IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-CA-01059

TERRY'S ENTERPRISES, INC. AND BARRY TERRY, JR. — APPELLANTS/ CROSS-APPELLEES

VS.

SUSIE P. CAVIN, INDIVIDUALLY, ET AL — APPELLEES/ CROSS-APPELLANTS

APPEAL FROM THE CIRCUIT COURT
OF WASHINGTON COUNTY, MISSISSIPPI

REPLY BRIEF OF THE APPELLANTS/CROSS-APPELLEES TERRY'S ENTERPRISES, INC. AND BARRY TERRY, JR.

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

Terry's Enterprises, Inc. and Barry Terry, Jr., Appellants/Cross-Appellees, through counsel, hereby file their rebuttal to Appellees'/Cross-Appellants' response herein. The Terrys' assignments of errors have all been set forth in great detail in Terrys' initial Brief and in the rebuttal filed herein. In the Terrys' initial Brief, counsel provided extensive citations and excerpts of applicable case law and factual arguments supporting their assignments of errors. The Cavins, as Appellees, have provided inapplicable case citations and no excerpts in their response to the Terrys' initial Brief. The Terrys' rebuttal to said response makes it apparent that the Terrys' appeal, and assignments of errors, are all well taken, and should be granted.

As to the Cavins' cross-appeal of the Court's denial of their *additur* motion, the Terrys, in their rebuttal herein, provide extensive legal and factual arguments, but the Cavins/Cross-Appellants have provided no legal basis for their cross-appeal. The case law cited by the Cavins is either misplaced and/or irrelevant. The Cavins' cross-appeal is unsupported and deficient as a matter of law, as discussed in detail *infra.*

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VS.

SUSIE P. CAVIN, INDIVIDUALLY AND ON BEHALF OF THE WRONGFUL DEATH BENEFICIARIES OF JESSIE RAY CAVIN, DECEASED — APPELLEES/ CROSS-APPELLANTS

I.

APPELLANT TERRYS' ISSUE I AND APPELLEE/CROSS APPELLANTS' ISSUE I – WHETHER THE JURY WAS PROPERLY INSTRUCTED UNDER PLAINTIFFS' INSTRUCTION P-8

A.

Appellants Terry's Enterprises, et al objected to, and raised by Post-Trial Motion, and by this appeal, multiple errors regarding Plaintiffs' Instruction P-8, granted, over Defendants' objection. That instruction, reproduced in its entirety in Appellants' initial Brief, addressed Susie Cavin's claim for damages, and erroneously allowed, among other issues, consideration of:

1. Future medical and other expenses which Plaintiff will reasonably incur in the future; and
2. Future pain and suffering,

The proffered instruction, to which objection was interposed, is deficient, not because it contained an "inaccurate statement of law", but because the quality and quantum of proof presented at trial, by Plaintiff Susie Cavin, was insufficient to support any award for any "future damages" at all. In this context, Terry's Enterprises, et al, do not dispute the precedence of *Beverly Enterprises, Inc. v. Reed,* 961 So. 2d 40, 43 (Miss. 2007) and *Hill v. Dunaway,* 487 So. 2d 807, 809 (Miss. 1986), cited by the Appellee/Cross-Appellant Susie Cavin. The real issue is whether there was

sufficient proof to justify granting Instruction P-8. A Jury Instruction may not be granted unless the instruction is supported by the evidence. *Church v. Massey,* 697 So. 2d 407, 411 (Miss. 1997) (See also *Copeland v. City of Jackson,* 548 So. 2d 970, 973 (Miss. 1989)).

Ms. Cavins' Brief in opposition, at Pages 7 and 8, provide nine (9) unnumbered reasons which arguably supported Instruction P-8. Only two of those unnumbered items, 5 and 7, [1] have any applicability to Ms. Cavin's claim for any kind of "future damages".

