

IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-CA-00908

DONNA CALLAHAN and
DONNA HOLST

APPELLANTS


VS.

CALENDAR J. LEDBETTER and
LEE COUNTY SCHOOL BOARD

APPELLEES

APPEAL FROM THE CIRCUIT COURT OF LEE COUNTY

APPELLANT'S PRINCIPAL BRIEF

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record hereby certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order for the justices of the Supreme Court and the Court of Appeals to evaluate possible disqualification or recusal.

1. The Plaintiff and Appellant, Donna Callahan, Houston, Mississippi.
2. The Plaintiff and Appellant, Donna Holst, Tupelo, Mississippi
3. Donna Callahan and Donna Holst's attorney Clarence McDonald Leland of Brandon, Mississippi.
4. A Defendant and Appellee Callendar J. Ledbetter
5. The defendant, Callendar J. Ledbetter's attorney is William C. Murphree, Esq., of the Mitchell, McNutt & Sams firm in Tupelo, Mississippi
6. The other Defendant and Appellee, Lee County School District
6. The defendant, Lee County School District's attorney is Gary L. Carnathan, Esq., of the Carnathan & Malski firm in Tupelo, Mississippi.

Respectfully submitted,



Clarence McDonald Leland

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STATEMENT OF THE ISSUES

This is an intersection car wreck case where a Lee County School District bus which had stopped at a stop sign pulled out in front of an automobile traveling on a through highway causing the automobile to hit the bus just behind the door on the right side of the bus.

- I. THE TRIAL COURT ERRED IN FINDING CALLAHAN TO BE THIRTY-FIVE PERCENT CONTRIBUTORILY NEGLIGENT.
- II. THE TRIAL COURT ERRED IN REDUCING DONNA HOLST'S RECOVERY BY 35% AS A GUEST PASSENGER.
- III. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF DAMAGES.

STATEMENT OF THE CASE

(A) Procedural History

This case is a Tort Claims Act case which was tried to a verdict in a bench trial before the Honorable Thomas J. Gardner, III, Circuit Judge, in the Circuit Court of Lee County, Mississippi on the 9th day of January, 2007.

(B) Facts

This case arose when a Lee County School District bus driven by Calendar Ledbetter, now deceased, was traveling on County Road 261, commonly known as Bissell Road. The bus had stopped at the intersection of the Natchez Trace and County Road 261, when it pulled from the stop sign on Bissell Road into the path of the northbound 1999 Dodge Intrepid driven by Donna Callahan with Donna Holst and Jeremy Callahan as guest passengers. Calendar Ledbetter, the driver of the Lee County School District bus was cited by the federal park ranger for failure to yield the right of way. P1, Exhibit 1 (accident report). Ms. Ledbetter paid the fine in federal court in Oxford. P1, p. 48. Donna Callahan was not charged with any violations. P1, Exhibit 1.

The 1999 Dodge Intrepid was disabled as a result of the accident. Donna Holst, mother of Donna Callahan, suffered incapacitating injuries in the accident. P1, Exhibit 1. On the day of the accident, Calendar Ledbetter, the driver of the Lee County School District bus, gave a statement to the federal park ranger stating that she did not see the Dodge Intrepid coming and that when she heard the brakes squeal she punched it but got hit. P1, Exhibit 1.

When Ms. Ledbetter was deposed (Ms. Ledbetter's deposition was read into the record), she contradicted that statement and said that the bus brakes did not squeal nor did

Ms. Ledbetter had to go to Oxford to federal court to pay her ticket. T. p. 48.

There were three occupants of the Callahan vehicle. Donna Callahan was driving, her son Jeremy was sitting in the middle between his mother and his grandmother Donna Holst. The family was on the way to Tupelo because it was Donna Callahan's birthday and her mom, Donna Holst, was treating the family, Donna's two boys, and Donna's brother, to dinner and a movie. T. p. 7.

Donna Callahan testified that they got onto the Trace, had to detour because of a construction zone, then they got back onto the Trace. She saw the school bus on her left and it was stopped at the stop sign. Donna let up off the gas because she has always been a cautious driver. *Id.* She did not apply her brakes, she only took her foot off the gas, just to be cautious. T. p. 8. Just as the Callahan vehicle got to the bus, it pulled out and Donna Callahan could do nothing other than slam on her brakes. *Id.*, T. p. 13. The bus driver either hit the brakes or punched it, depending on which version of her story is believed.

