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 BRIEF IN SUPPORT OF APPEAL

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

CIVIL CAUSE NO.: 2007-TS-00404

WILLIAM JENNINGS,
APPELLANT

VS.

RUDOLPH L. MCCELLEIS
APPELLEE

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 possible disqualification or recusal.

William Jennings, Appellant
Bill Waller, Sr., Attorney for Appellant
Rudolph L. McCelleis, Appellee
William M. Dalehite, Jr., Attorney for Appellee
Seth McCoy, Attorney for Appellee
Honorable Bobby DeLaughter, Hinds County Circuit Court Judge

CERTIFIED, this the ___ day of August, 2007.

BILL WALLER, SR.

Attorney of Record for Appellant,
William Jennings

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E. Statutory and Social Change Forces Abolishment or Amendment to the Anonymous Defendant Rule and it was error to sever direct action against State Farm.

II. STATEMENT OF THE CASE

This cause of action arose out of an automobile accident between William Jennings and Rudolph McCelleis. When the original Complaint was filed, Jennings filed suit against the McCelleis for personal injuries and State Farm Insurance Company for bad faith, breach of fiduciary duty and conflict of interest, in Hinds County Circuit Court. (R. 4, R.E. 12). State Farm Insurance Company insured both the Plaintiff and the Defendant. The lower court severed the causes of action for trial purposes. (R. 142, R.E. 10). The lower court granted Plaintiff's Motion for Summary Judgment on Liability and the case was tried before Honorable Bobby DeLaughter on the issue of damages only. After a trial, a jury verdict was rendered assessing the Plaintiff's damages at $5,000.00. (R. 263, 271, 272; R.E. 9, 8, 7). Plaintiff then filed a Motion for Additur or For New Trial which was denied. (R. 273, R.E. 72). It is from this order that the Plaintiff appeals. (R. 317, R.E. 6).

III. SUMMARY OF THE ARGUMENT

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.

Miss. Code Ann. § 11-1-55 (Rev. 1991), grants the trial judge the authority to grant an additur. The Appellate courts in Mississippi have affirmed or granted an additur in many cases. The court erred in not granting an additur or a new trial on damages. The evidence presented supports a claim for damages well in excess of the $5,000 award by the jury. The Court should grant a new trial for damages based on the fact that the small amount of the verdict resulted in a miscarriage of justice.

The ruling of the court in admitting Dr. Noland's testimony as an expert witness, but excluding his opinion or rating as to the percentage of disability suffered by the Plaintiff as a direct and proximate result of his injuries was extremely detrimental to the Plaintiff in presenting evidence as to the extent and amount of the Plaintiff's damages. The law does not permit a trial judge to decipher which part of the testimony of an expert witness will be submitted to the jury or excluded. As stated above, Dr. Noland's testimony was admitted but his opinion as to the permanent partial disability of the Plaintiff's body as a whole was excluded. 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.

The court excluded future wages in Jury Instruction C-6. The court reasoned that there was no proof of present net cash value of loss of future wages and would not allow future wages to be considered. This issue relates to and connects directly with the exclusion of Dr. Noland's opinion

as to Plaintiff's disability.

Prior to examining the jury, the Plaintiff made a motion *ore tenus* for mistrial or to transfer the case to the First Judicial District in the eastern part of Hinds County. The court overruled Plaintiff's motion and more or less ruled that the Plaintiff had agreed to try the case in the Second Judicial District in order to get an earlier trial, however, that agreement did not foresee the overwhelming distortion of the panel and unconstitutional composition of the racial demographics. All jury trial in either civil or criminal cases are to have a panel that is not prejudiced or biased for any reason including race.

It was error to sever direct action against State Farm. State Farm was a named defendant in the original complaint which alleged that they had insurance coverage of various types on both vehicles and used that conflict of interest to avoid paying Plaintiff. This case and scores like it should result in the Court modifying the anonymous defendant rule.