What Dr. Robichaux actually said about Ms. Cavin's medical needs was that Ms. Cavin **might**, in the future, experience some "mild arthritic problems", for which, occasionally, at the very worst, use of some non-steroidal inflammatory such as ". . . Advil, Aleve or some other non-steroidal anti-inflammatories should be sufficient . . ." Appellant, Terry's Enterprises, has cited the applicable testimony, and has provided Record Excerpts for the same. Ms. Cavin, through her counsel, has chosen not to cite what is claimed to be pertinent, in opposition. The same is true for any "future injections" Ms. Cavin **might** need. "Might" does not establish the required "reasonable medical certainty" and, there is no proffer of evidence addressing "reasonable medical certainty" on these issues. Nor is there any evidence, encompassed within the same instruction, to support any viable claim for

> . . . future pain and suffering . . . including inability of Plaintiff to enjoy the pleasures of life . . .

As to this last damage claim, there is absolutely no proof. The only proof offered was that, for a short time, Ms. Cavin did not work, but several months after her injury she did return to work.

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[1] Unnumbered item 5, at page 8 of Appellees' Brief, argues the "unspecified degree of impairment in her 'left arm' " and unnumbered item 7 argues some expected ". . . pain, stiffness and weakness from arthritis to become possibly worse over time . . .", all of which is admitted, but further arguably that the same ". . . will require treatment with Advil, Aleve or injections . . ." which claim is inaccurate. Dr. Robichaux did not testify to what Ms. Cavin herein alleges.

There is no evidence suggesting she can not continue the same work indefinitely. The record is simply silent as to any alleged future "inability" of Ms. Cavin to do anything which she used to do.

Plaintiffs' Instruction P-8 was so defective, in its multiple parts, that its granting, over objection, can not be anything but error. Terry's Enterprises, et al (Appellants) have cited a maxim of law, which Ms. Cavin has not contested, that some "level of certainty" must be "proven", i.e., that there is something more than mere conjecture, before damages may be either considered or awarded. See *City of Jackson v. Spann,* 2009 WL 141848 (Miss. 2009) and *Catchings v. State,* 684 So. 2d 591, 598 (Miss. 1996). If the mere "guessing at an amount of future medicals", by a medical expert is legally insufficient, then where there isn't even a "guess", the evidence is clearly insufficient to support any award for "future damages".

B.

Ms. Cavin's Argument that the Terrys' Waived Objection to Parts of Plaintiffs' Instruction P-8

Ms. Cavin, by counsel, also argues that Defendants/Appellants Terry's, et al, waived judicial review of one specific paragraph of Plaintiffs' Jury Instruction P-8, regarding "future medicals". This claim is merely a "twist" of the argument to which Terry's Enterprises has addressed in Paragraph A above.

To reiterate, Instruction P-8 was "fatally defective", on multiple grounds.[2] Terry's counsels' alleged failure to specifically object to specific language regarding "future medicals" is the crux of the argument. Ms. Cavin fails to appreciate the significance of the Terrys' "contrary to the great weight of the evidence argument", encompassed with the Terrys' Post Trial Motion for *Remittitur* or

[2] The other "fatal defects" of Plaintiffs' Jury Instruction P-8 are further discussed in Section IV of this Brief, regarding Emotional Distress & Mental Anguish, which arguments are incorporated, by reference, into this subpart.

New Trial. The issue which Ms. Cavin suggests was waived was specifically asserted, and thus preserved for appeal, by Terrys' Post Trial Motion.

II.

Whether Plaintiff Susie Cavin Was Entitled to Recover Damages for Emotional Distress/Mental Anguish

Appellants Terrys' Issue I, Paragraph B and Appellees' Response, Item II, Concerning Recovery of Damages for Emotional Distress/Mental Anguish

While all assigned errors, for purposes of this appeal, are important, those relating to the Trial Court's granting of Instruction P-8, and its corresponding refusal of Defendants Terrys', Instruction D-4 (as both addressed Plaintiff Susie Cavin's alleged entitlement to "emotional distress and mental anguish"), are especially important.

Defendants/Appellants Terrys offered Instruction D-4, to preserve the argument that sufficient "manifestation" must first be demonstrated, before any Jury could properly consider damages for "emotional distress/mental anguish". Instruction D-4, stated, in its essential elements:

> You (the Jury) may only award damages for emotional distress if the Plaintiff proves, by a preponderance of the evidence, that Plaintiff sustained a physical injury, a physical illness or assault upon her mind, nervous system or personality of the Plaintiff which is medically cognizant and which requires treatment by a medical professional . . . unless you find, by a preponderance of the evidence, that Defendants' conduct was willful, wanton, malicious, outrageous or intentional.