The Callahan vehicle hit the bus close to the front. *Id.* When the impact was over, Donna Callahan looked at her son Jeremy, who was injured with a hole between his eyes that you could probably fit a nickel into and the hole was deep, all the way to Jeremy's skull. Donna Callahan then pulled her son out of the car and he had started bleeding heavily, the blood running down his face. *Id.*

The blood got all over Jeremy, it was pouring out on the highway. Donna had never seen that much blood before, she was screaming for someone to help her because she thought her son was going to bleed to death, she was hysterical at that time. A man pulled up behind the bus, got out and called 911. T. p. 9. Another man that was headed south on the Trace stopped and used a towel to try to stop the bleeding. *Id.* Jeremy was only ten at

the time of the wreck. T. p. 10.

After calming down, Donna Callahan checked on her mother. Her mother, Donna Holst could not move. *Id.* Fortunately, a registered nurse happened upon the wreck and was attending to Donna Holst, telling Mrs. Holst not to move because she may have a neck injury. Her neck was already visibly swollen. T. p. 11-12, 39. It took about 30 to 45 minutes for the ambulance to get there, and the ambulance took Jeremy and Mrs. Holst to the emergency room with Donna Callahan riding in the front of the ambulance. T. p. 12.

When Donna Holst arrived at the emergency room she was unable to sign the admission papers because of numbness in her dominant arm. P-7. The arm became numb after the impact with the bus. T. p. 39. The ER nurse's assessment on arrival at the hospital documents right breast pain and right arm numbness. *Id.*, T.p. 58. Her diagnosis at the ER that night was acute chest pain, acute cervical strain and small submandibular hematoma. P-7. The ER missed a cracked rib which she sustained in the wreck but it was later found by Dr. Simpson. T. p. 41. Her neck was swelling that night but did not start giving her problems for a few days after that. T. p. 58. She went to Dr. Gore for these problems. Dr. Gore sent her to Dr. Hammett because he could not do anything for her. T.p. 59.

Donna Holst had previously had problems with her cervical spine which had required surgery on her spine at C-6,7 in 1997. T. p.125. After the spine surgery in 1997 healed, she was doing well and was off all medications, experiencing little, if any, pain after the surgery. P-2, p. 40. Donna Holst and Donna Callahan testified that Donna Holst was relatively pain free and functioning very well after the 1997 surgery. T. p. 20, 52, 53. The surgeon's records (Dr. Windham) reflect that three weeks post surgery she was off all medications and had no pain. T. p. 56.

About a week after the wreck Donna was trying to fix a curtain in her bathroom and when she reached up to fix it, she went down “like a rock.” She called an ambulance after she lay there for a while. Dr. Simpson diagnosed her with a cracked rib. T. p. 41. In addition, the wreck caused her neck to start causing her pain again. She tried several things, including going to a chiropractor but that just made her problem worse. *Id.* She went to Dr. Gore who referred her to Dr. Hammett in Tupelo. *Id.* Dr. Hammett started epidurals in her neck and also placed her on a TENS unit. *Id.*

Donna Holst continues to be treated by Dr. Hammett for the neck pain, having treatments every three to four months which costs approximately \$10,000.00 per year, not counting hospital or radiologist fees associated with them. T. p. 50. Donna Holst’s life expectancy, according to the mortality tables in evidence, showed that she had a life expectancy of 21.4 years left at the trial date, which amounts to \$210,000.00 in future medicals. *Id.* Donna Holst had already utilized \$106,560.36 in medicals at trial time. T. p. 48. The trial court awarded Donna Holst \$40,000.00 in damages reduced by 35% for contributory negligence on the part of her daughter Donna Callahan, for a total award to Mrs. Holst of \$26,000.00. R. 116.

Donna Holst’s pain management doctor, Dr. George Hammitt, III, testified that the wreck that forms the basis of this lawsuit caused the facet disease that she has and the wreck aggravated the degenerative disc disease that she already had. Exhibit 2, p. 21, 37. Donna Callahan was not having to have pain injections prior to the wreck and the wreck worsened her pain to the point that she and her family practitioner sought further treatment. Exhibit 2, p. 38. The wreck aggravated her degenerative disc disease. Exhibit 2, p. 39. Donna Holst suffered damage above the previous cervical fusion in the wreck. This is one

level above the 1997 fusion, which is consistent with what one would expect in a moderate to high speed crash. Exhibit 2, p. 41-42.

