IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-CA-00908

DONNA CALLAHAN and
DONNA HOLST — APPELLANTS

V.

CALENDAR J. LEDBETTER and
LEE COUNTY SCHOOL BOARD — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY

# APPELEE'S BRIEF

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**No. 2007-CA-00908**

**DONNA CALLAHAN and**
**DONNA HOLST** **APPELLANTS**

**V.**

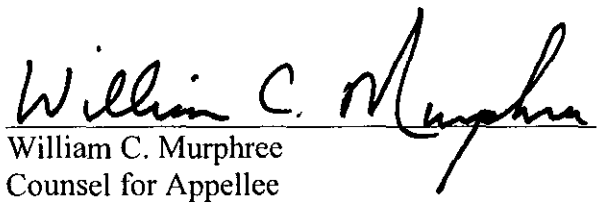
**CALENDAR J. LEDBETTER and**
**LEE COUNTY SCHOOL BOARD** **APPELLEES**

## CERTIFICATE OF INTERESTED PERSONS

The undersigned 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 and the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. The Plaintiff and Appellant Donna Callahan, Houston, Mississippi.
2. The Plaintiff and Appellant Donna Holst, Tupelo, Mississippi.
3. Clarence McDonald Leland, Brandon, Mississippi.
4. William C. Murphree, Esq., and Mitchell, McNutt & Sams, P.A., Tupelo, Mississippi.
5. The Defendant and Appellee body politic, Lee County School District, by and through its School Board.
6. Gary L. Carnathan, Esq., Carnathan & McAuley, Tupelo, Mississippi.
7. Coregis Insurance Company, Chicago, Illinois.
9. GE Insurance Services
10. Swiss Re

Respectfully submitted,



William C. Murphree
Counsel for Appellee

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## Statement of Issues

Appellee Lee County agrees with Callahan's and Holst's Statement of Issue: I: Whether the trial court committed reversible error in finding Callahan negligent and finding that her negligence was thirty-five percent (35%) of the total fault that caused the collision and Issue III: Whether the trial court erroneously determined the amount of damages. Lee County does not agree with the Statement of Issue II: Whether the trial court erred in reducing Holst's recovery since she was a guest passenger.

## Statement of the Case

### (A) Procedural History

The Honorable Thomas J. Gardner tried this case without a jury pursuant to the Mississippi Tort Claims Act on January 9 and 10, 2007. Judge Gardner rendered findings of fact and conclusions of law and judgment on April 24, 2007. Neither Callahan nor Holst filed any post-trial motions, and both perfected appeal on May 24, 2007.

### (B) Facts

On August 7, 2000 at approximately 3:30 p.m. Donna Callahan drove her vehicle north on the Natchez Trace. (R.A., Trial Transcript, Vol. 2, p.30). Mrs. Callahan's mother Donna Holst and son Jeremy Callahan rode as passengers in the vehicle. (R.A. Trial Transcript, Vol. 2, p.31). At the same time Calendar J. Ledbetter, an employee of the Lee County School District, drove a school bus owned by the district east on County Road 231 also known as Bissell Road. (R.A. Exhibits, Vol. 1, P-1, Ledbetter Deposition, p.13; Trial Transcript, Vol. 2, p. 30).

Bissell Road intersects the Natchez Trace, and the County has placed stop signs on Bissell Road requiring vehicles crossing the Trace to stop before continuing across. Calendar Ledbetter testified that she completely stopped the school bus in obedience to the stop sign. (R.A. Exhibits, Vol. 1, P-1 Ledbetter Deposition, p.7). Likewise, Mrs. Callahan testified that as she approached the intersection she saw the bus completely stopped. (R.A. Trial Transcript, Vol. 2, pp. 12, 31-32). Calendar Ledbetter testified that she looked north and south, waited for some southbound traffic to pass, and then started to cross the Natchez Trace. As she approached the intersection, Mrs. Callahan's speed was fifty miles per hour. (R.A. Vol. 2, Trial Transcript, p. 32). Mrs. Callahan's northbound vehicle struck the bus as it crossed the Trace. (R.A. Exhibits, Vol. 1, P-1 Ledbetter Deposition, p. 7). The impact occurred in Mrs. Callahan's lane, and her