This record clearly reflects a tragic accident, but one of only "simple negligence". It does not involve "willful, wanton, malicious, outrageous or intentional" conduct by Defendants/Appellants Terrys' Instruction D-4 was, and still is good "Mississippi Law", on the facts presented.

To the contrary, Instruction P-8 authorized, over objection, Jury consideration of damages for emotional distress and/or mental anguish to Susie Cavin for:

> . . . 3. Past and future demonstrable harm from emotional distress and mental anguish proximately caused by the injury . . .; (and)
>
> . . . 4. Past and future demonstrable harm from emotional distress and mental anguish proximately caused by Plaintiff's witnessing the death of her husband Jessie Ray Cavin.

Instruction P-8, given the evidence produced, is a misstatement of Mississippi Law, and is not supported by sufficient evidence. Specifically, Ms. Cavin produced no evidence, to any degree of medical certainty, of any "demonstrable mental or emotional harm". No case, in Mississippi Jurisprudence, has ever allowed damages for "emotional distress/mental anguish" without corresponding and corroborating proof, medically cognizable, that any such claim actually existed. Ms. Cavin does not satisfy this requirement, simply by her saying, as echoed by her children, "she's emotionally distressed and mentally anguished". There is no other proof to support Ms. Cavin's claim for mental anguish/emotional distress in this record, much less any competent medical proof.

Appellants Terrys do not, as Ms. Cavin, through counsel, suggest (Page 10, Cavin's Brief) either ignore or misunderstand Ms. Cavin's actual personal injury, from the subject accident. The Terrys, through counsel, actually embrace the same, as evidence why Ms. Cavin is not entitled to separate damages for her alleged emotional distress or mental anguish. Her personal injury alone, *ipso facto*, does not translate, automatically to a viable personal claim for emotional distress and/or mental anguish. The cases cited by Ms. Cavin for this proposition, *Miss. Valley Gas v. Estate of Walker,* 725 So. 2d 139 (Miss. 1998), *Occhipinti v. Rheem Mfg. Co.,* 172 So. 2d 186 (Miss. 1965), *Adams v. U. S. Homecrafters, Inc.,* 744 So. 2d 736 (Miss. 1999), *Paz v. Brush Engineer Materials, Inc.,* 949 So. 2d 1 (Miss. 2007) and *Entex, Inc. v. McGuire,* 414 So. 2d 431 (Miss. 1982), actually support Appellants Terrys. As Ms. Cavin has cited numerous cases, a case by case review is appropriate.

Entex, Inc. v. McGuire, 414 So. 2d 431 (Miss. 1982) is the seminal case for "bystander liability". It has nothing whatsoever to do with the issues of this case, *vis a vis,* proof of a "mental

injury". In *Entex,* unlike this case, the Plaintiff had been treated and diagnosed, relative to the event claimed, by a clinical psychologist, who testified that McGuire had ". . . anxiety, neurosis and depressive neurosis . . .". No such corresponding evidence exists in the instant case.

Miss. Valley Gas v. Estate of Walker, 725 So. 2d 139 (Miss. 1998) stands for the very proposition argued by the Terrys, i.e., that when the Defendant's conduct is no more than "simple negligence", Plaintiff's production of evidence amounting to no more than loss of sleep, bad feelings, depression, being very upset, etc., is legally insufficient to sustain consideration of damages for mental anguish/emotional distress.

There was a similar holding involved in *Adams. v. U. S. Homecrafters, Inc.,* 744 So. 2d 736, 743-44 *et sq.* (Miss. 1999), again, directly contrary to Ms. Cavin's claim. *Adams* stated:

> In this case, however, the Adamses failed to present sufficient proof of emotional distress to warrant the instruction to the jury. The only evidence presented by the Adamses . . . was . . . It's been a total nighttime . . . I've stayed up for days . . . hoping water wouldn't get on any porch . . . I've dug it out (a ditch) in the middle of the nighttime.
>
> . . . The evidence presented is similar to *Morrison v. Means,* 680 So. 2d 803 (Miss. 1996) and *Strickland v. Rossini,* 589 So. 2d 1268 (Miss. 1991) wherein Plaintiffs' complaint of worry or emotional upset, loss of sleep . . . We found . . . insufficient evidence to support an award for emotional distress.