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.

IV. STATEMENT REGARDING ORAL ARGUMENT

The Plaintiff is of the opinion that oral argument would greatly aid the Court in its analysis of the issues presented in this case. The simple facts of a two vehicle, rear-end collision with neck and back injuries to the Plaintiff became very unique in the course of circumstances arising from jury selection to verdict, including the direct action against State Farm which was abated by the trial court; the racial demographics of the jury; the exclusion of an opinion on disability by the long term treating physician; rulings on the evidence offered; refusal of certain instructions as well as editing others; and the small verdict supports an argument for an additur. All of this makes this case extremely unique on several points of law including the fact that the Plaintiff raised the question of abolition or amendment of the anonymous defendant rule. Accordingly the Plaintiff respectfully requests that the Court grant oral argument in this case.

V. STATEMENT OF THE FACTS

On August 3, 2004, at about 3:00 o'clock p.m., William Jennings was operating his 1986 Chevrolet 3/4-ton pickup truck traveling in an easterly direction on Lakeland Drive in the City of Jackson, Hinds County, Mississippi, and stopped as required by a red signal light at the intersection with River Ridge Street, and his vehicle was standing still when Rudolph McCelleis, operating his 2003 Ford Explorer vehicle in the same direction and in the same traffic lane failed to stop running into the rear of Appellant's pickup truck and causing him serious, painful and permanent injuries.

It is undisputed and admitted that Jennings' Chevrolet was stopped, headed east at a traffic control signal light and had been standing still prior to the arrival of the Ford Explorer operated by McCelleis, who ran into the rear of the pick-up truck. (R.147, R.E. 68).

Both vehicles were covered by policies of insurance issued by State Farm Insurance Company. When State Farm refused payment, Jennings eventually filed suit against both Rudolph McCelleis and State Farm. (R. 4, R.E. 12). The case against State Farm was severed from the case against Rudolph McCelleis. (R. 142, R.E. 10). Appellant filed a Motion for Summary Judgment on Liability in the proceedings against McCelleis. (R. 147, R.E. 68). The Motion was granted and the trial proceeded on January 8, 2007 on the issue of damages only. (R. 256, R.E. 71). The Jury returned a damages verdict in the amount of $5,000.00 on January 10, 2007. (R. 263, 271, 272; R.E. 9, 8, 7).

Plaintiff filed a Motion for Additur or For New Trial on January 11, 2007. (R. 273, R.E. 72). The lower court overruled the Motion on March 1, 2007. (R. 317, R.E. 6). Plaintiff filed his Notice of Appeal on March 12, 2007. (R. 318, R.E. 90).

V. ARGUMENT

A. The verdict is contrary to the evidence presented because Plaintiff's damages including his medical diagnosis and medical expenses were not disputed or rebutted by any evidence, credible or otherwise.

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.

Liability in this accident is undisputed and thus no evidence on liability was required. 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).

1. Additur should be granted to achieve a just award since the small amount of the verdict reflects that the jury was influenced by bias, prejudice or passion, and that the damages awarded were contrary to the overwhelming weight of the credible evidence.

Miss. Code Ann. § 11-1-55 (Rev. 1991), grants the trial judge the authority to grant an additur and provides: "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 fact was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of the credible evidence." Miss.

Code Ann. § 11-1-55.

The Court may grant additur if: "(1) if the court finds that the jury was influenced by bias, prejudice, or passion or (2) if the damages were contrary to the overwhelming weight of credible evidence." *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So.2d 942, 944 (Miss. 1992)(citing *McIntosh v. Deas*, 501 So.2d 367, 369-370 (Miss. 1987).

Without objection, medical treatment expenses in the amount of $11,172.76 were admitted into evidence. Miss. Code Ann. § 41-9-119 (Rev. 1993) provides that "Proof that medical, hospital, and doctor bills were paid or incurred because of any illness, disease, or injury shall be *prima facie* evidence that such bills so paid or incurred were necessary and reasonable." *See Boggs ex rel. Boggs v. Hawks*, 772 So.2d 1082, 1085 (¶ 7) (Miss. App. 2000).

