Case No. 2008-CA-01187

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DONALD KOGER,
APPELLANT

v.

AUSTIN ADCOCK,
APPELLEE

Appeal from the Circuit Court of the First Judicial District
of Hinds County, Mississippi

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# REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

Submitted by:

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Koger proved by a preponderance of the evidence all four (4) elements of a negligence action, which are duty, breach of duty, causation and injury. *Davis v. Christian Broth. Homes of Jackson, Mississippi, Inc.*, 957 So. 2d 390, 398 (Miss. App. 2007). The evidence presented at trial proved: (1) Adcock had a duty to stop at the red light; (2) Adcock breached that duty by running the red light; (3) Adcock's running the red light was the sole proximate cause of Koger's back injury and leg pain; and (4) Koger suffered a back injury and leg pain, and he incurred medical bills totaling $18,996.66 and lost wages totaling $4,567.64.

In his brief, Adcock argues that "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." Appellee Brief at 2. This argument is misleading and inaccurate. Adcock did testify that the light was yellow the last time that he saw it; however, he also testified that **he could not swear** that he did not run a red light. Adcock's testimony to the same was as follows:

> Q. All right. And I also asked you in that deposition -- Is it your contention at this time that you ran a red light or that Donald Koger ran a red light, and you said -- I don't know?
> A. No, sir. **I can't swear** to either one.

Tr. Transcr. vol. 3, 58:7-11 (Oct. 8-9, 2007).

Also, Adcock testified that he could not deny telling two (2) different individuals that he knew that the light was red when he proceeded through it. His testimony was as follows:

> Q. Did you tell this police officer that you ran a red light?
> A. I don't recall that.
> Q. So you're not saying you didn't, are you?

A. No, sir.
Tr. Transcr. vol. 3, 47:25-48:4 (Oct. 8-9, 2007).

. . .

Q. (By Mr. Evans) Have you ever given a statement where you said the light was red when you went through it?
A. Sir?
Q. Have you ever given a statement where you said, "Yes, ma'am, it changed yellow, I stopped, just as I got to the light, it changed to red and I swerved out across the intersection to try to keep from hitting anyone, maybe I could hit the curb or something to stop it." Did you ever recall saying that?
A. I don't recall.
Q. You deny you said it?
A. No, sir.
Tr. Transcr. vol. 3, 60:20-61:8 (Oct. 8-9, 2007).

At trial, two (2) unbiased witnesses, Officer Melvin Bender and Brenda McCabe, testified that Adcock ran the red light. Officer Bender testified that Adcock told him, at the accident scene, that he had a red light. His testimony was as follows:

Q. So Austin Adcock over here told you he had the red light?
A. Yes.
Tr. Transcr. vol. 3, 35:5-7 (Oct. 8-9, 2007).

Brenda McCabe, the woman who was driving directly behind Adcock, testified as follows regarding the color of Adcock's light:

Q. Now was there any question that when he went through that light his light was red?
A. No, sir.
Tr. Transcr. vol. 3, 68:21-23 (Oct. 8-9, 2007).

In addition to Brenda McCabe testifying that Adcock had run the red light, she also testified that Koger did nothing wrong:

Q. As far as you can tell did you see Donald Koger do anything wrong?
A. No, sir.
Tr. Transcr. vol. 3, 73:12-14 (Oct. 8-9, 2007).

Donald and Patricia Koger's testimony was further evidence that Adcock ran the red light. They both testified that their light was green when they proceeded through the intersection in

question. Tr. Transcr. vol. 3, 110:10-16; 135:21-136:13; 142:20-23 (Oct. 8-9, 2007). If their light was green, then Adcock's light had to be red.

There is absolutely no testimony or evidence in the Record substantiating Adcock's claim that he did not run the red light or his contention that he did not cause the wreck. At trial, Adcock never actually testified that he did not run the red light. Adcock only testified that the light was yellow **the last time he *saw* it**. Tr. Transcr. vol. 3, 47:14-21; 57:20-23; 65:10-12 (Oct. 8-9, 2007). Never once did Adcock testify that the light was yellow when he went through it. Adcock was asked on three (3) different occasions whether his light was yellow **when he *went through* it**. All three times Adcock avoided that specific question by testifying that his light was yellow the last time that he saw it. His testimony to the same was as follows:

Q. So as you were going up to the light it didn't change again to yellow?
A. No, sir. It didn't change again. **It was yellow the last time I *saw* it.**
Q. **So you're saying that you *went under* a yellow light**?
A. **I'm saying the last time I *saw* it, it was yellow**.