The defendants' expert, Dr. Michael Currie, is not a pain management specialist but is a specialist in neuroradiology and general radiology. T. p. 99. Dr. Currie testified that he could see nothing on any radiological study to account for Donna Holst's pain but was quick to voluntarily add on direct examination that "it's very difficult to correlate exactly what is occurring with findings radiographically when sometimes (sic) is happening neurologically" and that sometimes a patient will look terrible on a radiological study and not be having pain and conversely a patient will look good on a study and be experiencing pain. T. p. 116.

Dr. Currie compared studies done in 1997 when Donna Holst had surgery with studies done in 2002, after the wreck. Dr. Currie's opinion was that there was no evidence of any significant progression in her disease after the 1997. T. p. 137, L. 22-28. Dr. Currie would have expected Donna Holst to regain her function. T. p. 139, L. 22-23. However, Dr. Currie could not say that Donna Holst does not have more pain now than she did before the wreck because pain is subjective and there is no way to measure it. T. p. 155, L. 14-18. Dr. Currie does not disagree with Dr. Hammitt's conclusion that Donna Holst's condition was aggravated by the wreck nor does he believe that Dr. Hammitt is doing anything wrong in his treatment of Donna Holst. T. p. 156, L. 25-29, T. p. 157, L. 1-6.

Dr. Currie recognizes that a radiological study does not always tell the tale as he testified about his own patient having terrible pain in his neck when the studies showed no problem with the spine, and that this is not an exact science. T. p. 158, L. 16-27. Dr. Currie also acknowledges that Dr. Hammitt is in a better position to know Donna Holst's

condition than he is as he has never examined Mrs. Holst and that Dr. Hammitt is in a better position to determine if there is a causal connection between the wreck and Donna Holst's pain. T. p. 158, L28-29, T. p. 159, L. 1-11.

Dr. Currie agrees that everything within reason has been tried on Mrs. Holst to relieve her pain. T.p. 160, L. 9-12. Dr. Currie also agreed that he had spent a limited amount of time in evaluating the records only, less time than Dr.Hammitt has spent with Mrs. Holst. T.p. 160, L. 24-28. Dr. Currie testifies that problems at the C-6 level cause problems with the arm and into the hand and finger areas. T. p. 161, L. 2-8. These are the exact problems shown on the ER documents on the day of the wreck, wherein Donna Holst complained of right arm numbness as shown on the Emergency Department Nurses Assessment which is the next to last page in Exhibit 7. Exhibit P-7.

Dr. Currie sums up his opinion of Mrs. Holst condition by saying that he does not dispute that the motor vehicle accident aggravated Mrs. Holst's symptoms, that it is not unusual for a patient to have problems, like he described in his own patient, to have pain complexes that cannot be explained radiographically. T. 163, L. 1-23.

The defendants stipulated that the medical expenses totaling \$106,560.36 were reasonable and necessary but dispute that they are causally connected to the accident. T. p. 51, L. 9-13. No testimony from Dr. Currie was received which contradicted the reasonableness or necessity of the bills, nor did he testify that they were not causally related to the wreck.

SUMMARY OF THE ARGUMENT

The trial court erred as a matter of law when it ruled that Donna Callahan was contributorily negligent in this wreck because there was no evidence in the record that she

did anything she should not have done nor failed to do anything that she should have done. In order to receive the benefit of an affirmative defense, such as contributory negligence, a party must plead the defense in its answer or on motion. The defendant did not so plead.

The trial court erred in assessing Donna Holst's damages. The proof showed that Donna Holst had past medicals in the amount of \$106,560.36 at the time of trial and more than \$210,000.00 in future medicals over Donna Holst's remaining life shown by the mortality tables in evidence of 21.4 years at an average medical expense level of \$10,000.00 per year, not considering the inflating cost of medical care. The trial court gave no indication of what damages, if any, it considered in arriving at a figure of \$40,000.00 nor how it arrived at such a figure. The trial court incorrectly reduced Donna Holst's recovery by 35% which it assigned to the driver of the vehicle in which Donna Holst was riding as a guest passenger.