As in the case of *Boggs ex rel. Boggs v. Hawks*, 772 So.2d 1082, 1086 (Miss. App. 2000), 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. In *Boggs*, the court determined "that Hawks failed to rebut the reasonableness of Bogg's medical bills. Hawks relied on speculation and attempts to attack the credibility of the witnesses. However, Hawks failed to present any testimony that showed that the medical bills were neither fair, reasonable, nor necessary." *Boggs ex rel. Boggs v. Hawks*, 772 So.2d 1082, 1086 (Miss. App. 2000).

In the present case, the Defendant attempted to create credibility issues in order to rebut the damages evidence. This is evident in the Defendant's opening argument.

> Ladies and gentlemen of the jury, on behalf of Mr. McCelleis I submit to you that the one issue in this case is not how much. It's the issue of credibility. The credibility between this man and this man. Now, that's the issue in this case.

(Tr. 56, R.E. 181).

Defendant attempted to attack the credibility of the Plaintiff during cross examination by asking him about his prescription drug use and attempting to depict him to be a prescription drug addict, which actions were clearly explained by the Plaintiff in his testimony. (Tr. 109, 113-116, 120-122, R.E. 183, 185-188, 190-192). Further, Defendant attempted to attack his credibility regarding his annual household income. (Tr. 111, R.E. 184). Additionally, Defendant's counsel made the statement to Plaintiff: "Also, you testified in the same deposition that you had been involved in a previous rear end type accident approximately three or four years before this one; is that correct? A. Yes, sir." (Tr. 119, R.E. 189). Plaintiff clarified on redirect examination that he did not get any back injury or any injuries out of that accident. (Tr. 122, R.E. 192).

Defendant further attempts to attack Jennings' credibility during the cross-examination of Wallace Whatley. (Tr. 150-151, R.E. 195-196).

> Q. Mr. Whatley, your brother has testified today that he makes estimates, that he makes measurements, that he carries the ladder, that he puts the ladder on the house, that he gets on the roof unless there's a steep pitch. That was his testimony. You're saying that that's not true; is that correct?
> A. He hasn't don that - - not since his wreck.
> Q. He hasn't done that since the wreck? That's your testimony?
> A. That's my testimony.
> Q. And you live with him at the present time?
> A. Yeah.
> Q. And you were living with him at the time of this accident?
> A. I was living there at the time of the accident, yes.
> BY MR. DALEHITE: Thank you. Nothing further.

Just as in the *Boggs* case, the Defendant herein failed to present any testimony that showed that the medical bills were neither unfair, unreasonable, or not necessary. During the Defendant's case in chief, only one witness was called, namely, the Defendant herein, and he presented no

testimony to the contrary to rebut the medical expenses, diagnosis of his injuries, the treatment modalities, or the disability. (Tr. 185-192, R.E.207-214). There were no rebuttal documents offered by Defendant nor any discrediting cross-examinations.

"We are aware of the rule that a jury has a wide latitude in assessing damages. However, a verdict should be in such an amount as to reasonably compensate a person who is entitled to recover for injuries and damages sustained; and, we do not hesitate to set aside those verdicts which wholly failed to do so." *Horton v. Brooks*, 325 So.2d 912, 913 (Miss. 1976). Also, the Court in *Harvey v. Wall*, 649 So.2d 184, 187 (Miss. 1995) stated: "In the past this Court has not hesitated to imposed *(sic)* an additur when we have found a jury's verdict did not sufficiently compensate a plaintiff for pain and suffering." *Id.*

