct evidence and those reasonable inferences to be drawn therefrom in determining if the defendant's negligence proximately contributed to the plaintiff's damages." *Id.* (internal citations omitted). In *Coleman* the plaintiff did not have any expert economic testimony showing the decrease in value of earning capacity, did not have any proof as to inflation, taxes, or discounted rate. The court therein found that based on the evidence and from all reasonable inferences to be drawn therefrom, that the accident caused a fifty percent loss in earnings from the date of the accident to trial and that the accident proximately caused a ten percent permanent reduction in plaintiff's future wage earning capacity. *Id.*

The Defendant argues that the Plaintiff only presented self-serving testimony as evidence of proof of his loss of wages. In the *Coleman* case the only evidence as to loss of wages was the plaintiff's own testimony. Plaintiff's testimony regarding his limitations since the accident is corroborated by his wife and brother. (Tr. 148, 170-173, R.E. 193, 203-206). Furthermore, the Plaintiff himself testified that his loss of employment income since his injuries was $1,000 per

month. (Tr. 99, R.E. 182).

As stated previously in Appellant's Brief, the opinion of an economist using tables to tell the jury the "present value" of expected earnings is advisory in nature and is not required. It is a simple mathematical computation. *Dickey v. Parham*, 295 So.2d 284, 286 (Miss. 1974)(citing *Rayner v. Lindsey*, 243 Miss. 824, 138 So.2d 902 (1962)).

The exclusion of the future loss of wages instruction was manifest error and clearly reversible.

II. CONCLUSION

Additur has been granted or upheld in numerous cases in the Appellate courts in this State, and this is yet another case where additur should be granted, or a new trial on damages should be granted because the verdict of the jury was so inadequate as to shock the conscience and against the overwhelming weight of the evidence.

Respectfully submitted this 25 day of September, 2007.

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CERTIFICATE OF SERVICE

I, BILL WALLER, SR., the undersigned counsel for the Appellant, do hereby certify that I have this day mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Reply Brief in Support of Appeal to the following:

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SO CERTIFIED this 25 day of September, 2007.

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