ARGUMENT

I. THE TRIAL COURT ERRED IN ASSESSING DONNA CALLAHAN'S DAMAGES.

A. Standard of Review

This case was brought under this state's Tort Claims Act, which permits negligence actions against state agencies under certain conditions that include the requirement that, if the case goes to trial, it will be heard as a bench trial. *Simpson v. City of Pickens*, 761 So.2d 855, 860(¶ 15) (Miss. 2000). The trial court sits as finder of fact and, if the court's factual determinations are challenged on appeal, as here, the reviewing court must consider the entire record and is obligated to affirm where there is substantial evidence in the record to support the trial court's findings. *Ezell v. Williams*, 724 So.2d 396,

397 (¶ 4) (Miss. 1998); *Mississippi State Hosp. v. Wood*, 823 So.2d 598, 601(¶ 7) (Miss. Ct. App. 2002). The facts found by the trial judge will not be disturbed unless the judge "abused his discretion, was manifestly wrong, his findings are clearly erroneous or an erroneous legal standard was applied." *Stanton v. Delta Regional Medical Center*, 802 So.2d 142, 145 (¶ 6) (Miss. Ct. App. 2001).

The standard of review for a judgment entered pursuant to a bench trial is well settled. "A circuit court judge sitting without a jury is accorded the same deference with regard to his findings as a chancellor," and his findings are safe on appeal where they are supported by substantial, credible, and reasonable evidence. *City of Jackson v. Perry*, 764 So.2d 373, 376 (¶ 9) (Miss. 2000) (citing *Puckett v. Stuckey*, 633 So.2d 978, 982 (Miss. 1993)). Mississippi appellate courts review errors of law, which include the proper application of the Mississippi Tort Claims Act, de novo. *Perry*, 764 So.2d at 376.

B. Failure To Plead Affirmative Defense of Contributory Negligence

Rule 8 of the Mississippi Rules of Civil Procedure sets forth the General Rules Of Pleadings. Rule 8c sets out the affirmative defenses which are available in Mississippi. Among them is the defense of contributory negligence. Rule 8(c) is a mandatory rule in that it says that a party **shall** (emphasis added) set forth the affirmative defenses in the pleading. The text of the applicable portion of the rule is as follows:

(c) *Affirmative defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counter-claim or a counter-claim as a defense, the court on

terms, if justice so requires, shall treat the pleading as if there had been proper designation.

The defendants failed to plead contributory negligence as an affirmative defense in their answer as required by the rule. R. p. 5-8 If a party fails to plead an affirmative defense, that defense is waived. *Hertz Commercial Leasing v. Morrison*, 567 So.2d 832 (Miss. 1990). Contributory negligence is an affirmative defense and must be pleaded and proved by defendant. *Myrick v. Holifield*, 126 So.2d 508 (Miss. 1961). The defendants did not so plead, therefore this defense was waived and the trial court incorrectly reduced the damage awarded to Donna Holst and Donna Callahan.

C. Lack of Evidence of Contributory Negligence

Donna Callahan was the driver of the 1999 Dodge Intrepid which collided with the Lee County School District bus driven by Calendar Ledbetter. Donna Callahan testified that she was a cautious driver and that she had always been such a cautious driver. T. p. 7. Donna Callahan testified that she was on the Trace, a through highway, that she saw the school bus stopped at the intersection. Donna Callahan is a cautious driver and she took her foot off the gas just because she was being cautious. *Id.* The school bus did not pull out until the Callahan vehicle was almost to the bus. T. p. 8. Donna Callahan could do nothing other than slam on her brakes. She skidded perhaps six to ten feet before hitting the bus close to the front of the bus. *Id.* There were no injuries on the bus indicating Donna Callahan was not traveling very fast. P-1.

Calendar Ledbetter failed to keep a proper lookout on the day of the accident, as the trial court so found, causing her to fail to yield the right of way when she admitted that she

should have taken a second look before pulling out into the intersection. P-1 p. 18. The court found that she was distracted by the children in the bus. T. 112. Ms. Ledbetter either punched the accelerator or slammed on her brakes depending on which version of her story is believed.