The Appellate courts in Mississippi have affirmed or granted an additur in many cases. In *Gaines v. K-Mart Corp.*, 860 So.2d 1214, 1220-21 (¶¶ 25-30) (Miss. 2003) the Court affirmed an additur where the jury found defendant 5% liable, but plaintiff was not awarded 5% of the uncontradicted damages. In *Scott Prather Trucking, Inc. v. Clay*, 821 So.2d 819, 822 (¶ 13) (Miss. 2002), the Court affirmed an additur where stipulated and uncontested damages clearly exceeded the jury award. In *Maddox v. Muirhead*, 738 So.2d 742, 744-45 (¶ 10) (Miss. 1999), the Court granted an additur where "the jury award failed to compensate Maddox for medical bills that were uncontested by either defendant." *Id.* In the case of *Rodgers v. Pascagoula Pub. Sch. Dist.*, 611 So.2d 942, 945-46 (Miss. 1992) the Court granted an additur where the jury only awarded medical expenses and there was uncontested evidence that plaintiff also suffered uncompensated pain. In the case of *Pham v. Welter*, 542 So.2d 884, 889 (Miss. 1989) the Court granted an additur where the jury's verdict "ignored" the ample evidence concerning the plaintiff's past and future pain and

suffering and permanent partial disability. The jury's verdict was barely above the amount of undisputed medical expenses. The court erred in not granting an additur or a new trial on damages.

2. A new trial should be granted because the court ruled that the Defendant was at fault and the amount of the verdict reflects that the jury ignored the overwhelming and undisputed evidence of damages.

The question is whether or not the verdict was a reasonably adequate award and one of the criteria used by the Court is whether or not the amount of the verdict evinces bias, prejudice, or passion or was contrary to the overwhelming weight of credible evidence.

The Court should grant a new trial for damages based on the fact that the small amount of the verdict resulted in a miscarriage of justice. Looking to the criteria for granting a new trial, when all of the testimony has been considered along with all arguments delivered, if, upon a completed view of the entire case, the trial judge is of the opinion that the verdict is against the overwhelming weight of the evidence, or clearly against the great preponderance, of the evidence, his duty is, upon a motion for a new trial to set aside the verdict and grant a new trial. *Allstate Ins. v. McGory*, 697 So.2d 1171, 1172 (Miss. 1997).

The evidence presented supports a claim for 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.

B. It was error to exclude the opinion of the Plaintiff's primary treating physician regarding his permanent disability rating of fifty percent (50%).

Dr. Robert Noland, a native of Mississippi, is a licensed physician who is a board certified doctor in the field of family medicine. (Tr. 158, R.E. 197). Dr. Noland testified as to Plaintiff's injuries. Dr. Noland began treating Jennings after the accident for pain in his neck and back in

September 2004. (Tr. 158, R.E. 197). This treatment was extensive and continued over a long period of time, giving the doctor an opportunity to make a positive diagnosis. Since it is customary for a radiologist to interpret an MRI screening by a written report and since this was a part of Dr. Noland's records, it specifically corroborated and supported his opinion as to permanent disability.

After the jury had been sworn in, Defendant brought its motion to strike the testimony of Dr. Robert Noland before the Court. (Tr. 29-30, R.E. 169-170). Specifically, Defendant objected to Dr. Noland's testimony regarding any conclusions that he drew from his review of the MRI based upon the position that Dr. Noland was unqualified in the field of x-rays or MRI interpretation. (Tr. 30, R.E. 170). Defendant also objected to Dr. Noland's testimony concerning his opinion that the Plaintiff was 50 percent (50%) permanently disabled as a result of a bulging disc in his neck. (Tr. 31, R.E.171). It was Defendant's position that Dr. Noland assigning a percentage of disability was outside his expertise or knowledge on the subject matter. (Tr. 32-33, R.E.172-173).

