CASE NO. 2008-CA-01187

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DONALD KOGER,
APPELLANT

V.

AUSTIN ADCOCK,
APPELLEE

BRIEF OF APPELLEE, AUSTIN ADCOCK

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

(ORAL ARGUMENT NOT REQUESTED)

Submitted by:

CHRISTOPHER R. SHAW, [redacted]
LAURA L. HILL, [redacted]
WATKINS LUDLAM WINTER & STENNIS, P.A.
190 East Capitol Street, Suite 800 (39201)
Post Office Box 427
Jackson, Mississippi 39205-0427
Telephone: 601) 949-4900
Facsimile: (601) 949-4804

Attorneys for Appellee

IN THE SUPREME COURT OF MISSISSIPPI

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DONALD KOGER **APPELLANT**

VERSUS

AUSTIN ADCOCK **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. Donald Koger, Plaintiff/Appellant
2. Austin Adcock, Defendant/Appellee
3. Don H. Evans, attorney for Plaintiff/Appellant
4. Christopher R. Shaw, Watkins Ludlam Winter & Stennis, P.A., attorney for Defendant/Appellee
5. Laura L. Hill, Watkins Ludlam Winter & Stennis, P.A., attorney for Defendant/Appellee.

Respectfully submitted, this the 1st day of April, 2009.

CHRISTOPHER R. SHAW

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STATEMENT AS TO ORAL ARGUMENT

Appellee does not request oral argument in this appeal. The jury's verdict in favor of Appellee, Austin Adcock, is supported by substantial evidence and the Circuit Court did not commit any errors of law that would warrant reversal. Nor does this appeal raise any complicated issues of fact or unsettled issues of law. Accordingly, Appellee submits that oral argument is not necessary to the determination of the issues presented by this appeal.

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-01187

DONALD KOGER — APPELLANT

VERSUS

AUSTIN ADCOCK — APPELLEE

BRIEF OF APPELLEE

I. STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS

On January 27, 2004, Plaintiff/Appellant Donald Koger ("Appellant" or "Koger") filed the Complaint that commenced this action in the Circuit Court of Hinds County, Mississippi against Austin Adcock ("Adcock"). The Complaint charges Adcock with negligence and gross negligence in connection with an automobile accident that occurred on or about June 3, 2002. [R. Vol. 1 p. 4-6].

At trial, Koger attempted to prove that Adcock negligently caused the accident at issue by allegedly running the red light at the intersection of Terry Road and Highway 80. Koger claimed that, as a result of the accident, he suffered serious injuries, including a back injury that caused pain to radiate down his leg. He also claimed that the accident caused him to incur substantial medical expenses and lost wages, and that he intended to have surgery to alleviate his back injury at some unknown point in the future.

Adcock, however, testified at trial that the light at the subject intersection was yellow the last time he saw it. Adcock also introduced substantial evidence that (1) Koger suffered from a pre-existing back condition known as degenerative disc disease prior to and at the time of the

accident; (2) Koger had previously been rejected from the military due to back problems; (3) At or near the time of the accident, Koger told Adcock's father that he had suffered from back problems for years which had "nothing to do with this accident;" and (4) Koger also told Adcock's father, and a third party witness, that he was not injured as a result of the accident.

After two days of trial, the jury returned a defense verdict in favor of Adcock on October 9, 2007. The Circuit Court entered final judgment on the jury verdict on October 30, 2007. [R. Vol. 1, p. 94]. Thereafter, Koger moved the Circuit Court for a judgment notwithstanding the verdict or, alternatively, a new trial or an additur on November 2, 2007. [R. Vols. 1-2, p. 95-156]. Koger's post-trial motions were then fully-briefed and argued by counsel before the Honorable Circuit Judge Winston Kidd on February 11, 2008. On June 5, 2008, the Circuit Court entered its Order denying Koger's post-trial motions. [R. Vol. 2, p. 197]. Koger then filed his notice of this appeal on July 2, 2008. [R. Vol. 2, p. 200].

B. STATEMENT OF FACTS

During the trial of this matter, the following evidence was presented:

On June 3, 2002, Donald Koger was traveling North on Terry Road when he collided with a truck that was heading West on Highway 80. [R. Vol. 3, p. 53] [R.E. 1]. The truck was being driven by Austin Adcock. While the force of the collision caused Adcock's truck to flip, neither Adcock nor his passenger, Brad Blackwell, were injured as a result of the accident. Furthermore, despite Plaintiff's claims that the light on Highway 80 was undisputedly red at the time of the accident, Adcock provided sworn testimony at trial that the light was actually yellow the last time he saw it. [R. Vol. 3, p. 64-65] [R.E. 2].