Ms. Ledbetter's deposition significantly conflicted with her statements to Donna Callahan and the park ranger who wrote the accident report on the day of the wreck. Ms. Ledbetter, in her deposition, said there were four children on the bus. The accident report attached to Ms. Ledbetter's deposition shows the names of seven children who were on the bus. P-1, Exhibit 1. When asked in her deposition she said that she never saw the car nor the truck in front of the car. Exhibit P-1, p.10, 11. The day of the wreck she told Donna Callahan that she saw the truck in front of the Callahan vehicle. T. p. 10, 11. Ms. Ledbetter should certainly be considered an unreliable witness as her statements to the federal park ranger and Donna Callahan totally conflict with her deposition testimony.

Perhaps the most telling inconsistency between Ms. Ledbetter's deposition and her statements on the day of the wreck concerns her actions when she saw the Callahan vehicle. At the time of her deposition she said that when she saw the Callahan vehicle it was 25 to 30 feet away and she slammed on her brakes. P-1, p. 24, 25. Ms. Ledbetter denied hearing tires squeal as she told the park ranger on the day of the wreck. *Id.* p. 25., Exhibit 1 to P-1. In her deposition she said Donna Callahan did not hit her brakes at all, the only way she stopped was when she hit the bus. P-1, p. 33. Ms. Ledbetter did not mention seeing the Callahan vehicle when she gave her statement to the park ranger. Ms. Ledbetter said that she heard the squeal and punched it but I got hit. P-1, Exhibit 1. Ms. Ledbetter was ticked

for failure to yield right of way. P-1, Exhibit 1. Ms. Ledbetter went to federal court in Oxford and paid the ticket. P-1, p. 48. It is apparent that Ms. Ledbetter had either forgotten what happened on the day of the wreck or was less than truthful in her deposition.

Donna Callahan had a right under the law to assume that the school bus would obey the law and not pull out in front of her until she knew, in the exercise of ordinary care, that the driver of the bus would not yield the right of way. *Dame v. Estes*, 101 So.2d 644 (Miss. 1958). Donna Callahan was proceeding along the Trace at or below the speed limit. T. p. 16. Donna Callahan testified that the bus did not move until she was almost to it, (T. p. 8.), about two car lengths. T. p. 33. It is worthy of note that Ms. Ledbetter agreed with this distance in her deposition when she testified the car was 25-30 feet from her when she saw it. P-1, p. 15. To avoid the wreck, Calendar Ledbetter testified that she should have looked again, before pulling out. P-1, p. 18. Donna Callahan was not ticketed for any improper driving. T. p. 13. There was no contributory negligence on the part of Donna Callahan based on the overwhelming weight of the evidence as she took her foot off the accelerator when she saw the bus at the stop sign and continued to keep an eye on the bus as she proceeded down the highway.

The trial court erred when it used statements of witnesses, all laymen, who estimated distances and speeds involved in the wreck which occurred within a matter of seconds and in close quarters to determine that Donna Callahan somehow breached her duty and determined that she was guilty of contributory negligence. *Myrick v. Holifield*, 126 So.2d 508 (Miss. 1961). The trial court's findings are manifestly wrong and clearly erroneous and not supported by the evidence in the record.

II. THE TRIAL COURT ERRED IN REDUCING DONNA HOLST'S RECOVERY BY 35% AS A GUEST PASSENGER

Donna Holst was riding with her daughter, Donna Callahan, and her grandson, Jeremy Callahan on the day of the wreck. T. p. 35. Donna Holst had her seat belt on. T. p.36. Donna Holst was a guest passenger in her daughter's automobile and absent a showing that Donna Holst had some degree of control or authority over Donna Callahan's operation of the vehicle, the negligence, if any, of Donna Callahan cannot be imputed to Donna Holst as a guest passenger where a third person's negligence was a proximate cause of the injury. *Woodard v. St. Louis-San Francisco Ry. Co.*, 418 F.2d 1305, 1306 (5th Cir. 1969).

The case law shows that even as closely aligned as spouses are, one spouse's negligence cannot be imputed to the other spouse unless there is a showing of a joint enterprise or joint venture, much less a daughter's alleged negligence. *Id. at 1306*. Where spouses were on their way to church and had an accident, the negligence of the driver was not imputed to the passenger. *Marr v. Nichols*, 208 So.2d 770 (Miss. 1968).