vehicle struck the bus behind the door. (R.A. Exhibits, Vol. 1, P-1 Ledbetter Deposition, p. 19). Thus, the front/mid-portion of the bus had crossed the lane for southbound traffic, had crossed the center line, and gone into the northbound lane. Both drivers had a clear, unobstructed view. (R.A. Vol. 1, Trial Transcript, pp. 31-32.)

Mrs. Callahan testified that she watched the bus as she approached. (R.A. Vol. 1, Trial Transcript, p. 12). She testified that when she was almost at the intersection the bus suddenly pulled out in front of her. (R.A. Vol. 1, Trial Transcript, p.8). She testified that she immediately applied her brakes but only skidded six to ten feet before her vehicle struck the bus. (R.A. Vol. 1, Trial Transcript, p. 8). Although Mrs. Callahan said the bus suddenly pulled in front of her, she estimated the bus's speed at five (5) miles per hour as it crossed the intersection. (R.A. Vol. 2, Trial Transcript, pp. 32-33). Thus, Mrs. Ledbetter's testimony established that the bus had little speed because it had just pulled out from a dead stop.

Following the collision an ambulance took Mrs. Callahan, Mrs. Holst, and Jeremy to North Mississippi Medical Center. Mrs. Callahan received no treatment at this time; Mrs. Holst was treated in the emergency room and released; and Jeremy stayed over night in the hospital receiving treatment for a laceration to his forehead.

Mrs. Callahan went to see Dr. Edward Gore in Houston, Mississippi on August 10, 2000. Dr. Gore gave her a thirty (30) prescription for Xanax, which she took and did not have refilled. Mrs. Holst subsequently received treatment for her cervical spine, which lee County will discuss in detail in the Argument section of this brief.

## Summary of the Argument

The trial court properly found that Donna Callahan negligently failed to keep a reasonable lookout and that her negligence along with negligence of the school bus driver

proximately caused the collision of the two vehicles.

The evidence established that Donna Holst suffered from degenerative disk disease long before the collision occurred and that three years before the collision she underwent a cervical fusion to relieve intractable pain. The evidence clearly established that the collision caused no new injury nor did it cause any new condition. While the trauma did temporarily exacerbate her pre-existing condition, this exacerbation caused Holst to suffer more pain for only a limited period of time. The evidence established that Holst's present condition and the treatment needed for that condition result not from the collision but from her pre-existing condition.

## Argument

### I. The Trial Court Erred in Assessing Donna Callahan's Damages

### (A) Standard of Review

Thompson brought this case under the Mississippi Tort Claims Act; therefore the Circuit Court of Lee County had the sole authority to determine the credibility of the witnesses, to assess the persuasiveness of each witness, to decide what weight to afford to the testimony of each witness. Mississippi Dept. of Public Safety v. Durn; 861 So. 2d 990 (Miss. 2003); Donaldson v. Covington County, 846 So. 2d 219 (Miss. 2003); City of Jackson v. Brister, 838 So. 2d 274 (Miss. 2003).

This Court gives great deference to the trial judge's findings of fact, and the trial court's findings of fact are safe on appeal if they are supported by substantial, credible, and reliable evidence. Durn, supra, at 994; Donaldson, supra, at 227; Brister, supra, at 277.

This Court must let stand the findings of the trial court unless it finds those findings manifestly wrong or clearly erroneous. Donaldson, supra, at 227; Singley v. Smith, 844 So. 2d

448 (Miss. 2003); Wilson v. Greyhound Bus Lines, Inc., 830 So. 2d 1151 (Miss. 2002). That this Court might conclude that it would have decided the case differently does not alone constitute a basis to reverse the trial court. McCardle v. McCardle, 862 So. 2d 1290 (Miss. 2004); Bratcher v. Surrette, 848 So. 2d 893 (Miss. 2003).