Following the accident, Adcock's father, Eugene Adcock, arrived at the scene. Adcock testified that he asked Koger whether he was okay three separate times, and each time Koger

replied that he believed he was fine. [R. Vol. 3, p. 80; R. Vol. 4, p. 174-175] [R.E. 3]. This conversation was overheard by Brad Blackwell, who also testified that Koger stated two or three times that he was okay following the accident. [R. Vol. 3, p. 90] [R.E. 4]. In addition, third party witness Brenda McCabe also testified that she asked Koger whether he was alright, and Koger replied that he did not believe he was hurt. [R. Vol. 3, p. 75] [R.E. 5].

Notably, Koger's wife, Patricia Koger, underwent back surgery approximately one to two weeks prior to the subject accident; however, following the collision, neither she nor Koger rode to the hospital in the ambulance that had been called to the scene. [R. Vol. 3, p. 81; 121-22] [R.E. 6]. Moreover, despite her serious prior back injuries, Mrs. Koger has not asserted any claims related to back injuries resulting from the June 3, 2002 collision. [R.E. 6].

Evidence was also produced which revealed that Donald Koger suffers from a back condition known as a degenerative disc disease which existed prior to – and was not caused by – the accident on June 3, 2002. [R. Vol. 3, p. 125-126; R. Vol. 4, p. 162] [R.E. 7]. Koger's own medical expert, Dr. Jeffrey Summers, actually indicated what he determined were signs of pre-existing degeneration in Koger's spine during Summers' video deposition, which was presented to the jury at trial. [R. Vol. 1, p. 45-46] [R.E. 8]; [R. Vol. 4, p. 163] [R.E. 9]. And despite Koger's contention that Dr. Summers steadfastly opined that Koger's alleged back and leg pain were caused by the June 3, 2002 accident, Dr. Summers also testified that such an opinion was only based on ***the assumption*** that Koger was pain free prior to the accident. [R. Vol. 1, p. 62] [R.E. 10]. Yet Eugene Adcock testified that Koger told him, at the scene of the accident, that he had suffered from back problems for years which had nothing to do with the wreck. [R. Vol. 3, p. 80] [R.E. 11]. Moreover, additional evidence was produced showing Donald Koger had been

rejected from joining the military in the 1960's due to problems with his back. [R. Vol. 3, p. 123; 146] [R.E. 12].

The only physical injuries for which Donald Koger sought an award of damages at trial were back injuries, which he contends caused pain to radiate in his back and down his leg.

Following the presentation of evidence at trial, the Court conducted a thorough jury instruction conference wherein it considered all instructions offered by counsel for each party. [R. Vol. 4, p. 179-190] [R.E. 13]. Without objection from Koger's counsel, the Court refused a peremptory instruction in favor of Koger. [R.E. 13]. Thereafter, the Court fully and properly instructed the jury as to all elements of Mississippi negligence law applicable to this case. [R. Vol. 4, p. 191-207] [R.E. 14].

II. SUMMARY OF THE ARGUMENT

The final judgment, based upon the verdict of the Hinds County jury, is supported by substantial evidence and should be affirmed. Koger's appeal wholly ignores that the Plaintiff, not the Defendant, bears the burden of proof and persuasion in a negligence action. In particular, a Plaintiff must prove each of the four elements of negligence – duty, breach, causation, and damages – by a preponderance of the evidence. Notably, it is ***the sole province of the jury*** to determine whether a Plaintiff has met that burden.

Over the course of trial, Adcock not only testified that the light was yellow the last time he saw it – thereby rebutting Koger's evidence of breach of duty – he also introduced substantial evidence to rebut Koger's proof that his alleged injuries were caused by the June 3, 2002 automobile accident. Such conflicting evidence clearly created a jury question as to the elements of negligence in this case, and the jury was entitled to draw its own reasonable inferences from the evidence and determine for itself whether Adcock caused the June 3, 2002 collision and

whether that accident caused or contributed to Koger's claims of back pain. Thus, the Circuit Court properly denied Koger's post-trial Motion for Judgment Notwithstanding the Verdict or, Alternatively, New Trial or, Alternatively, Additur.

Furthermore, the jury was properly instructed. Jury Instruction No. 16 was neither misleading nor otherwise defective. It was supported by substantial evidence related to Koger's preexisting condition of degenerative disc disease, and the jury was properly instructed as a whole. Moreover, as conflicting evidence was presented on the various elements of Koger's negligence claim, Koger was not entitled to a peremptory instruction at the close of trial and the Court properly denied his request for such an instruction.

The final judgment, which was rendered after two (2) days of trial and based upon a sound and supported jury verdict, should be affirmed.

III. ARGUMENT

A. STANDARD OF REVIEW

The role of a reviewing court is to determine whether there is an evidentiary basis for the jury's verdict. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946). A jury's verdict should be overturned "only when there is a complete absence of probative facts to support the conclusion reached ...." *Id.* The court is permitted to intercede only if the verdict is against the overwhelming weight of evidence or is a result of bias, passion, and prejudice. *Southwest Miss. Reg'l Med. Ctr. v. Lawrence, et al.*, 684 So. 2d 1257 (Miss. 1996). In *Southwest, supra*, this Court, citing well-established authorities, emphasized the great deference given to jury verdicts.