The rule generally prevailing with respect to imputing the negligence of the driver to the passenger was set forth in *Illinois Central Railroad Company v. Brasher*, 80 So.2d 739 (Miss. 1955), citing 8 Am. Jur.2d 221, Automobiles and Highway Traffic, § 669 is set forth as follows:

"The negligence of the driver of a motor vehicle is not imputable to his wife who is riding with him as a passenger, in the absence of some element of control or authority over the operation of the vehicle by the wife, and will not prevent her from holding a third person liable for injuries incurred by reason of the concurring negligence of her husband and such third person. A wife, when

traveling in a motor vehicle driven by and under the control of her husband, is, with reference to contributory negligence, in no different position from that which she would occupy if the driver of the vehicle had been a person other than her husband. It is only when the husband is acting as agent for his wife in the operation of the vehicle, or when they are engaged in a joint enterprise, or when the wife otherwise has some right of control over the operation of the vehicle, that the negligence of the driver is imputable to his wife so as to defeat recovery by her for injuries sustained as a result of the concurrent negligence of a third person." 8 Am. Jur.2d 221, Automobiles and Highway Traffic, § 669.

Donna Holst did not own the automobile and the fact that she was buying dinner for her daughter, son and grandsons is not enough to show a joint venture or any type of enterprise pursuant to Mississippi case law. *Woodard* at 1307, 1308. No negligence is imputed to passengers who have no control over the conduct of the person causing the accident, in this case Calendar Ledbetter. *Choctaw, Inc. v. Wilcher*, 521 So.2d 878 (Miss. 1988). The court erred when it imputed 35% negligence to Donna Callahan, who was not a defendant in the lawsuit, and because Donna Holst was a guest passenger to whom no negligence can be imputed given the facts of this case. *Woodard* at 1307, 1308.

Donna Callahan's negligence, if any, may not be imputed to her guest passenger mother as a defense by a third party whose negligence is a proximate cause of the passenger's injury unless the driver is the agent or servant of the passenger (*Yazoo & M.V.R. Co. v. Lucken*, 102 So. 393, 398 (Miss 1925), or there is a joint venture or enterprise, or the passenger has the right to control the vehicle. *Woodard* at 1307-1308.

III. THE TRIAL COURT ERRED IN DETERMINING THE AMOUNT OF DAMAGES

A. Damages as to Donna Holst

The trial court erred in determining the amount of damages when it ignored the overwhelming weight of the evidence in the record. The evidence showed, and the trial court found that Donna Holst had surgery on her cervical spine at C 6-7. T. p. 114. The medical evidence showed, the testimony of Mrs. Holst showed, and the trial court found that following the surgery in 1997, Donna Holst was pain free until the accident occurred. *Id. at 114-115.*

The medical evidence showed and the testimony of Mrs. Holst was that she experienced considerable pain to her body, but in particular she suffers pain to her neck as a result of the wreck. The trial court found that this was so. *Id. at 115.* To be able to endure the pain Mrs. Holst was directed by her primary physician, Dr. Edward Gore, to Dr. George Hammitt, III, a pain management specialist, one of only seven board certified pain management specialists in Mississippi. P-2, p. 5-6.

Dr. Hammitt administers injections to Donna Holst's spine in order to temporarily diminish the pain. Dr. Hammitt uses steroids and numbing medicines injecting them into the C7 spine area along with medical management with Ultram for pain relief. *Id. at p. 6.* Her worst pain is at the C7 region over her cervical spine. P-2, p. 5. The procedure is that Donna Holst comes in and has an IV started and goes back to a procedure room and under X-ray guidance, a needle is placed into the joint for the facet or into the epidural space for the cervical epidural and at that point in time, the placement is confirmed under X-ray.

Dr. Hammitt then injects a long-acting steroid call Depo-Medrol and another medication that is a numbing medicine called Bupivacaine. After this procedure is completed Mrs. Holst must be monitored for 45 minutes because she is sedated during the

procedure. These procedures can only be done three or four times per year because the steroids cause side effects such as depression, which Mrs. Holst has, mood swings, anxiety, insomnia and hot flashes. *Id.* p. 8. Donna Holst also has been prescribed a TENS unit for pain management. T. p. 49.

These procedures require Dr. Hammitt to utilize a radiologist to perform these procedures. Dr. Hammitt's charges are \$10,000.00 per year for four treatments, not counting the radiology and hospital charges. *Id.* p. 13-14. Donna Holst was 62 years of age at trial date which gives her a life expectancy of 21.4 years. The procedures cost \$10,000.00 per year for Dr. Hammitt, not counting the hospital charges or the radiologist's charges. This totals over \$210,000.00 in future medical expenses. T. p. 50.