Paz v. Brush Engineer Materials, Inc., 949 So. 2d 1, 3-5 (Miss. 2007), is actually a "medical monitoring claim", only inferentially addressing emotional distress and mental anguish. However, it, likewise, doesn't support Ms. Cavin's claims. At page 11, the Court said, to support a claim for mental distress, proof of

> . . . a resulting physical illness or assault upon the mind, personality or nervous system of the Plaintiff which is medically cognizable and which requires or necessitates treatment by the medical profession – (citing *Leaf River Products, Inc. v. Ferguson,* 662 So. 2d 645 (Miss. 1995)).

(Emphasis added)) is required.

Obviously, Ms. Cavin comes nowhere close to the requisite proof required for her alleged emotional distress/mental anguish claim. No medical witness was ever called, and her brief "experiment" with Lexapro, which she discontinued, has not, in any event, ever been connected to her "mental distress or emotional anguish" claim. A causal connection between any treatment and/or medications must be established before damages for emotional distress may be awarded. *Randolph v. Lambert,* 926 So. 2d 941, 946 (Miss.Ct.App. 2006). The complete void of any evidence supporting a causal connection between Ms. Cavin's one time/unconsumed Lexapro prescription and any alleged emotional distress from this accident, when combined with the scarcity of evidence supporting any such distress, leads to the inevitable conclusion that the instruction of the Jury, along with any award for emotional distress, was erroneous, incomplete, and thus, reversible error.

Lastly, Cavin's citation to *Occhipinti v. Rheem Mfg. Co.,* 172 So. 2d 186 (Miss. 1965), is peculiar. *Occhipinti* was a wrongful death case, in 1965, where questions about when a fetus was "viable", was at issue, concerning a mother's grief over the loss of that fetus. Nothing in *Occhipinti* supports Ms. Cavin's claim for emotional distress or mental anguish.

Given the absence of real proof, beyond garden variety worry, loss of sleep and crying, which are not legally sufficient, alone, to support an award, Ms. Cavin produced nothing material to her claims. No instruction describing the Plaintiff's burden of proof, or the current status of emotional distress damages in Mississippi, was given by the Court, due to the denial of Defendants' Instruction D-4. The granting of Instruction P-8 in essence instructed the Jury to award the Plaintiff emotional distress damages, thereby taking the discretion of such an award away from the Jury. Instruction P-8, as to mental anguish and emotional distress, should not have been given. Instruction D-4 should have been given to the Jury, to define the requirements for consideration of mental anguish or emotional distress damages.

III.

Whether the Terrys were Entitled to *Remittitur* or New Trial on Damages Awarded to Plaintiff Susie Cavin

Rebuttal of Plaintiffs' *Remittitur* Argument

Appellants have appealed the Trial Court's denial of their Motion for *Remittitur*, or alternatively New Trial, on the Jury's $1,000,000.00 personal injury verdict to Susie Cavin. The Cavins, in their Response to Terrys'/Appellants' initial Brief make only unsupported conclusory comments, such as the following:

1. The Verdict was "well supported by the evidence"; and
2. "As Ms. Cavin presented evidence of medical treatment of her emotional injury . . ." (See Appellees'/Cross-Appellants' Brief at page 13).

The Appellees provided no citations or excerpts to support any of their contentions and thus, exactly what such "evidence" pertains to is anyone's "guess". It is without dispute that the Plaintiff must produce some credible evidence in order to recover for each element of damages claimed. The trial evidentiary record in this case is deficient, if not altogether absent, as discussed in detail in the Appellants' initial Brief and *supra,* thereby incorporated herein, for the following elements of damages:

1. Future pain and suffering/Future disability/Future loss of enjoyment of life;
2. Future medical costs; and
3. Emotional distress.

The $1,000,000.00 personal injury verdict awarded to Ms. Cavin, based upon this deficient record, can not be sustained, was improper, evident of bias, prejudice and passion on the part of the Jury, and against the weight of credible evidence. Therefore, the Appellants' Motion for *Remittitur*

should have been granted by the Trial Court. The Trial Court's denial of said Motion was an abuse of its discretion, and such denial is ripe for a remand by this Court.