> This Court will not set aside a jury verdict unless it is against the overwhelming weight of the evidence and credible testimony. *Adams v. Green*, 474 So. 2d 577, 581 (Miss. 1985). The jury is the judge of the weight of the evidence and the credibility of the witnesses. *Jackson v. Griffin*, 390 So. 2d 287, 289 (Miss. 1980).

> Because of the jury verdict in favor of the appellee [Lawrence], this Court resolves all conflicts in [**32] the evidence in [her] favor. This Court also draws in the appellee's favor all reasonable inferences which flow from the testimony given. *City of Jackson v. Locklar*, 431 So. 2d 475, 477 (Miss. 1983). This court must assume that the jury drew every permissible inference from the evidence offered in favor of the appellee. *Burnham v. Tabb,* 508 So. 2d 1072, 1077 (Miss. 1987).

Id. at 1267. Thus, "in determining whether a jury verdict is against the overwhelming weight of the evidence, the Appellate Court ***must accept as true the evidence which supports the verdict*** and ***will reverse only when it is convinced that the Circuit Court has abused its discretion*** in failing to grant a new trial." *Herrington v. Spell*, 692 So.2d 93, 103 (Miss. 1997) (emphasis added).

The Court also views all evidence in the light most favorable to the jury verdict when reviewing the denial of a motion for judgment notwithstanding the verdict. *Johnson v. St. Dominc's – Jackson Mem'l Hosp.*, 697 So.2d 20, 22 (Miss. 2007). As a motion for JNOV challenges the legal sufficiency of the evidence, "this Court will affirm the denial of a JNOV if there is substantial evidence to support the jury verdict." *Adcock v. Miss. Transp. Comm'n*, 981 So.2d 942, 948 (Miss. 2008) (citing *Johnson*, 697 So.2d at 22)). "'Substantial evidence' is information of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions." *Id.* at 948-49 (internal citations omitted). Accordingly, the denial of a JNOV will only be reversed if, "the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated." *United States Fid. & Guar. Co. of Miss. v. Martin*, 998 So.2d 956, 964 (Miss. 2008) (citing *White v. Stewman*, 932 So.2d 27, 32) (Miss. 2006).

The record in this case is replete with evidence that rebuts the evidence proffered by Plaintiff and supports the jury verdict. For instance, there is substantial evidence that Koger had pre-existing back problems which had nothing to do with the subject accident. Additionally, multiple witnesses testified that Koger repeatedly stated that he was fine after the accident, and it is undisputed that he refused to ride to the hospital in the ambulance that was provided at the scene. Such evidence is more than sufficient to support a finding that Koger failed to carry his burden of proof on the elements of causation and/or damages – ***two*** of the required elements of his negligence claim.

This is simply not a case where the elements of Koger's claims were so indisputable, or Adcock's evidence so deficient, as to obviate the need for a trier of fact. Consequently, it would be an undue invasion of the jury's historic function for this Court to weigh the conflicting evidence, judge the credibility of witnesses, and arrive at a conclusion opposite from the one reached by the Hinds County Circuit Court jury and approved by the learned Circuit Judge. *Lavender v. Kurn*, 327 U.S. 645, 652-653 (1946).

B. THE CIRCUIT COURT PROPERLY DENIED KOGER'S MOTIONS FOR JNOV, NEW TRIAL, OR, ALTERNATIVELY, ADDITUR.

1. The Jury Verdict in Favor of Austin Adcock is Supported by Substantial Evidence.

In his brief, Koger contends that the Circuit Court wrongly denied his motion for judgment notwithstanding the verdict because he allegedly "proved by a preponderance of the evidence all of the elements of a negligence action," and because, "the evidence supporting the verdict for Adcock fails the legal sufficiency test." Br. of Appellant at 9, 33. These arguments are unfounded.

It is well-established law in Mississippi that a plaintiff in a civil action carries the burden

of proof and must prove his case by a preponderance of the evidence. *See Amiker v. Brakefield*, 473 So.2d 939 (Miss. 1985). The term "burden of proof" means the burden of production as well as the burden of persuasion. In a negligence action in particular, the plaintiff must prove four (4) basic elements: 1) duty, 2) breach of duty, 3) causation, and 4) damages. *Entrican v. Ming*, 962 So.2d 28, 32 (Miss. 2007). To prove causation, the plaintiff must establish through admissible evidence the causal connection between the alleged liability and the injuries complained of. *Id.* Notably, however, it is the sole province of the jury to determine whether a plaintiff has met his burden of proof with respect to each of these elements, and the failure to prove any element justifies a verdict in favor of the defendant. *Id.* Thus, even if a plaintiff can establish fault on the part of a defendant, if the jury determines that fault was not a substantial factor in causing or contributing to the injuries complained of, then a defense verdict – as in this case – must be rendered. *Id.*