Tr. Transcr. vol. 3, 47:14-21 (Oct. 8-9, 2007).

. . .

Q. So your story today is that you had a yellow -- **you *went* on *through* a yellow light**?
A. **The last time I *saw* the light it was yellow**.

Tr. Transcr. vol. 3, 57:20-23 (Oct. 8-9, 2007).

. . .

Q. (By Mr. Martin) **What color was the light the last time you *went through* it**?
A. **The last time I *saw* it was yellow**.

Tr. Transcr. vol. 3, 65:10-12 (Oct. 8-9, 2007).

**Adcock's testimony that the light was yellow the last time that he *saw it* is not testimony that he did not run the red light.** In fact, Adcock testified that he could not swear that he did not run the red light. There is a vast difference between testifying that a light was yellow "the last time you saw it" and testifying that you did not run a red light. Therefore, the only real issue with regard

to the color of Adcock's light, at trial, was whether Adcock was truly unsure of the color of his light or whether he was intentionally misrepresenting to the jury that his light was yellow the last time that he saw it. The fact is, ***noone*, including Adcock, testified that Adcock did not run the red light**. Meanwhile, the testimony of four (4) witnesses proved that he did.

Adcock also claims that "photographs and testimonial evidence were presented which indicated that Koger's vehicle actually hit Adcock's vehicle at the time of the wreck." Appellee Brief at 8. This argument is completely irrelevant because all of the evidence presented at trial proved that Adcock ran the red light. When one party runs a red light, the issue of "who hit who" is immaterial. The party running the red light is at fault.

Adcock further argues that reasonable minds can differ on the issues of duty and breach of duty in this case. He argues that even if Adcock did run the red light, "that fact alone does not warrant the granting of a judgment notwithstanding the verdict in this case." Appellee Brief at 8-9. Koger disagrees. This is not a situation whereby the jury returned a verdict in favor of Koger but awarded him zero (0) dollars in damages. The jury in this case returned a verdict in favor of Adcock. Due to the fact that Adcock could not testify or swear that he did not run the red light and the testimony of four (4) witnesses proved that he did run the red light, reasonable and fairminded jurors in the exercise of fair and impartial judgment could not have arrived at a conclusion that Adcock did not run the red light. However, this jury panel arrived at that conclusion in complete contradiction to the evidence presented. Clearly, they were not reasonable or fairminded.

Regarding Koger's injuries, Adcock argues that Eugene Adcock, Brad Blackwell and Brenda McCabe all testified that Koger stated, on the date of the accident, that he believed that he was okay. For argument sake, even if Koger did tell these witnesses that he believed that he was okay just minutes following the accident in question, that does not mean that Koger's aches and pains did not

worsen as the day passed. Pain from an automobile accident is not always immediately severe. Sometimes it takes a day or two for the pain to really set in to where the injured individual really feels that the pain is severe enough to go to the doctor. These three witnesses only saw Koger for a few minutes following the accident. Koger's doctors, including, but not limited to, Dr. Summers, treated Koger for months and had a better handle on what his injuries actually entailed. Moreover, Koger and his wife testified that he had pain immediately following the accident. Even if the jury did not believe their testimony with regard to that, there was no question that Koger went to the MEA Clinic the day after the accident. Obviously, the pain that he was having had at least set in by then.

Adcock argues that Eugene Adcock asked Koger three times whether he was hurt and that Koger told him that **he was not injured**. However, the Record is full of evidence that Eugene Adcock could not truly recollect what Koger had said to him on the date of accident. Eugene Adcock's memory, at trial, was extremely foggy. Eugene Adcock did testify on more than one occasion that Koger said that he was not hurting; however, he also testified to the contrary:

> Q. But he did tell you his back was hurting but it wasn't from this?
> A. **I believe** he did, yes, sir. **When I think back on it** he commented that he had had some problems but he didn't think this had anything to do with it. **I don't remember** what he said was wrong with his back. **He might have told me** at that time **but I don't remember** it. **It's been four years ago.**

Tr. Transcr. vol. 3, 80:19-81:1 (Oct. 8-9, 2007).

. . .

> Q. But yesterday you said he said his back was hurting but it wasn't affected by this accident.
> A. **I don't remember** if he said his back was hurting. I remember him saying he had back problems but he didn't seem to be injured in this accident. **That's all I remember** on it.

Tr. Transcr. vol. 4, 176:21-177:1 (Oct. 8-9, 2007).