The Cavins' reliance on *APAC Mississippi v. Johnson,* 2009 WL 596000 (Miss.Ct.App. 2009) is curious, indeed. In that case, Ms. Johnson, the Plaintiff, was awarded $350,000.00, approximately one-third (1/3) of what Ms. Cavin was awarded in the case *sub judice.* Ms. Johnson, it would seem, suffered significantly more serious injuries than did Ms. Cavin. As the Court noted in its opinion: "Johnson . . . was sent by ambulance to the University Medical Center suffering from **fractures in her vertebra,** and wore a neck brace for at least five weeks. Johnson testified that she has experienced ongoing neck pain, has had trouble sleeping, and hence has been some form of pain medication every since the accident – both over the counter and prescription. Further, Johnson stated that she had to decrease her participation in several activities – attending college, being a band booster . . ., and taking care of her grandchildren due to the pain she was experiencing". *APAC* at 12. There was no testimony at the trial *sub judice* evidencing any such significant pain and/or restrictions in activities. Ms. Cavin noted no decrease in activities and even returned to work shortly after the accident. As noted, extensively, in Appellants' initial Brief, and *supra*, the only future medication/treatment that Ms. Cavin might need was the possibility of some over the counter anti-inflammatory medications.

In summation, in *APAC* the Plaintiff received a much smaller award, for more significant injuries. *APAC* only stands for the proposition that Ms. Cavin's injury award, basically for a broken wrist and bruising, was inflammatory and improper, against the overwhelming weight of the evidence, and evident of bias, passion and prejudice. Terry's Enterprises, et al's/Appellants' Motion for *Remittitur,* or Alternatively, New Trial, due to the excessive nature of the $1,000,000.00 personal

injury verdict to Susie Cavin should have been granted by the Trial Court. The denial was an abuse of the Trial Court's discretion.

IV.

Whether the Cavins were Entitled to Jury Instruction P-11

The Trial Court Correctly Denied The Wrongful Death Beneficiaries' Request for *Additur* or New Trial and Correctly Instructed The Jury

A.

The *Additur*/New Trial Theory

The "Cavin" wrongful death beneficiaries, as Cross-Appellants, assert that the $500,000.00 award made by the Trial Jury was inadequate, due to an alleged jury instruction error, and that they were entitled, via Post Trial Motion, to an *additur*, or alternatively, a new trial as to damages. The Trial Court correctly denied this Post Trial Motion, as it obviously should have, where the amount awarded is not so shockingly low as to evidence bias, passion or prejudice by the Jury. $500,000.00, on its face, is neither an insignificant or inconsequential award.

Subtracting identifiable economic damages, as to which there was no dispute, $212,927.00 (being the present net cash value of Jesse Cavin's life earning expectations, at the time of his death), plus $7,083.86 in funeral expenses means that the Jury's non-economic damage award was $279,989.14. When split equally by the six (6) wrongful death beneficiaries, namely the widow, Susie Cavin, and her five (5) adult children, each, for loss of companionship and society, was effectively awarded $46,664.86. Given the absence of any proof, by any of the five (5) adult children, of any identifiable financial assistance from Jessie Cavin, nor any proof of "special needs" which Jessie Cavin, during his lifetime, had ever provided to any of his adult children, the "per capita" award for loss of companionship and society, for each, simply can not be characterized as so low, so inconsequential as to shock the conscious of any reasonable person. This point is particularly

significant, given the statutory mandated "equal distribution" of wrongful death proceeds, Miss. Code Ann. § 11-7-13, as each of Jessie Cavin's children actually also received an additional $35,487.83, being 1/6 each of Cavin's future income stream, which none of them, on the evidence produced, would have otherwise received. In sum, each beneficiary, his widow and five (5) adult children, alike, received $82,152.69. While the "non-economic damage award" could arguably have been higher, it could also have been lower. Absent some arguable reason to believe bias or prejudice was involved, Mississippi jurisdictional precedent has always, steadfastly, required that awards of damages, by a duly empanelled group of jurors, sworn to fairly and impartially consider an appropriate award are not simply advisory, and might not be lightly disregarded or simply rejected. *Wells v. Tru-Mark Grain, Inc.*, 895 So. 2d 181 (Miss. 2004) (See also *Rodgers v. Pascagoula Public School District*, 611 So. 2d 942 (Miss. 1992)). Nor can it legitimately be argued that the Trial Court, by not substituting its own evaluation for that of the Jury, abused its discretion, which is the legal test applicable for granting a requested *additur* or alternatively, granting a new trial, on damages. *Wells*, 895 So. 2d at 183. To use Appellees'/Cross Appellants' **own words**, concerning the applicable standard of review (Brief of Appellees/Cross Appellants, at page 14) ". . . **the jury's verdict was by no means 'flagrantly outrageous'** . . .". (Emphasis provided.)