Koger spends eleven (11) pages of his brief arguing that all of the evidence presented indicates that Adcock ran the red light on June 3, 2002 and caused the wreck. To begin, this argument is false. Adcock testified at trial that the traffic light at the intersection of Highway 80 West and Terry Road was yellow the last time he saw it before the accident. [R.E. 2] Furthermore, photographs and testimonial evidence were presented which indicated that Koger's vehicle actually hit Adcock's vehicle at the time of the wreck. [R.E. 1] This evidence, and the veracity, truthfulness, and accuracy of Adcock's testimony, were considered and weighed by the jury in connection with all other evidence presented on the issues of duty and breach of duty. As reasonable minds can differ on this issue, the question was properly submitted to the jury for resolution and Koger's Motion for JNOV was properly denied.

Moreover, even assuming for the sake of argument that Adcock ran the red light as Koger

contends, that fact alone does not warrant the granting of a judgment notwithstanding the verdict in this case. Koger still failed to satisfy his burden of proof and persuasion as to causation and damages, as Adcock presented substantial evidence to rebut Koger's proof on each of those elements. This is evidenced by the jury's verdict in favor of Adcock.

First, Eugene Adcock testified as a fact witness at the trial of this matter and stated that he spoke with Koger at or near the time of the accident. Mr. Adcock further testified that he asked Koger three different times whether he was hurt, and Koger advised that he was not injured.[1] [R.E. 3] This conversation was overheard and substantiated by another fact witness, Brad Blackwell, who testified that he heard Koger state that he was okay two or three times after the accident. [R.E. 4] A third fact witness, Brenda McCabe, likewise testified that she asked Koger whether he was ok and he responded that he did not believe he was injured. [R.E. 5] Koger also admitted at trial that he refused to ride to the hospital in the ambulance that had been called to the scene of the accident, and it is also undisputed that Koger's wife – who testified that she had undergone back surgery just weeks before the June 3, 2002 automobile accident – did not suffer any injuries as a result of that accident. [R.E. 6]

All of this evidence is directly relevant to the question of whether Koger was in fact injured as a result of the subject collision. And while Koger contends that the evidence and testimony presented by Adcock is biased or otherwise unreliable, Mississippi law is clear that the jury is the sole judge of witness credibility, and each member of the jury is free to assign as much weight to each piece of evidence as he or she deems necessary. *See Jackson v. Griffin*, 390 So.2d 287, 289 (Miss. 1980).

Adcock also produced substantial evidence related to Koger's pre-existing back

[1] This testimony falls outside of the hearsay rule. *See* Miss. R. Evid. 801(d)(2).

condition, degenerative disc disease.[2] Koger admits that he has this condition, and Koger's own medical expert, Dr. Jeffrey Summers, indicated what he determined were signs of pre-existing degeneration in Koger's spine during his video deposition as follows:

> Q. Can you kind of point that out to the jury where we're talking about?
>
> A. Actually L5-S1 foramen, this picture is not going to show that foramen very well. It's the very last one before your sacrum, which is part of your tailbone. The L5-S1 foramen is the hole where the L5 nerve comes out of, and that would be at this level right here. And in his case he has degenerative changes and some what they call stenosis which is tightness of the hole where that nerve comes out. He also had some evidence of degenerative changes, milder at these two levels with some tears in the disc.
>
> Q. Why don't you just mark them along in there.
>
> A. This is the annulus, the posterior annulus, the back of the disc right there. This hole here would be where he has tightness. He's also got what's called a degenerative spondylolisthesis which is—the back of the bone here where the canal is connected to the front part of the bone here, the vertebra where the discs are and there is a ring. The back part of the spine forms a ring that you really can't see in this angle, and part of that ring is cracked, but that was felt to be degenerative in nature.

[R.E. 8] (emphasis added). This deposition testimony was presented to the jury at trial.

Moreover, despite Koger's repeated contention that Dr. Summers was the only doctor to testify and that he steadfastly opined that Koger's alleged back and leg pain were caused by the June 3, 2002 accident, ***Dr. Summers also testified that his opinion was based on an assumption*** as follows:

> Q: Sure. Dr. Summers, I reviewed your medical records and your treatment of the plaintiff in this case, and I believe you testified that it's your opinion based upon a reasonable degree of medical certainty that the aggravation or exacerbation of the condition of the plaintiff was caused by the accident, is that right?
>
> A. Yes, sir.

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[2] It is worth noting that the only injuries Koger contends to have suffered as a result of the wreck are back injuries, which he alleges caused pain to radiate in his back and down his leg.

Q: All right. What do you base that on?

A: On the **assumption** that he was pain free before the accident and that he had the symptoms he presented to me after the accident.

[R.E. 10] (emphasis added).