On the date of trial, Donna Holst had incurred \$106,650.36 in past medicals including pharmacy bills, (\$15,813.08, T. p. 44) such large charges as \$29,360.53 to North Mississippi Medical Center, (*Id.* p. 43,), \$19,535.99 for Dr. Hammitt at Pain Management Center of North Mississippi (*Id.* at p. 45), and \$18,296.00 at the Pain Management Center which was Dr. Hammitt's old clinic, (*Id.* at p. 46) as well as numerous other smaller charges which bring the total to the \$106,650.36 referenced above. Donna Holst's past medicals and future medicals totaled together reach almost \$320,000.00.

The defendants did not object to the authenticity of the bills nor to the reasonableness or the necessity of the charges. *Id.* p. 51. The defendants do not concede that there was a causal connection between the wreck and the medical bills. *Id.* Dr. George Hammitt testified that the problems that Donna Holst now has, including the

numbness in her arm and hand as well as the pain at C7 were caused by the wreck, (P-2, p.21), or exacerbated by the wreck because Donna Holst was not receiving any pain treatments before the wreck at all, so the wreck made these treatments necessary. *Id.* at 38.

Dr. Hammitt testified that the wreck aggravated the degenerative disc disease that she had. *Id.* p. 39. Dr. Hammitt also testified that one would expect the damage that is seen at C7 because C5-6 are fused and that puts more pressure on C7 in a whiplash wreck. *Id.* p. 41-42. Dr. Hammitt did not see much damage below C5-6, most of the damage causing the pain was one level above the fusion, as would be expected. *Id.* at p.41.

The defendants called Dr. Michael Currie, a local physician who is board certified in radiology and neuroradiology. T. p. 99. Dr. Currie spent 10- 15 hours studying radiological studies, MRI's X-rays, etc. and testifying. T. p. 108. Dr. Currie testified that he was looking for something anatomical that could explain the pain Donna Holst suffers. He found from the 1997 studies done on Donna Holst that there was no evidence of any real progressive disease at all. T. p. 137. There was no indication that there were ligamentous-type injuries or soft tissue type injuries. T. p. 139.

Dr. Currie, however, spontaneously testified on direct examination that you are not always able to look at radiologic studies and find the cause of pain as Dr. Currie recounted the experience of some of his patients. Dr. Currie testified that he would see big problems with people's lower back on the studies. Dr. Currie would ask the patient if his lumbar spine was hurting and the patient would say that he was having no problems

with his back but his neck was hurting and that his back did not hurt at all. Dr. Currie very candidly testified on direct examination that “it is very difficult to correlate exactly what is occurring with findings radiographically when sometimes (sic) is happening neurologically. T. p. 114.

Dr Currie testified that there could be minute changes that Dr. Hammitt talked about in his deposition that couldn’t be seen on the radiographic studies because they were minute but that would cause mild inflammation and some mild arthritis. T. p. 153. Dr. Currie was unable to say that Donna Holst does not have more pain after the wreck that she did before the wreck. T. p. 155.

Dr. Currie did not disagree with Dr. Hammitt’s conclusion that Donna Holst’s condition was aggravated by the motor vehicle accident. *Id.* p. 156. Dr. Currie is of the opinion that Dr. Hammitt is not doing anything wrong by giving her the injections in her spine and the medical records indicate that these treatments are working, giving her relief of between 40 and 100 percent improvement in pain. T. p. 157.

Dr. Currie could not think of anything that could be done for Donna Holst that Dr. Hammitt was not doing for her “other than just simple conservative therapy and then some occasional facet injections or epidurals or some other type of thing. People that have chronic type pain patterns, surgery is not the answer, and that’s the only other option for them.” T. p. 158. Dr. Hammitt could not tell the court to a reasonable degree of medical certainty that every symptom that Ms. Holst has described is not the result of the wreck and every dollar that has been spent to alleviate her pain was not correctly spent. *Id.*

Most importantly, Dr. Currie agreed that Dr. Hammitt was in a better position to determine if there was a causal connection between the automobile wreck and the pain that Donna Holst now suffers than he is. Dr. Currie could not testify that there was anything in the record to indicate that Donna Holst has told Dr. Hammitt anything that was not truthful in seeking treatment for her pain. *Id.* at p. 159. Dr. Currie agreed that everything within reason had been tried to make Donna Holst well. T. p. 160.