**(B) Failure to Plead Affirmative Defense of Contributory Negligence**

Callahan and Holst maintain that Lee County failed to affirmatively plead the defense of contributory negligence. Callahan and Holst maintain, therefore, that the trial judge erroneously awarded them less than their total damages. As Lee County will discuss in more detail in the next section of this brief, the trial judge did not lessen the damage award to Holst pursuant to the theory of comparative negligence.

Callahan correctly notes that Lee County did not plead the defense of contributory negligence. However, in his opening statement before the Court heard any testimony, one of Lee County's attorneys stated:

> The County readily acknowledges that there is some degree of fault in this trial. However, we say that there's also a degree of fault on Mrs. Callahan, who was driving the vehicle. We believe the evidence will bear that out. (R.A. Vol. II, p. 3)

Prior to the Court's taking testimony neither Callahan nor Holst filed any motion in limine asking the Court to exclude any evidence regarding Callahan's negligence. At no time during the trial did either Callahan or Holst object to the admission of any evidence regarding Callahan's negligence. At the conclusion of all the testimony neither Callahan nor Holst mentioned the issue of Callahan's negligence.

The Court after accepting post-trial briefs entered its opinion and judgment (Vol. I, Record Excerpts, pp. 0110 et seq. The Court after reviewing the evidence presented at trial stated:

> In considering the relative responsibility of the drivers of the two vehicles involved in the accident, the Court, in its role as fact finder, finds that Mrs. Ledbetter, driver of the Defendant, Lee County School Board's bus is 65% responsible for the accident and resulting injuries, leaving Mrs. Callahan 35% of the responsibility for such. (R.A. Vol. 1 Record Excerpts, p. 00113).

First, Rule 15 of the Mississippi Rules of Civil Procedure eliminates the complaint by Callahan and Holst that the trial court erroneously considered Callahan's negligence and applied the doctrine of comparative negligence. Rule 15(b) provides:

> **(b) Amendment to Conform to the Evidence.**
> When issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the maintaining of the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence. The court is to be liberal in granting permission to amend when justice so requires.

Since neither Callahan nor Holst made any objection following the statement that the County would prove Callahan partially at fault for the collision, and at no other time, they certainly impliedly consented to trying the issue of Callahan's negligence. As Rule 15 provides, the fact that the County did not move to amend its Answer to conform to proof of Callahan's negligence does not affect the trial of this issue.

Second, neither Callahan nor Holst filed a Rule 59 motion for a new trial asserting that the trial court erroneously applied the doctrine of comparative negligence. The appellate courts

of Mississippi have held time and again that they will not review errors occurring at trial unless the appellant brought the error to the attention of the trial court in a motion for a new trial.[1] Armstrong v. Gaddis, 32 So. 917 (Miss. 1902); Hayes v. Slidell Liquor Co., 55 So. 356 (Miss. 1911); Briscoe's Estate v. Briscoe, 255 So.2d 313 (Miss. 1971); Materials Transp. Co. v. Newman, 656 So.2d 1199 (Miss. 1995); Wilson v. G.M. Acceptance Corp., 883 So.2d 56 (Miss. 2004); Hillier v. Minas, 757 So.2d 1034 (Miss. App. 2000).

Third, the Supreme Court in cases not necessarily involving a motion for new trial has held that if a variance occurs between pleading and proof, a party must object when the other party offers the proof. A party cannot fail to object and then raise the issue for the first time on appeal. Stonewall Life Ins. Co. v. Cooke, 144 So. 217, 225 (Miss. 1932); Ark. Fuel Oil Co. v. Trinidad Asphalt Mfg. Co., 198 So. 41, 42 (Miss. 1940); Alexander Pool Co. v. Peavey, 152 So.2d 451, 455 (Miss. 1963); Robertson v. Stroup, 180 So.2d 617 (Miss. 1965); Downes v. Crosby Chem. Co., 234 So.2d 916, 921 (Miss. 1970); Kayser v. Dixon, 309 So.2d 526, 530 (Miss. 1975).