As an expert, Summers was not entitled to any greater assignment of credibility than any other witness and the Court properly instructed the jury in this case that the questions of weight and credibility given to any witness testimony rest solely with them. Furthermore, at trial Adcock presented evidence that directly rebuts the "assumption" underlying Dr. Summers' opinion. To begin, Eugene Adcock testified that Koger told him, at the scene of the accident, that he had suffered from back problems for years which had nothing to do with the wreck. [R.E. 11] Additionally, Koger admitted that he had been rejected from joining the military ***in the 1960's*** due to what he understood were problems with his back. [R.E. 12] The jury was entitled to weigh these additional pieces of evidence against the testimony of Dr. Summers and determine, for themselves, how much credibility to assign to each piece of evidence, and what if any effect they had on Koger's proof of causation and damages.

On the current record in this case, Koger cannot reasonably contend that "there is a complete absence of probative facts to support the conclusion reached." *See Lavendar v. Kurn*, 327 U.S. at 653. Accepting all of the facts presented by Adcock as true and drawing all reasonable inferences from those facts in his favor, this is simply not a case where the elements of Koger's claim are so clear, or Adcock's evidence so deficient, that the necessity of a trier of fact has been obviated. *See Martin*, 998 So.2d at 964. To the contrary, Adcock produced sufficient evidence to create jury questions on the issues of (1) whether Adcock caused the subject collision, and (2) whether that collision caused the injuries Koger complained of at trial.

As a result, the Circuit Court properly denied Koger's Motion for JNOV and the jury's verdict must not be disturbed.

2. The Jury Verdict in Favor of Austin Adcock is Neither Contrary to the Overwhelming Weight of the Evidence Nor the Result of Bias, Passion, or Prejudice.

These same facts and evidence also demonstrate that the jury's verdict in favor of Austin Adcock was not contrary to the overwhelming weight of the evidence. Indeed, several key pieces of evidence were introduced that were relevant to the issues of breach and causation, including, but not limited to: 1) Adcock's testimony that the light was yellow the last time he saw it; 2) evidence of Koger's pre-existing back condition, 3) Koger's prior rejection from the military for back problems, 4) Koger's admission to Eugene Adcock on the day of the accident that he had suffered for back problems for years that had nothing to do with the accident, and 5) Koger's statements to Eugene Adcock and Brenda McCabe that he was not injured after the accident.

Reasonable minds – and reasonable jurors – could differ on what effect, if any, these factors had on Koger's ability to prove his negligence claim by a preponderance of the evidence. But drawing all reasonable inferences from this evidence in Adcock's favor and assuming that the jury also drew every such permissible inference, as this Court must, the jury's defense verdict in this case was not against the overwhelming weight of the evidence. The Circuit Court therefore did not abuse its discretion in failing to grant a new trial on the issues of liability or damages.

Nonetheless, Koger contends, "the jury obviously departed from its oath when it found in favor of Austin Adcock." Br. of Appellant at 42. However, there is no evidence which would show or tend to show that the jury failed to properly consider all of the evidence and testimony

presented, nor is there any evidence to support the claim or contention that the jury misunderstood or ignored the instructions given by the Court. Koger likewise has failed to produce any evidence whatsoever, or point to any particular incident in the record, that would have caused bias, passion or prejudice on the part of the jury in this case. Instead, he baldly asserts that, "If the jury was not confused by Jury Instruction No. 16,[3] then there is no question that the verdict was the result of bias, passion, and prejudice." Br. of Appellant at 37. This assertion, without more, is insufficient to justify reversal of the jury verdict in this case. *See Kent v. Baptist Mem'l Hosp. – North Miss., Inc.*, 853 So.2d 873, 882 (Miss. App. 2003) (finding Plaintiff's claims that verdict was result of bias, passion, and prejudice where Plaintiff produced no evidence of bias and pointed to no particular incident in record that would have caused such bias or prejudice on part of jury). The Circuit Court's denial of Koger's Motion for a New Trial should therefore be affirmed.

3. Koger is Not Entitled to an Additur.

The Mississippi statute governing conditions of additurs expressly provides:

> The supreme court or any other court of record in a case **in which money damages were awarded** may overrule a motion for new trial or affirm on direct or cross appeal, upon condition of additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence.

Miss. Code Ann. § 11-1-55 (emphasis added).

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[3] Notably, Koger presents no evidence demonstrating that the jury was in fact confused by Jury Instruction No. 16. As discussed in detail in Section C, *infra*, Jury Instruction No. 16 was not misleading, it was supported by substantial evidence presented at trial, and it was therefore properly given in this case.

In this case, the Circuit Court properly denied Koger's request for an additur because Koger was not awarded any damages at trial; there was nothing for the Court to "add to," as no judgment was rendered for Koger. When a jury awards a verdict of zero damages, that award is tantamount to a finding that the plaintiff sustained no damages. *See Patterson v. Liberty Assocs., L.P.*, 910 So.2d 1014, 1021 (Miss. 2004); *Knight v. Brooks*, 881 So.2d 294, 297 (Miss. App. 2004). It cannot be defined as an inadequate award of damages as it is no award at all. Were the Court to order an additur in this case, therefore, it would essentially be reversing the jury's verdict in favor of Austin Adcock and entering its own verdict.