Dr. Currie agreed that the C6 nerve runs along the back of the neck and out into the arm into the middle fingers (T. p. 161) which is exactly one of the problems Donna Holst complained of at the hospital on the night of the accident. Exhibit 3, next to last page. Dr. Hammitt testified that the damage he saw in the spine was consistent with where the most force would have been applied in the wreck. P-2, p. 42. Dr. Currie agreed that it is not unusual that Donna Holst had not gotten well, even though he would have expected her to be better within five or six months. *Id.*

Dr. Currie cannot dispute that the motor vehicle accident aggravated Donna Holst's symptoms. Dr. Currie cannot explain radiographically why Donna Holst is having the pain she is having but it can occur. The trial court misinterpreted the testimony of Dr. Currie when it found that his testimony was that her present condition was the result of a degenerative disease condition in motion before the accident. The trial court did, however, find that the wreck aggravated the condition. T. p. 115. Dr. Currie actually testified that Donna Holst's anatomical condition had not changed since the 1997 surgery, saying that there is "no evidence of any real progressive disease at all" (T. p. 137.) and he never opined that Donna Holst's pain was the result of a degenerative disease condition in motion before the accident. T. p. 95-163.

Blake v. Clein, 903 So.2d 710, 729-30 (Miss. 2005), stands for the proposition that plaintiffs who are far more susceptible to a particular harm than the average person may nonetheless recover their full damages without reduction. In other words, you take the plaintiff as you find her. Donna Holst's damages were caused by the wreck which forms the basis of this lawsuit. The trial court was manifestly wrong and clearly erroneous in its finding of the damages suffered by Donna Holst.

B. Damages to Donna Callahan

Donna Callahan was a twenty-seven year old mother at the time of the wreck. She was driving the 1999 Dodge when the school bus pulled out in front of her. She suffered great mental anguish seeing her ten year old son (T. p. 10.) with a nickle sized hole in his head which was "so deep you could see all the way to his skull." T. p. 8. The hole was right between his eyes. *Id.*

The hole in his head was not bleeding when Donna Callahan first looked at him but very soon blood started pouring down Jeremy's face. *Id.* It soaked his shirt and got all over his mother also. *Id.* Donna Callahan put her hand on it and applied pressures but it didn't stop, it was pouring through her finders and pouring out onto the highway. Donna had never seen that much blood in her life. *Id.* Donna Callahan thought her child was about to bleed to death. *Id.* Fortunately, a man coming from the opposite direction of them on the Trace stopped to lend aid and he had a towel which he put against Jeremy's head and managed to pretty much stop the bleeding. *Id.* at 9. Donna Callahan had never seen Jeremy injured to that extent before. *Id.* at 14.

Donna Callahan's physical injuries consisted of chest soreness, as well as hand and finger soreness. *Id.* at 15. Donna could not eat or sleep so her doctor put her on

Xanax. *Id.* She lost five pounds in one week because of the trauma of what she witnessed. *Id.*

In addition to the trauma of seeing her ten year old badly injured, she saw her mother badly injured also. Just after the wreck she looked at her mother and “she was just laying still.” *Id.* at 17. Her mother’s neck was swelling at that point, it was visibly swollen. *Id.* at 12. Fortunately, an RN happened upon the scene and began to take care of her mother, telling her mother not to move because she might have a neck injury. *Id.*

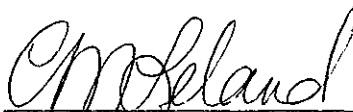

Donna Callahan suffered both mentally and physically and the \$3,000.00 in damages which the trial court reduced by 35% are wholly inadequate for the mental and physical trauma that she suffered through. The trial court’s finding of damages was manifestly wrong and clearly erroneous.

IV. CONCLUSION

The trial court erred in finding that Donna Callahan was contributorily negligent because there was no credible evidence in the record that she did anything wrong. The trial court erred in reducing Donna Holst’s recovery by 35% for the contributory negligence of her daughter who was driving the automobile in which she was a guest passenger when it applied an erroneous legal standard. The court erred in determining the amount of damages for both Donna Callahan and Donna Holst. This Court is asked to reverse, render on the question of contributory negligence, render on reducing Donna Holst’s recovery as a guest passenger, and remand for a new trial on damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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