Finally, the Supreme Court has held that §11-7-17 Mississippi Code of 1972 permits the fact finder to apply the doctrine of comparative negligence even though the defendant has not pled contributory negligence. When a jury serves as fact finder the jury can apply the doctrine even through the defendant has not pled comparative negligence and even though the trial court has not given a comparative negligence instruction.

In Herrington v. Hodges, 161 So.2d 194 (Miss. 1964) the Supreme Court ruled regarding pleading, proof, and the effect of §11-7-17 of the Code of 1972 (formerly §1445 Code of 1942). In this case a one vehicle collision occurred causing injuries to both the driver and her guest



[1] The Supreme Court has held that if a party makes a proper objection at trial it preserves the issue for appeal even if it does not reiterate the error in a Rule 59 motion.

diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property."

Section 1455: "All questions of negligence and contributory negligence shall be for the jury to determine."

This language is not ambiguous. It requires the jury to do what it calls for, namely, determine *all questions of negligence and contributory negligence* and diminish the plaintiff's damages (if any) in proportion to the amount of negligence attributable (if any) to the plaintiff...Herrington, at 197).

**(C) Lack of Evidence of Contributory Negligence**

Callahan and Holst maintain that the negligence of Calendar Ledbetter was the sole proximate cause of the collision. Lee County acknowledged that it bears some degree of responsibility for the collision; however, the evidence establishes that Donna Callahan was negligent and also bears responsibility for the collision and, therefore, for the damages which both she and Mrs. Holst claim.

This case is similar in many respects to a case which the Supreme Court recently decided and which is reported at Thompson v. Lee County, 925 So.2d 57 (Miss. 2006). This case like Thompson involved a collision between an automobile and a school bus. In this case as in Thompson the automobile traveled north on a through highway, and the school bus traveled east on a subordinate county road. In this case as in Thompson the undisputed evidence showed that both drivers had a clear, unobstructed north-south view. In this case as in Thompson the undisputed evidence showed that the school bus came to a complete stop in obedience to the stop sign before entering the intersection. In this case as in Thompson the collision occurred in the lane for northbound traffic after the school bus had crossed the lane for southbound traffic and had partially crossed the lane for northbound traffic. In this case as in Thompson the automobile struck the mid-part of the bus.

In Thompson the trial Court held that §63-3-805 Mississippi Code of 1972 sets out the duties of both drivers. That statute reads:

> The driver of a vehicle shall stop as required by this chapter at the entrance to a through highway and shall yield the right-of-way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard. However, said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right-of-way to the vehicle so proceeding into or across the through highway.
>
> The driver of a vehicle shall likewise stop in obedience to a stop sign as required by this chapter at an intersection where a stop sign is erected at one or more entrances thereto although not a part of a through highway and shall proceed cautiously, yielding to vehicles not so obliged to stop which are within the intersection or approaching so closely as to constitute an immediate hazard, but may then proceed.

The trial court construing §63-3-805 held that this statute does not confer an absolute right-of-way to the driver of a vehicle on the through highway. The trial court further held that Mississippi's comparative negligence statute applies to intersection collisions just as it applies to all other situations regarding negligence and causation. The trial court held that in certain situations both drivers can be at fault for an intersection collision. In Thompson the trial court found both drivers equally at fault for causing the collision.

On appeal the Mississippi Court of Appeals reversed the trial court on the issue of liability holding that because the school bus driver had a clear, unobstructed view and because the school bus driver had the stop sign, the driver on the through highway could not have been guilty of negligence.