In ruling on Defendant's motion, the court overruled it without prejudice to making timely objection during the course of the trial because there was not enough information before it at that time to make that ruling. (Tr. 45, R.E. 179). The motion was re-urged prior to Dr. Noland being called as a witness by deposition. The court ruled that based upon M.R.E. 703 the Defendant's objections were overruled on the grounds that they're based on the MRI report of Dr. Yong Kim, a radiologist. (Tr. 159, R.E. 198). The court further found that Dr. Noland's findings and/or opinions concerning the etiology of a patient's pain and the method employed were entirely within the field of expertise of Dr. Noland and were admissible under M.R.E. 702. (Tr. 161, R.E. 200).

However, the court found that Dr. Noland's testimony as to the extent of Plaintiff's permanent disability was speculative in nature which rendered it inadmissible. (Tr. 161, R.E. 200).

The ruling of the court in admitting Dr. Noland's testimony as an expert witness, but excluding his opinion or rating as to the percentage of disability suffered by the Plaintiff as a direct and proximate result of his injuries was extremely detrimental to the Plaintiff in presenting evidence as to the extent and amount of the Plaintiff's damages. The law does not permit a trial judge to decipher which part of the testimony of an expert witness will be submitted to the jury or excluded. As stated above, Dr. Noland's testimony was admitted but his opinion as to the permanent partial disability of the Plaintiff's body as a whole was excluded.

Dr. Noland testified in his deposition that the pain medication prescribed for the Plaintiff was needed and necessary. (R. 238, R.E. 149). Dr. Noland further testified that it was his opinion within a reasonable degree of medical certainty that the Plaintiff has a permanent problem. (R. 240, R.E. 151). Further, Dr. Noland testified within a reasonable degree of medical certainty that the Plaintiff cannot doe what he used to do; he's not going to be able to do any lifting; not going to be able to do any work with his hands over his head. (R. 241, R.E. 152). Not only is Dr. Noland qualified as an expert witness, but he is also the Plaintiff's treating physician.

In the case of *Flight Line, Inc. v. Tanksley*, 608 So.2d 1149 (Miss. 1992) expert opinions are not obligatory or binding on the trier of fact, but are advisory in nature, and the jury may credit them or may not as they appear entitled, weighing and judging expert opinions in context of all evidence in the case and jury's own general knowledge. 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. The case of *Kramer Service v. Wilkins*, 186 So. 625 (Miss. 1939) presented the rule that is still in effect and one that the Court should generally follow. Moreover, the bifurcated admission of expert testimony is a rare occurrence particularly since, in the

subject case, the disability rating was an imperative part of the doctor's treating modality which was not contradicted, disputed, or discredited in any way. The *Kramer* rule is "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.* Since the Plaintiff, nor any of his lay witnesses, were qualified to explain the extent of his permanent disability in medical terms and as related to the body as a whole, it was incumbent upon the Plaintiff to present medical evidence as to that disability. The physical limitations of the use of the Plaintiff's back is based upon several procedures used by Dr. Noland, including the MRI performed by an independent radiologist, a specialist in x-rays. Furthermore, no other doctor had treated the Plaintiff in the manner and form, nor did any other doctor have direct knowledge of the limitations caused by the injury to his back. The Plaintiff, a lifetime roofing contractor, using his only physical ability to climb roofs and to make estimates as to install repairs and shingles, had a limitation that was evaluated by his treating physician, but excluded by the trial judge. As stated in *Kramer*, 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.

Overall, the long term physical limitations on the Plaintiff, a fifty percent (50%) disability to the body as whole, was a major part of the claim for damages, and since the jury heard no evidence, lay or expert, it had no guide and no evidence from which it could award damages and this is certainly another reason for the rather pittance verdict.