Susie Cavin's "share" of the "non-economic damages" awarded was also $46,664.86, and her share of the "economic loss" was an additional $35,487.83. Can it be legitimately argued that Susie Cavin, the widow, upon receiving individually $82,152.69, has likewise not been fairly compensated, by the Trial Jury empanelled, to decide her claim? While Defendants/Appellants/Cross Appellees realize that no one would sacrifice the life of a loved one, for any amount of money, much less for the sum of $82,152.69, that is not the legal test of the reasonableness of this award. A Jury's award, absent sympathy, passion or prejudice, and which award is based upon the common experience of

the Trial Jurors, who reached their assessment, without emotion, is "*prima facie*" a fair award of compensation. *Wells,* 895 So. 2d at 183; *Hankins Lumber Co. v. Moore,* 774 So. 2d 459 (Miss. 2000). Considering that it is the Cavins' burden to prove all damages, and their "inadequacy", there is, simply looking at the $500,000.00 award, no evidence that the Jury's verdict was somehow tainted.

B.

The "Mis-Instruction of the Jury" Theory

As the Cavin Wrongful Death beneficiaries have not met, and can not present, as discussed in Part A immediately above, grounds establishing that the Trial Court's denial of their *additur*/new trial motion was an abuse of discretion, the only remaining basis for their Cross-Appeal rests in their incorporation of their argument that the refusal of a requested Jury Instruction justified their Post Trial Motion for *additur* or, alternatively, a new trial on damages. The standard for review, i.e., abuse of discretion, should be the same for the "jury instruction" argument, seeing that the Cross-Appellants specifically appealed the Trial Court's denial of their Post Trial Motion for *additur,* or alternatively, for new trial. Even if abuse of discretion is not the standard of review, the Cavins can not meet their appellate burden of proving any such denied instruction was necessary to present the proper legal instruction to the Jury. The instructions approved by the Trial Court were, when taken on the whole, an accurate representation of the applicable law.

It is puzzling that the Cavin beneficiaries have not seen fit to abstract the instruction involved (Plaintiffs/Appellees/Cross Appellants offered Jury Instruction P-11), nor have they cited the underlying statutory authority for the damages sought by that Instruction, i.e., the Mississippi Wrongful Death Statute at Miss. Code Ann. § 11-7-13. Appellants Terrys do generally agree with the Cavin Wrongful Death Beneficiaries that the "intent" of Instruction P-11 was to provide the Jury with a verdict form which would have required, for each separate wrongful death beneficiary, a

separate award figure, representing for each, the alleged value of each one's separate "loss of companionship and society". The Trial Judge, quite properly, refused that proposed Instruction and verdict form.

Not having the benefit of the Cavin's specific argument, in their apparent reliance on *River Region Medical Corporation v. Patterson,* 975 So. 2d 205 (Miss. 2007), Appellants Terrys opine that reliance must be based upon *dicta* in that opinion, by former Chief Justice Smith, at page 208, reading:

> . . . it is true that under the statute (Miss. Code Ann. § 11-7-13), her husband and children would be entitled to damages should they prevail in their wrongful death action. It is also true, therefore, that certain damages would have to be shared equally among them. However, here the jury awarded damages solely for loss of society and companionship. These damages are separate from and possibly in addition to any damages they would share equally, i.e., the damages of the estate and those suffered by Ms. Nettles . . . (Emphasis added.)