The case then went to the Mississippi Supreme Court on a Writ of Certiorari. The Supreme Court reversed the Court of Appeals and reinstated this the trial court's decision. In Thompson the Supreme Court ruled as did the trial court that the school bus driver had satisfied his first duty by coming to a complete stop at the stop sign. The Supreme Court next observed

that if the school bus driver had a clear, unobstructed view to the south, then logically the automobile driver had a clear, unobstructed view to the north. The Supreme Court ruled that the trial court had correctly interpreted and applied both §63-3-805 and the comparative negligence statute.

The Supreme Court in analyzing the trial court's findings of fact and conclusions of law stated:

> Section 63-3-805 appropriately requires a driver of a vehicle approaching an intersection with a through highway and being confronted with a stop sign to stop. Proceeding cautiously, once the driver of the vehicle determines there are no vehicles on the through highway which pose an immediate hazard, that driver may proceed to enter the through highway. The drivers of vehicles traveling on the through highway and approaching the intersection "shall" yield the right-of-way to the vehicle which is proceeding into or across the through highway...
> That Gregory came to a complete stop at the stop sign on North Street before entering Romie Hill Road is unrebutted in the record. The only other premise on which Joey could conclude that Gregory's school bus traveled from the stop sign to his northbound lane of travel in "just over one second" would be that the laws of physics allow a school bus to go from zero miles per hour to seven miles per hour, instantaneously. We find this to be an impossibility. Additionally, Gregory's unrebutted testimony was that at the time of the collision, he was traveling at the rate of "five, maybe a little bit more than that, six, seven miles an hour." As Gregory also testified, a school bus cannot "dart through" an intersection from a dead stop as compared to a car. In referring to school buses in general, Gregory testified that "[t]hey don't take off that fast."
> Thompson, at 65, 69-70.

The Supreme Court, therefore, concluded that the trial court had legally sufficient evidence to conclude that the automobile driver was contributorily negligent. This case stands on all fours with Thompson. The legally sufficient evidence establishes that Donna Callahan was contributorily negligent.

## II. The Trial Court Erred in Reducing Donna Holst's Recovery by 35% as a Guest Passenger

Holst asserts that the trial court erroneously imputed Callahan's negligence to her and, therefore, erroneously reduced her damage award. Nowhere in his opinion does the trial judge say that he imputed Callahan's negligence to Holst. In fact, the trial court stated:

> In considering the relative responsibility of the drivers of the two vehicles involved in the accident, the Court, in its role as fact finder, finds that Mrs. Ledbetter, driver of Defendant, Lee County School Board's bus is 65% responsible for the accident and resulting injuries, leaving Mrs. Callahan 35% of the responsibility for such.

The trial court did not reduce the damage award to Holst by imputing Callahan's negligence to her. Rather, the trial court applied the provisions of §85-5-7, which empower the fact finder to determine the relative fault of all persons – parties and non-parties – which caused damages. Furthermore, the statute as written at the time Holst and Callahan filed suit provided that she could recover up to 50% of her damages from Lee County, and she did in fact because of trial court's finding recover 65% of damages from the County.

Should Holst in her reply brief assert that the County should have affirmatively pled §85-5-7, the County submits that the same arguments it made in section I.B. of the brief apply. Holst cannot now claim for the first time that the trial court erroneously applied §85-5-7.

## III. The Trial Court Erred in Determining the Amount of Damages

### (A) Damages to Donna Holst

In 1997 Donna Holst suffered from intractable pain in her neck and right arm. She had a ruptured cervical disk, and she had not improved with conservative treatment. (Vol. II, Exhibits, P-5). At that time because of Holst's condition Dr. Thomas Windham admitted Holst to Baptist Memorial Hospital (Oxford) and performed an anterior cervical fusion with removal of the

ruptured disk because of her intractable pain. (Vol. 5, Exhibits, P-10).

Holst has taken the position that the surgery "cured" her and that from that point forward she lived without pain until the motor vehicle collision on August 7, 2000. However, seven (7) months after she had the fusion Holst went to the local Social Security office to apply for disability benefits because of her neck/back problems including constant pain in her hips, back, neck, arms, and hands. (Vol. 4, Exhibits, D-8). As a result of Holst's condition the Social Security Administration approved her for disability benefits beginning August 1997. (R.A. Vol. II, Trial Transcript, p. 73).