The *Kramer* rule was followed in *Aetna Life Ins. Co. v. Evins*, 199 So.2d 238 (Miss. 1967), wherein the Court stated: "From this medical testimony we are of the opinion that the damage to the appellee's spinal cord is sufficient, independent of the brain damage, to result in his disability. We are concluded to make the foregoing statement by the testimony of medical specialists, as was the lower court, in view of *Kramer Service v. Wilkins*, 184 Miss. 483, 489-499, 186 So. 625, 628 (1939)" wherein the *Kramer* rule was cited again as being the law of this State. The word "exceptional cases" is mentioned in *Kramer* and adopted in *Aetna Life* and that definition simply means that where there is no other evidence available to the jury to determine a percentage or extent or nature of a disability then that presented by a medical expert has to be accepted by the court, the jury and the attorney for the appellee. However, the question presented on appeal is quickly one of admissibility of the opinion of the expert witness. Since he was admitted as a qualified medical expert, the court has no authority to decipher what the jury will hear and what the jury will not hear. The entire testimony of Dr. Noland was clearly admissible for consideration by the jury and failure to do so excluded vital evidence as to the Plaintiff's damages, and probably contributed in a major way to the trifle verdict. Plaintiff was unable to find any other reported cases dealing with the authority of the court to exclude facets of the opinion of the Plaintiff's treating physician.

C. It was error for the trial court to remove the portion of damage Instruction C-6 that would have allowed the jury to consider loss of future wages.

At the trial of this cause, Defendant objected to any testimony concerning Plaintiff's loss of wages based upon never having been provided a copy of the Plaintiff's tax returns and the lack of foundation other than Plaintiff's own testimony without any corroborative evidence. (Tr. 33-34, R.E. 173-174). The court overruled the Defendant's motion for the failure of the Defendant to seek the

assistance of the court in compelling the lost wage information. (Tr. 42, R.E. 176).

The Plaintiff objected to the exclusion of future wages in Jury Instruction C-6. (Tr. 197-198, R.E. 215-216). The court reasoned that there was no proof of present net cash value of loss of future wages and would not allow future wages to be considered. (Tr. 198, R.E. 216). 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)).

This issue relates to and connects directly with the exclusion of Dr. Noland's opinion as to Plaintiff's disability. The Court will obviously take judicial notice that you cannot award damages for permanent partial disability except through an opinion of a treating physician. As in all cases, this case has some unique features, including the fact that Plaintiff was a relatively young roofing contractor who had been and remained self-employed both before and after his injuries, and who had daily requirements and duties for strenuous physical activities such as climbing on top of roofs for estimates and/or for repairs and replacement of roofing materials. A small contractor such as the Plaintiff received direct compensation for his own manual labor which was a vital part of each construction project. His testimony that his loss of earnings was $1,000 was corroborated by his witnesses, but obviously ignored by the jury. (Tr. 99, 149, R.E. 182, 194).

As stated previously, Dr. Noland testified in his deposition that the pain medication prescribed for the Plaintiff was needed and necessary. (R. 238, R.E. 149). Dr. Noland further testified that it was his opinion within a reasonable degree of medical certainty that the Plaintiff has a permanent problem. (R. 240, R.E. 151). Further, Dr. Noland testified within a reasonable degree of medical certainty that the Plaintiff cannot do what he used to do; he's not going to be able to do

any lifting; not going to be able to do any work with his hands over his head. (R. 241, R.E. 152).

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). Plaintiff testified his injuries were about 30 months old, making his up-to-date loss of earnings $30,000, according to the undisputed evidence making the question of "present value" irrelevant. Therefore, the exclusion of the future loss of wages instruction was manifest error and clearly reversible.

D. It was error for the trial court to overrule Plaintiff's Motion for Mistrial based upon grounds that include abnormal composition of the jury panel of approximately 85% African-Americans when the Appellant was a Caucasian male and the Defendant was an African-American male. The jury selected included eight (8) African-Americans who revealed upon being polled that they voted for the $5,000 verdict.