To put this language in context, it is important to appreciate the limited issue before the Court in *River Region.* That limited issue was whether Thomas Patterson, the widower of the decedent, presented sufficient threshold proof of his claim for loss of society and companionship. Patterson did not testify. The Trial Court denied River Region's Motion for Judgment Notwithstanding the verdict, which decision was reversed and rendered by the Court on the basis that ". . . Patterson bore the burden of proving his own claim of loss of society and companionship. This he did not do." Under these circumstances, this Court never reached, because it did not have to, any issue of disparate compensation for separate beneficiaries, claiming damages for their loss of society and companionship.[3]

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[3] Actually, as this Court may take Judicial Notice of its own case (decided upon the Record Submitted and the Briefs and Arguments of Counsel, on appeal), none of the *River Region* purported wrongful death beneficiaries testified about loss of society and companionship claims. The single Jury Verdict, ultimately reversed by this Court, was for $1,710,000.00, for all beneficiaries, with no "specific findings", for each, under any Jury Instruction granted, in the form argued by the Cavin Wrongful Death Beneficiaries. The two other Plaintiffs, in the *River Region* case, had settled before the final submission of the appeal in that case, and their

Not only does the language of the decision in *River Region* not actually support the Jury Instruction argued by the Cavin beneficiaries, clearly, any "comment", extraneous to what was really "ripe for determination", in *River Region* did not require any gratuitous comment about "separate verdict forms" for each beneficiary's claim for damages, for loss of society and companionship.[4] While generally dissenting to the Supreme Court's reversal of the Trial Court's denial of the JNOV, on the specific issue raised in this case, i.e., separate "awards", to each beneficiary, Justice Graves specifically pointed out that Miss. Code Ann. § 11-7-13 does not support the "separate verdict" Instruction requested. At page 209, Justice Graves noted:

> . . . the majority's finding is contradicted by the statutory language. Miss. Code Ann. § 11-7-13 states in relevant part. . . . the party or parties suing shall recover such damages allowable by law . . . taking into consideration all damages of every kind to . . . all parties' interest in the suit. . .
>
> . . . This Court consistently has found that this language . . . includes damages for the loss of society and companionship. . .

At Page 210, Justice Graves detailed pertinent language in the wrongful death statute as

> . . . All other damages recovered under the provision of this section . . . shall be distributed as follows:
>
> . . . Damages . . . shall be equally distributed to his wife and children. . .

Justice Graves then further commented

> . . . Clearly, Section 11-7-13 includes damages for loss of society and companionship

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involvement had no bearing on this Court's decision, as above discussed, i.e., that Thomas Patterson simply had not proven his beneficiary status. That is all that was actually decided in *River Region.*

[4] In *River Region*, Defendant sought a special interrogatory on the issue of Thomas Patterson's separate claim for "loss of society and companionship", as Defendant had argued that Thomas Patterson had abandoned his marriage to the decedent and, therefore, was not, in fact, a wrongful death beneficiary. The Trial Court denied the special interrogatory request, found that Patterson had not abandoned the marriage, and further held "equal distribution" of any jury award was required as to all beneficiaries. This Court's decision in *River Region* only addresses Patterson standing as a wrongful death beneficiary, and the Court reversed and rendered, upon the determination that he was not. Again, at page 207, this Court held ". . . Plaintiff, Patterson bore the burden of proving his own claim of loss of society and companionship. This he did not do . . ."

> . . . Therefore, such damages must fall into the category of "all other damages", which "shall be equally distributed". Moreover, this Court has upheld the equal distribution of such damages. See *Pannell v. Guess,* 671 So. 2d 1310 (Miss. 1996).

Pannell v. Guess, id, cited by Justice Graves, was a Chancery decision from Lee County, where an argument was made that the Court should have considered a request for a "disproportionate award" between wrongful death beneficiaries for damages, which included those for loss of companionship. The Chancery Court, ultimately affirmed by the Mississippi Supreme Court, declined, and distributed wrongful death proceeds equally. This Supreme Court noted (p. 1314):

> . . . the Chancellor had no choice but to distribute the insurance settlement proceeds to Shelly's father, mother, half-sister and half-brother, equally. Accordingly we can not say that the Chancellor's refusal to hold a separate hearing in which each wrongful death beneficiary could attempt to prove his or her individual damages (and therefore, the right to receive a larger or smaller portion of the insurance proceeds) was erroneous . . .
>
> David and Betty Pannell do not cite any Mississippi case law or statutory law that would allow or require the lower Court to conduct a hearing at which the wrongful death beneficiaries would be required to "justify" their damages. Moreover, this Court could find no such authority under our statutory or case law . . .