Dr. Michael Currie, a board certified neuroradiologist, testified that Donna Holst suffered from degenerative disk disease in her cervical spine and in her lumbar spine at the time the collision occurred. (R. A. Vol. II, Trial Transcript, pp. 109-111). The evidence in this case establishes that degenerative disk disease is a progressive disease; it cannot be cured. The evidence establishes that a cervical fusion is somewhat like a contract with the devil. It stabilizes one small part of the spine and relieves radicular pain. It does not relieve the axial pain along the rest of the spine. Likewise, it causes additional stress on the vertebrae above and below the fusion. Thus, a surgeon does a fusion only as a last resort, only when there is nothing else to relieve intractable pain in one part of the spine. (Vol. 1, Exhibits, Hammitt Deposition, pp. 23-25).

Without a doubt the 1997 fusion did relieve Mrs. Holst's intractable pain at the C6-7 site. It did not and could not cure her degenerative disk disease. (Vol. 1, Exhibits, Hammitt Deposition p. 26). It did not and could not cure her axial pain in the other parts of her cervical spine. (Vol. 1, Exhibits, Hammitt Deposition, p. 27). Likewise, it could not halt the progression of the disease in her cervical spine. (Vol. 1, Exhibits, Hammitt Deposition, p. 25).

The Plaintiff asserts that she is now in greater pain six (6) years after the motor vehicle accident than she was before the motor vehicle accident. The Plaintiff's theory is that "my pain is greater now than it was before the motor vehicle accident; therefore, the pain that I suffer now resulted from the motor vehicle accident."

The Plaintiff' theory is flawed. First, both Dr. Hammitt and Dr. Currie agree that trauma can aggravate or exacerbate this pre-existing condition. Dr. Hammitt stated that he could not quantify the degree of aggravation nor could he say to a reasonable degree of medical certainty that even had the motor vehicle accident never occurred that Mrs. Holst would not be in the same condition today. (Vol. 1, Exhibits, Hammitt Deposition, pp. 38-39).

Likewise Dr. Currie testified that degenerative disk disease is a progressive disease. (Vol. II, Trial Transcript, p. 114). While physicians can take prophylactic methods to manage the pain, they cannot cure the disease, nor can they stop the pain. Dr. Currie compared radiological studies of Mrs. Holst's cervical spine before and after the collision. (Vol. II, Trial Transcript, pp. 105-110). Dr. Currie offered unrebutted testimony that anatomically Mrs. Holst's cervical spine was essentially the same after the motor vehicle accident as before the motor vehicle accident. (Vol. II, Trial Transcript, pp. 110-111). He testified - without rebuttal - that the trauma caused no new injury nor did it cause any new condition. (Vol. II, Trial Transcript, pp. 117, 138-142). Dr. Currie agreed with Dr. Hammitt that the trauma would have aggravated Mrs. Holst's pre-existing condition and would have caused her to suffer an increase of pain for a limited period of time. (Vol. II, Trial Transcript, p. 143). However, Dr. Currie testified - without rebuttal - that Mrs. Holst's present condition and the treatment it requires results not from the motor vehicle accident but from the devastating disease from which she suffers. (Vol. II, Trial Transcript, pp. 142-133). Dr. Currie did not base his testimony upon conjecture or speculation.

He based his testimony upon his knowledge of anatomy, of disease, and upon objective medical findings as shown in the radiological studies before the collision and after the collision.

The objective of tort law is to compensate the victim for the injury she suffered, for the aggravation she sustained. Tort law does not exist to compensate one for incurable maladies from which she suffered at the time of the motor vehicle accident.