For all of the reasons previously stated, the jury verdict in this case was neither contrary to the overwhelming weight of the evidence nor the result of bias, passion, or prejudice, and it therefore should not be disturbed on appeal. More than sufficient evidence was placed before the jury to justify its finding that Adcock was not liable to Koger for the alleged back injuries he complained of at trial. Additionally, Koger has produced no evidence whatsoever to support his claims that the jury's verdict was the product of bias, passion, or prejudice. Accordingly, Koger has failed to meet the standard necessary to justify the imposition of an additur in this case. The Circuit Court's denial of Koger's Motion for Additur should therefore be affirmed.

C. THE CIRCUIT COURT PROPERLY INSTRUCTED THE JURY AS TO KOGER'S PRE-EXISTING CONDITION.

The trial court spent a substantial amount of time considering each jury instruction submitted to it, hearing argument of counsel, and considering its own modifications to the proposed instructions. [R.E. 13] After careful consideration, Jury Instruction No. 16 was granted with modification by the Court. [R.E. 14]

Under settled Mississippi law, "the trial court enjoys considerable discretion regarding the form and substance of jury instructions." *Higgins v. State*, 725 So.2d 220, 223 (Miss. 1998); *Splain v. Hines*, 609 So.2d 1234, 1239 (Miss. 1992). "[T]he Court's primary concern on appeal is that the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it." *Young v. Guild*, 2008 WL 4740038, *4 (Miss. Oct. 30, 2008) (citing *Cohen v. State*, 732 So.2d 867, 872 (Miss. 1998)). Thus, "defects in specific instructions do not require reversal where all instructions taken as a whole fairly – although not perfectly – announce the primary rules of law." *O'Flynn v. Owens Corning Fiberglass*, 759 So.2d 526, 531 (Miss. 2000); *Burton by Bradford v. Burnett*, 615 So.2d 580, 583 (Miss. 1993).

"When analyzing the grant or refusal of a jury instruction, two questions should be asked: Does the instruction contain a correct statement of law and is the instruction warranted by the evidence?" *Young*, 2008 WL 4740038 at *4 (citing *Beverly Enters. v. Reed*, 961 So.2d 40, 43-44 (Miss. 2007)). Thus, "a party is entitled to a jury instruction so long as it concerns a genuine issue of material fact and there is credible evidence to support the instruction." *Id.* (citing *Mariner Health Care, Inc. v. Estate of Edwards*, 964 So.2d 1138, 1156 (Miss. 2007)); *see also DeLaughter v. Lawrence County Hosp.*, 601 So. 2d 818, 824 (Miss. 1992):

> ***The refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is proper, only if*** the trial court – and this Court on appeal – can say, taking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inference which may be drawn from the evidence in favor of the requesting party, that ***no hypothetical, reasonable jury could find the facts in accordance with the theory of the requested instruction.***

(citing *Hill v. Dunaway*, 487 So.2d 807, 809 (Miss. 1986)) (emphasis added).

These same standards apply to jury instructions concerning pre-existing conditions. *See Blake v. Clein*, 903 So.2d 710, 727 (Miss. 2005) (upholding jury instructions involving pre-

existing conditions when supported by evidence). The Supreme Court has stated that before a jury may be instructed upon a specific element of damages, there must be some testimony to support that element. *Lewis Grocer Co. v. Williamson*, 436 So.2d 1378, 1380 (Miss. 1983). Nonetheless the Court has also held, in the context of personal injury cases, that when such instructions are given absent evidence to support the pre-existing condition, the error is harmless and does not, in and of itself, require reversal. *Jones v. Hatchett*, 504 So.2d 198, 203 (Miss. 1987).

Applying these standards to the facts of this case, Jury Instruction No. 16 was properly given. That instruction read as follows:

> A pre-existing condition is a condition that may have caused or contributed to the injury claimed by Donald Koger, but is also a condition from which Donald Koger suffered before his motor vehicle accident with Austin Adcock. Therefore, Austin Adcock is not responsible for the injuries of Donald Koger which are the sole proximate result of his pre-existing condition.

[R.E. 14, p. 205] Koger complains that this instruction is peremptory, misleading, and a misstatement of both law and fact. All of these arguments are without merit.

To begin with, the facts of this case clearly reveal – and Koger admits in his brief – that he does in fact have a pre-existing back condition known as degenerative disc disease. *See* Br. of Appellant at 43. This fact is not disputed. Instead, Koger merely alleges that Jury Instruction No. 16 was "peremptory" because, "Dr. Summers, the only doctor who testified in this trial," opined that Koger's back and leg pain were caused by the subject accident. Br. of Appellant at 43. But Dr. Summers' testimony is inconsequential to the question of whether Jury Instruction No. 16 is peremptory. Where an instruction is predicated on the jury first finding something on its own from the facts, the instruction is not peremptory. *Paine v. Dimijian*, 29 So.2d 326, 328 (Miss. 1947).