This case was tried in the Second Judicial District of Hinds County, Mississippi in the Courthouse at Raymond. A jury, consisting of twelve (12) jurors was qualified and empaneled and submitted to counsel for both parties for *voir dire* examination. Prior to examining the jury, the Plaintiff made a motion *ore tenus* for mistrial or to transfer the case to the First Judicial District in the eastern part of Hinds County. Among the reasons dictated into the record, supporting this motion, was once the jury was observed it was 85% African-American and since McCelleis was African-American and Jennings was Caucasian, counsel for Jennings took the position that the overwhelming number of African-American venireman would prejudice his case in that their verdict would favor McCelleis who was of the same ethnicity. The racial demographics were composed of out of the first 12 jurors, 10 were African-American and out of the second group of 12 jurors, 6 were African-American, making 18 African-American venireman versus 6 Caucasian venireman out of

the first 24 veniremen.

The race of the jurors on the panel was not disclosed by the Jury Questionnaire and it was necessary for a personal observation of the jury panel to be carried out in order to establish the racial make-up of the panel. The court overruled Plaintiff's motion and more or less ruled that the Plaintiff had agreed to try the case in the Second Judicial District in order to get an earlier trial, however, that agreement did not foresee the overwhelming distortion of the panel and unconstitutional composition of the racial demographics. (Tr. 7-10, R.E. 165-168).

Counsel for Plaintiff pointed out that the demographics of the Second Judicial District of Hinds County is made up of 8,687 Caucasians and 38,568 African-Americans. (Tr. 3, R.E. 161). Plaintiff offered the census studies on the population demographics as an exhibit for identification. (Tr. 5-6, R.E. 163-164).

All jury trial in either civil or criminal cases are to have a panel that is not prejudiced or biased for any reason including race.

At Raymond, on the date of this trial, the composition of the venire violated rules and laws including that stated in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1988), non-discriminatory striking of jurors based solely on race is condemned. The question in this case is whether a judge should exclude a venire or part of it to avoid a racial composition that is obviously biased. A *prima facie* case was made in the context of Plaintiff's motion for mistrial which was not rebutted by defense counsel. (Tr. 3-10, R.E. 161-168). The right to a trial by jury includes the obligation of having a fair and impartial jury that is not racially misconfigured.

It is not necessary for the unconstitutional composition of the panels to be intentional because the test is whether or not the Plaintiff's constitutional rights have been violated whether by advertent

or inadvertent circumstances.

The law requires equal treatment of litigants under Title VII of the Civil Rights Act of 1964. Since the imbalance of the race of jurors favored the Defendant, there are no cases on point, however, *K.M. Leasing v. Butler*, 749 So.2d 310 (Miss. 1999) deals with the subject matter generally ruling that a Batson type challenge is waived unless a timely objection is made. Such objection was timely made in this case and it was error for the court to allow a trial when the jury panel was so racially askew.

E. Statutory and Social Change Forces Abolishment or Amendment to the Anonymous Defendant Rule and It was Error to Sever Direct Action Against State Farm.

It was error to sever direct action against State Farm. State Farm was a named defendant in the original complaint which alleged that they had insurance coverage of various types on both vehicles and used that conflict of interest to avoid paying Plaintiff. The injuries occurred on August 3, 2004 and suit was filed on June 16, 2005. (R. 4, R.E. 12).

The jury verdict in this case is a classical example of a verdict influenced by the unknown amount of liability insurance afforded the Defendant, a telephone company retiree, which forced a verdict for $5,000 because that was the minimum amount of liability insurance per person that can be purchased on a motor vehicle. They did not know and were not able to assume the amount of coverage maintained by Defendant. The procedural subterfuge preventing the joinder of State Farm as a defendant or interpleading the amount of liability insurance coverage forced an unjust, unreasonable and biased verdict.

The case law as well as Miss. R. Civ. P. 57 forbids joinder of a liability insurance company. The recent cases of *Westmoreland v. Raper*, 510 So.2d 884 (Miss. 1987) and *Sanders v. Robertson*,

954 So.2d 493 (Miss. 2007), create *stare decisis* of an indelible and unmovable nature regardless of the consequences of trial proceedings to protect anonymous defendants.