Mrs. Holst has offered into evidence substantial medical bills totaling over $106,000.00. Dr. Hammitt has testified that if she lives another 18-20 years she will incur another $180,000.00-$200,000.00 in medical expenses. §41-9-119 provides that there is a presumption these bills are reasonable and necessary. However, as the Supreme Court noted in Herring v. Poirrer, 797 So.2d 797, 809 (Miss.2000):

> Furthermore, even if, pursuant to §41-9-119, Herring's medical bills were necessary and reasonable, §41-9-119 does not mandate a finding that those medical bills were incurred as a result of the accident in question. Again, there was evidence before the jury which raised a question as to whether the accident actually caused the injuries, if any, sustained by Herring.

A Plaintiff in a personal injury lawsuit must prove by a preponderance of the evidence that her claimed injuries resulted directly from the Defendant's alleged negligence. Barkley v. Miller Transporters, Inc., 450 So.2d 416 (Miss.1984). The Supreme Court has made clear that a Plaintiff does not meet this burden by simply proving that some condition exists post-accident, Walters v. McLaurin, 204 So.2d 866 (Miss.1967).

Walters, supra, involved a set of circumstances quite similar to the instant case. Defendant's employee caused a ladder to fall while Plaintiff was on the ladder, and Plaintiff fell to the ground. Plaintiff sued; the case went to trial; and the jury returned a verdict for $31,500.00 for the Plaintiff. Defendant appealed contending that the verdict was excessive.

At trial the Plaintiff conceded that he had prior back problems but claimed he had fully recovered. A physician diagnosed a ruptured disk causing compression on the nerve at L4-5; however, this physician had never seen Plaintiff before the fall and had no knowledge whether the ruptured disk existed prior to Plaintiff's fall. This physician who made the diagnosis referred Plaintiff to Dr. Holder, an orthopedic surgeon whose partner had previously treated the Plaintiff and had operated on Plaintiff's back.

Dr. Holder testified that Plaintiff's condition was essentially the same after the fall as before the fall. Dr. Holder further testified that people with protruding or ruptured disks have times of remission and times when symptoms are acute. The Supreme Court rejected Defendant's arguments that Plaintiff was entitled to no damages; however, the Court concluded that Plaintiff had failed to prove that his present condition resulted from the fall. The Court concluded that the evidence established that Plaintiff's present condition for the most part resulted from former injuries, not from the fall. The Court concluded that evidence proved only that the fall had contributed to Plaintiff's condition to some degree and ordered a remittitur.

In the case at hand no doubt exists that Mrs. Holst had serious pre-existing back conditions. Like the Plaintiff in Walters she claims that she had fully recovered. Dr. Hammitt, who treats her for her present condition, acknowledged that he had never seen her prior to the motor vehicle accident and had never seen radiological studies taken before the motor vehicle accident.

Dr. Currie likewise never saw Mrs. Holst before the motor vehicle accident; however, Dr. Currie had reviewed and carefully analyzed both her pre-accident radiological studies and her post-accident radiological studies. Dr. Currie testified without dispute that Mrs. Holst's condition after the motor vehicle accident was essentially the same as before the accident. Dr.

Currie also testified without dispute that any exacerbation which the accident caused would have resolved in a matter of weeks.

Lee County submits that the following expenses are reasonably related to the motor vehicle accident:

| | | |
|---|---|---|
| 1. | 8/19/00 - Baptist Memorial Hospital | $4,496.00 |
| 2. | 8/14/00 - Columbus Pathology Associates | 476.00 |
| 3. | 8/7/00 - Family Med, Inc. | 16.98 |
| 4. | 8/19/00 - Golden Triangle Radiology | 845.00 |
| 5. | 8/9/00-9/13/00 - Griffin Discount Pharmacy | 204.09 |
| 6. | 8/7/00 - North Mississippi Medical Center | 1,076.86 |
| 7. | 9/18/00 - North Mississippi Medical Center | 992.05 |
| 8. | 9/28/00 - North Mississippi Medical Center | 91.35 |
| 9. | 11/28/00 - North Mississippi Medical Center | 71.40 |
| 10. | 8/14/00 - Trace Regional Hospital | 1,099.65 |
| | **Total** | $9,369.38 |

In making this concession as to causally related medical expenses, Lee County acknowledges that the agreed upon medical records reflect these expenses are related. However, as to the rest, the records themselves establish no causal connection, and Holst offered no credible evidence to establish a causal connection.