In no way does Jury Instruction No. 16, "direct[] that the jury return a verdict for Adcock if they found Koger suffered from any pre-existing condition," as Koger contends. Explicit in the language of the instruction are the words, "Therefore, Austin Adcock is not responsible for the injuries of Donald Koger ***which are the sole proximate result*** of his pre-existing condition." (Emphasis added). Thus, the jury was still left to determine one of the most important issues of the trial – whether the June 3, 2002 accident proximately caused and/or contributed to the back injuries that Koger alleged to have suffered at trial. The jury was also separately instructed as to the definition of "proximate cause," and Koger makes no complaints as to that or any other instruction. Because Jury Instruction No. 16 is clearly predicated on the jury making its own determination as to proximate cause, the instruction simply is not peremptory in nature.

Nor is Jury Instruction No. 16 misleading or contrary to the facts and the law of this case. Koger admits in his brief that he has degenerative disc disease. His treating physician, Dr. Summers, also admitted that Koger has degenerative disc disease. [R.E. 8] In addition, Adcock presented evidence at trial indicating that Koger was rejected from the military in the 1960's due to back trouble. [R.E. 12] Moreover, Eugene Adcock testified at trial that Koger told him – at the scene of the accident – that he had suffered from back problems for years that had nothing to do with the accident in question. [R.E. 11] Thus, ample evidence was presented at trial to support a pre-existing condition instruction.

This fact is not affected by Koger's attempted "pain" versus "injury" distinction. While Dr. Summers may have testified that Koger's back and leg "pain" were caused by the June 3, 2002 accident, Summers also testified that his conclusion was based on the ***assumption*** that Koger was pain free prior to the accident. [R.E. 10] It bears repeating that "the jury, as is their province, may reject the expert's testimony just as they might any other witness." *Blake v. Clein*,

903 So.2d at 729. It is also within the province of the jury, "to draw reasonable inferences from the evidence based on their experience and common sense." *Readus v. State*, 997 So.2d 941, 944 (Miss. 2008); *Fleming v. Floyd*, 969 So. 2d 868, 878 (Miss. 2007).[4] Such reasonable inferences include a finding in this case, based on Eugene Adcock's testimony and all other evidence presented concerning Koger's pre-existing back conditions, that the alleged back injuries and pain Koger claimed to suffer at trial were not the proximate result of the subject collision.

Jury Instruction No. 16 also accurately reflects the law in Mississippi. A defendant may only be held liable for those injuries the jury determines are proximately caused by that defendant's allegedly negligent act. *Entrican*, 962 So.2d at 32. By their very definition, damages or injuries that are ***pre-existing*** are not the result of a defendant's negligence, and a defendant cannot be held liable under Mississippi law for such pre-existing damages. Jury Instruction No. 16 therefore correctly recites Mississippi law by providing that, "Austin Adcock is not responsible for the injuries of Donald Koger which are the sole proximate result of his pre-existing conditions." The instruction also correctly defines a pre-existing condition as, "a condition from which Donald Koger suffered before his motor vehicle accident with Austin Adcock."

Therefore, applying the two questions enunciated by this Court in *Young*, *supra*, to Jury Instruction No. 16, the clear answer on both counts is yes: Does the instruction contain a correct statement of law? Yes. Is the instruction warranted by the evidence? Yes. *See Young*, 2008 WL 4740038 at *4 (citing *Beverly Enters. v. Reed*, 961 So.2d 40, 43-44 (Miss. 2007)).

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[4] Notably, the trial court properly instructed the jury in this case of both of these established rules of law. [R.E. 14, p. 193-95; 199].

Moreover, Koger does not dispute that the jury was accurately instructed on his negligence claim as a whole, and he makes no other assignments of error concerning jury instructions in this case. Accordingly, Adcock was entitled to Jury Instruction No. 16 and the trial court's decision to grant that instruction must be affirmed.

D. KOGER IS NOT ENTITLED TO A PEREMPTORY INSTRUCTION.

In his Brief, Koger challenges – for the first time – the Circuit Court's refusal of a proposed peremptory instruction in Koger's favor. As a preliminary matter, Adcock respectfully submits that this issue is not properly raised in this appeal because Koger (1) never objected to the Court's refusal of the instruction at trial, and (2) failed to raise the alleged error in his post-trial motions for JNOV or new trial.