Of equal significance was the Court's comment that Mississippi's wrongful death statute is in derogation of common law. At page 1313, the Court noted:

> . . . Miss. Code Ann. § 11-7-13, created a cause of action unknown to common laws
> . . . On appellate review, we strictly review Mississippi's wrongful death statute.

Such strict construed absolutely mandates that when the statute states that "all other damages", which is inclusive of those for loss of society and companionship ". . . shall be equally distributed . . .", then all must be equally distributed. This leaves no uncertainty that separate verdicts for each beneficiary were never contemplated. The use of the word "shall" is mandatory, in this respect! (See *Pannell* at 1313).

The Cavins' reliance on a Southern Federal District decision by U. S. District Judge William H. Barber, rendered two weeks after the Washington County trial of this case (See *Bridges, et al v.*

Enterprises Products Co. Inc., 551 F. Supp. 2d 549 (S.D.Miss.)) is similarly misplaced, for at least two district reasons. First, the decision by a Federal District Court, even sitting in Mississippi, is not binding on, or particularly "precedential" to, the Mississippi Supreme Court. Secondly, given the rationale cited by Judge Barber, the case is not even persuasive on the specific issue of the Cavins' Cross Appeal, specifically, the Court's refusal of Instruction P-11. *Bridges* is not persuasive, as *River Region,* cited therein does not specifically stand for the proposition urged, i.e., that each wrongful death beneficiary is entitled to a separate consideration and award of damages for his "personal" loss of society and companionship, in abrogation of the specific statutory mandate of Miss. Code Ann. § 11-7-13, and that all such sums said beneficiaries might receive ". . . shall be equally distributed . . .". The only other case cited by Judge Barber was *Long v. McKinney,* 897 So. 2d 160 (Miss. 2004), which, while addressing multiple issues and questions under the Mississippi Wrongful Death Statute,[5] does not address "separate verdict awards", for separate wrongful death beneficiaries who claim loss of society and companionship. While Judge Barber's decision in *Bridges* concluded that it was "not error" to have submitted to the jury a verdict form which did allow separate loss of society and companionship awards for the separate wrongful death beneficiaries, it does not stand for the proposition that refusal of any such instruction was "Trial Error", or that such an instruction is required.

[5] *Long* addresses multiple issues, including conflicts of interest between actual and potential wrongful death beneficiaries, similar conflicts between separate counsel, attempting to represent the separate interests of conflicting beneficiary claimants, the "one suit" mandate followed in Mississippi, choice of attorneys and "client obligations" for payment of their attorney's fees, and lastly the right to control the "one litigation" authorized by the Wrongful Death Statute.

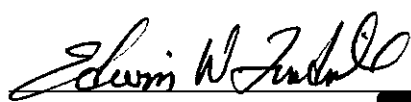
CONCLUSION

The Cavins' response to the Terrys' appeal, on multiple issues, is deficient, without citations and/or excerpts of applicable law and is unsupported by record excerpts of the testimony from the Washington County Circuit Court Trial. The case law and factual arguments made by the Cavins are unpersuasive. Therefore, the Terrys submit that all the arguments, made in their initial Brief, and repeated by this rebuttal *supra*, support their appeal and the Terrys pray that their appeal, on all counts, be granted.

Finally, the Cavins' cross-appeal is unsupported by applicable law relevant to the facts shown by the Trial Record. The Cavins do not address the proper standards of review, applicable to the Court's denial of their Motion for *Additur*. The Trial Court correctly denied the Cavins' Motion for *Additur*. There is no evidence that the jury was influenced by bias, prejudice or passion, and the jury award was in no form or fashion unconscionable and/or unreasonable. Therefore, the Terrys pray this Court will deny the Cavins' cross-appeal.

THIS THE 29TH DAY OF JUNE, 2009.

TERRY'S ENTERPRISES, INC.
BARRY TERRY, JR.

BY: 
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CERTIFICATE OF SERVICE

I, Edwin W. Tindall, do hereby certify that on June 29, 2009, I mailed, postage prepaid, a true and correct copy of Appellants'/Cross-Appellees' Reply Brief to the following:

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This, the 29th day of June, 2009.

EDWIN W. TINDALL