Jurors are well informed from various forms of media and are well aware that Mississippi has a compulsory liability insurance law, Miss. Code Ann. §63-15-43 (Eff. 1972) which in this case means that the jury knew that an elder grandfather type telephone company retiree would have some type of liability insurance, though it might be the minimum. The statute was amended in 2005 increasing limits to $25,000 per person.

The Court can take judicial notice that the compulsory liability insurance law requires all drivers to maintain proof of insurance and when called upon to present that proof by the law enforcement authorities. This reasonated as a "insurance policy" to pay for the damages caused by negligent driving. Since there is no contest of liability by the Defendant, the first assumption by the jury is that he is covered with liability insurance.

This anonymous defendant rule came into being before the adoption of the Rules of Civil Procedure and even Miss. R.Civ. P. 57 does not speak directly to direct actions against insurance companies, it simply allows declaratory judgment actions were coverage is a question. If coverage is not a question, Rule 57 simply accommodates the old common law rule shielding the insurance companies and making them anonymous defendants.

This case and scores like it should result in the Court modifying the anonymous defendant rule, which it probably will not. However, the Court could say in view of the compulsory liability insurance act wherein all citizens including judges, lawyers and jurors are compelled by law under a *quasi criminal* penalty to provide liability insurance coverage on their vehicles, then some modification or amendment to the anonymous defendant rule should be made and applied

immediately as grievous injustices are rampart throughout the State where judgments are given with no revelation regarding insurance coverage, if any.

As a senior member of the bar and having practiced personal injury law for more than half a century, I will argue my position to the Court by saying this rule was originally adopted to keep frivolous judgments from being awarded simply because the defendant, whether a private citizen or commercial enterprise, had insurance coverage. If so, society has elevated itself so that now insurance is not the magnet for large verdicts and it is an impediment to a fair trial to maintain this horse and buggy disguise.

If the Court would first assume that the laws and mores and folkways of our society have changed dramatically since the common law secrecy shield was thrown around insurance companies that some changes have to be made then this is a case by which the Court should abolish or modify the rule.

Since the Court has pursued new rules modernizing the system and in perfecting litigation to bring about just and fair decisions, we urge the Court to take into account that the general public from which a jury is chosen is both well-informed and well-intentioned, meaning that they assume a driver such as the one in this case has acquired liability insurance coverage and that such coverage ought to be paid to a blameless plaintiff. Since a preemptory instruction had been given, the jury was compelled to give a verdict for some amount. Their decision was to require the "retired" driver to pay such coverage but, not knowing the amount they elected to award the minimum.

The question arises: "Will the Court continue to sanction the anonymous defendant rule, or will it adopt some modification to avoid continuing injustice?"

VII. CONCLUSION

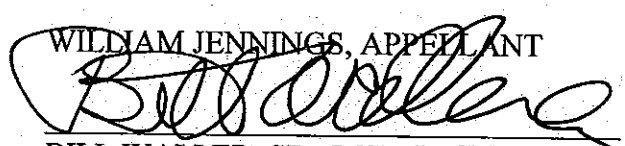
The real reason for the remittiturs or additurs statute, Miss. Code Ann. § 11-1-55 (Rev. 1991) is to "adjust" the verdict to bring about an amount reasonably necessary to compensate the plaintiff for his loss- whether an increase or decrease.

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.

There is no reason or explanation to justify this small verdict based upon the analysis of the evidence and the use of common sense, therefore, bias and prejudice becomes a forced conclusion which includes the jury's preference to protect the retired grandfather. Why would they do this? Circumstances strongly support the premise that the verdict was intended to protect the Defendant from a verdict which was not covered by liability insurance.

Respectfully submitted this 17th day of August, 2007.

WILLIAM JENNINGS, APPELLANT

BY: 

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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 Brief in Support of Appeal to the following:

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SO CERTIFIED this 17th day of August, 2007.

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