Mississippi law is clear that where "an issue is never presented to the trial court by way of objection to the jury instructions, or otherwise," and where an alleged error is not asserted in a party's motion for judgment notwithstanding the verdict, that party "is barred from presenting [the] issue for the first time on appeal." *Kent*, 853 So.2d at 881-82 (Miss. App. 2003) (citing *Triplett v. City of Vicksburg*, 758 So.2d 399, 401 (Miss. 2000)); *see also Ducker v. Moore*, 680 So.2d 808, 810 (Miss. 1996) (In the absence of a contemporaneous objection at trial, the Mississippi Supreme Court will not consider an allegedly erroneous instruction on appeal). Since Koger never objected to the Circuit Court's refusal of his proffered peremptory instruction at the jury instruction conference, [R.E. 13, p. 179], and since he likewise did not challenge the refusal of that instruction in his post-trial motions, this issue should not be considered by this Court on appeal.

Nonetheless, based upon the facts and evidence presented at trial, Koger was not entitled to a peremptory instruction in this matter and the Circuit Court properly denied his request for

same. Where sufficient evidence exists to create a jury question ***as to any of the elements of a Plaintiff's claim***, a peremptory instruction should not be granted. *Tentoni v. Slayden*, 968 So.2d 431, 436 (Miss. 2007) (citing *Windmon v. Marshall*, 926 So.2d 867, 872 (Miss. 2006) (emphasis added). Moreover, in reviewing a trial court's refusal to grant a peremptory instruction, this Court "[gives] the non-moving party the benefit of all reasonable inferences which may be drawn from the evidence." *Tentoni*, 968 So. 2d at 436.

In his brief, Koger contends he was entitled to a peremptory instruction because, "there was a tremendous amount of evidence against Adcock, proving that he did in fact run the red light." Br. of Appellant at 47. But, as previously stated, Adcock testified under oath at trial that the light was yellow the last time he saw it. [R.E. 2] This fact in and of itself creates a jury question sufficient to support the Court's refusal of a peremptory instruction for Koger. Nonetheless, "[i]t bears repeating that in a negligence case the Plaintiff has the burden to prove the defendant breached a duty ***causing the injury***." *Shields v. Easterling*, 676 So.2d 293, 295 (Miss. 1996) (affirming trial court's denial of peremptory instruction for Plaintiff). In this negligence case, as discussed in detail in Sections A and B, *supra*, Adcock presented more than enough evidence to create a jury question on the elements of both causation and damages. Thus, the Circuit Court properly denied Koger's requested peremptory instruction and submitted this case to the jury. The ruling of the trial court should be affirmed.

IV. CONCLUSION

The final judgment, based upon the verdict of the Hinds County jury in favor of Austin Adcock, is supported by substantial evidence and should be affirmed. Over the course of trial, Adcock not only testified that the light was yellow the last time he saw it – thereby rebutting Koger's evidence of breach of duty – he also introduced substantial evidence to rebut Koger's

proof that his alleged injuries were caused by the June 3, 2002 automobile accident. Such conflicting evidence clearly created a jury question as to the elements of negligence in this case, and the jury was entitled to draw its own reasonable inferences from the evidence and determine for itself whether Adcock caused the June 3, 2002 collision and whether that accident caused or contributed to Koger's claims of back pain. Accordingly, the Circuit Court did not err in denying Koger's post-trial Motion for Judgment Notwithstanding the Verdict or, Alternatively, a New Trial or, Alternatively, Additur.

Finally, the jury was properly instructed. The Circuit Court received and considered argument from counsel at the jury instruction conference. Indeed, as a result of that conference, Jury Instruction No. 16 was modified prior to being accepted by the Court. Further, Jury Instruction No. 16 was neither misleading nor defective. It was supported by the uncontested evidence that Donald Koger suffered from the pre-existing condition of degenerative disc disease, and the jury was left to determine whether the accident proximately caused and/or contributed to Koger's alleged injuries. Furthermore, the jury was properly instructed as a whole. Moreover, because conflicting evidence was presented on the various elements of Koger's negligence claim, Koger was not entitled to a peremptory instruction at the close of trial and the Court properly denied his request for such an instruction.

For each of the foregoing reasons, the final judgment, which was rendered after two (2) days of trial and was based upon a properly-supported jury verdict, should be affirmed.

Respectfully submitted, this the 1st day of April, 2009.

AUSTIN ADCOCK

By His Attorneys,
WATKINS LUDLAM WINTER & STENNIS, P.A.

By: _____
CHRISTOPHER R. SHAW

By: _____
LAURA L. HILL

Christopher R. Shaw ([redacted]
Laura L. Hill ([redacted]
WATKINS LUDLAM WINTER & STENNIS, P.A.
190 East Capitol Street, Suite 800 (39201)
Post office Box 427
Jackson, MS 39205
Telephone: (601) 949-4900
Facsimile: (601) 949-4804

CERTIFICATE OF SERVICE

I, Christopher R. Shaw, one of the attorneys for Appellee, do hereby certify that I have this day forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

Don H. Evans, Esq.
Attorney for Appellant
500 East Capitol Street, Suite 2
Jackson, MS 39201

THIS the 1st day of April, 2009.

_____
CHRISTOPHER R. SHAW