Lee County submits that the evidence supports the trial court's finding that Donna Callahan's negligence caused the thirty-five percent (35%) of Donna Holst's damages.

**(B) Damages to Donna Callahan**

Donna Callahan testified that she sustained no significant injury - just some soreness. (R.A. Vol. II, Trial Transcript, pp. 14-15). Her medical bills were less than a hundred dollars. (R. A. Vol. II, Trial Transcript, pp. 15, 26). Mrs. Callahan also testified she suffered emotional trauma because she witnessed her son's being injured in the motor vehicle accident. Indisputably, her son Jeremy did sustain an injury to his head and did bleed profusely at the accident scene.

The evidence establishes that Jeremy did not receive any identifiable closed head injury. (R.A. Vol. II, Trial Transcript, pp. 27-28). While no doubt the experience would have caused him to sustain some degree of temporary emotional trauma, he has not had to receive any psychiatric or psychological treatment. (R.A. Vol. 2, Trial Transcript, p. 30). He does have a scar, but Mrs. Callahan, who is his guardian, and who received a settlement for his injury, has seen no necessity to have the scar removed, nor has Jeremy experienced any desire to do so. (R.A. Vol. 2, Trial Transcript, pp. 28-29). Likewise, Mrs. Callahan has received no psychiatric or psychological treatment for any emotional trauma she suffered as a result of seeing Jeremy sustain injury, although her physician did give her a prescription for Xanax following the accident. (R.A. Vol. 2, Trial Transcript, p. 30). Obviously, Mrs. Callahan suffered only temporary mental suffering because of seeing her son injured and required no treatment other than a thirty (30) day prescription for Xanax.

## Conclusion

The evidence establishes that Donna Callahan negligently operated her vehicle and that her negligence constituted thirty-five percent (35%) of the total fault that caused the collision. The Court correctly reduced Callahan's damages pursuant to the statuatory provision for comparative negligence and correctly apportioned fault for Holst's damages pursuant to §85-5-7 of the Mississippi Code of 1972.

The evidence establishes that Donna sustained only minimal damages and because of her own negligence should only receive a minimal award determined by the trial court.

Donna Holst now receives costly medical treatment for chronic pain and will continue to for her natural life. However, the undisputed proof establishes that Mrs. Holst had suffered chronic pain before the collision and that while she may have periods of remission the pain

would have continued had the collision never occurred. The undisputed proof establishes that any exacerbation resulting from the collision resolved within a matter of a few months. Mrs. Holst deserved an award that would compensate her for the exacerbation caused by the County's negligence. She deserved no award for her continuing chronic pain.

This, the 3rd day of January, 2008.

**LEE COUNTY SCHOOL BOARD,**
**Defendant**

**BY:** /s/ William C. Murphree
**WILLIAM C. MURPHREE,** [redacted]

**BY:** _____
**GARY L. CARNATHAN** [redacted]

**OF COUNSEL:**

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## CERTIFICATE OF SERVICE

I, William C. Murphree, one of the attorneys for the Defendant, Lee County School Board, do hereby certify that I have this day served a true and correct copy of the above and foregoing Defendant's Post-Trial Memorandum Brief, on the following by placing said copy in the United States Mail, postage prepaid, addressed as follows:

Clarence McDonald Leland, Esq.
Clarence McDonald Leland, LTD.
P.O. Box 1466
Brandon, MS 39042-1466

Hon. Thomas J. Gardner, III
District One Circuit Court Judge
P.O. Drawer 1100
Tupelo, MS 38802-1100

DATED, this the 3rd day of January, 2008.

WILLIAM C. MURPHREE