Eugene Adcock actually testified at one point during the trial that he believed that Koger did

tell him that his back was hurting at that time. **He also testified that he *could not remember* what Koger had said**. The fact that Eugene Adcock testified that he could not really remember what Koger had said should have been reason enough for a reasonable and fairminded jury to question his testimony with regards to whether Koger had told him that he had had back pain prior to this accident. On more than one occasion, Eugene Adcock testified that Koger had told him that he was not hurting, which was in complete contradiction to the aforementioned testimony. This should have given the jury reason to question whether Eugene Adcock was being honest in his testimony or whether he was just trying to protect his son.

A reasonable and fairminded jury would not have completely disregarded everything that Dr. Summers testified to and decided to solely go with the testimony of a man who could not keep his story straight and could not clearly recollect what Koger had said regarding his injuries. Eugene Adcock gave four (4) different versions of what he believed he remembered Koger had said. No reasonable and fairminded jury would have chose to solely listen to him.

Adcock further argues that Koger admitted at trial that he refused to ride to the hospital in the ambulance and that it is undisputed that Koger's wife did not suffer any injuries even though she had undergone back surgery just weeks before this accident.

First, Koger's reasoning for choosing not to take the ambulance was completely justified. At trial, Koger testified that, because his wife had just had back surgery two weeks prior to the accident in question, he chose not to ride in the ambulance because he was concerned for her well-being. His testimony to the same was as follows:

> Q. So why didn't you go in the ambulance when it came?
> A. My back was hurting but I felt the seriousness of my wife's condition and that I wanted be with her and make sure that she could get back home and that she was okay. She was the one that had had the surgery, and I was just really concerned about her welfare because she was just shaking like she was going to pass out.

Tr. Transcr. vol. 3, 144:7-15 (Oct. 8-9, 2007).

Second, Koger went on to testify that his wife did not want to be transported by ambulance because an emergency room physician would not know her surgery history. He stated that she wanted to see her own doctor. Tr. Transcr. vol. 4, 158:7-159:11 (Oct. 8-9, 2007). Furthermore, Koger testified that his wife's doctor rescheduled her appointment for the next day. Tr. Transcr. vol. 3, 144:16-22 (Oct. 8-9, 2007). The fact that Koger's wife was not injured in the accident is absolutely irrelevant, as there have been numerous instances when one person in an automobile accident is injured while no one else is. There have been many occasions whereby one individual is killed in an automobile accident, while every other individual involved in that same accident survives **without** even **a scratch**.

Adcock argues that the jury is the sole judge of witness credibility. Koger agrees. However, the appellate courts have the authority to examine the credibility of a jury, by determining whether the jury departed from its oath and its verdict was the result of bias, passion and prejudice. Koger strongly believes that in the case at hand there was bias, passion and prejudice on the part of the jury. Adcock claims that Koger failed to produce evidence that would have caused bias, passion or prejudice on the part of the jury in this case. However, as the Supreme Court of Mississippi held in *Biloxi Elec. Co. v. Thorn*, 264 So. 2d 404, 406 (Miss. 1972), "[g]enerally, . . . the only evidence of curruption, passion, prejudice or bias on the part of the jury **is an inference**, if any, **to be drawn** from contrasting the amount of the verdict with the amount of the damages." (citing *Kincade & Lofton v. Stephens*, 50 So. 2d 587 (Miss. 1951)). See also *Knight v. Brooks*, 881 So. 2d 294, 297 (Miss. App. 2004). In this case, the jury found in favor of Adcock when all of the evidence pointed in Koger's favor. There is no question that this verdict was so against the overwhelming weight of the evidence as the evince bias, passion and prejudice on the part of the jury.

### A. The trial court erred when it denied Koger's Motion for Judgment Notwithstanding the Verdict.

Koger was entitled to a judgement notwithstanding the verdict. In the case at hand, the evidence supporting the verdict for Adcock fails the legal sufficiency test because a reasonable and fairminded jury would not have returned with a verdict in favor of Adcock when all of the evidence pointed in Koger's favor.

The evidence presented at trial clearly showed that Adcock ran the red light. Two (2) unbiased witnesses testified that Adcock's light was red as he proceeded through the intersection. Officer Bender testified that Adcock told him, on the date of the accident, that he had a red light. Brenda McCabe testified that the light was red as Adcock went through it. She testified that she was behind Adcock and could actually see his light. Both Donald and Patricia Koger testified that their light was green as they proceeded through the intersection, which means that Adcock's light had to be red. Adcock could not deny telling two individuals that he had run the red light. Also, he testified that he could not swear that he did not run the red light. Adcock testified that the light was yellow the last time that he saw it. He never testified that he did not run a red light. All of the evidence proved that Adcock ran the red light. Reasonable and fairminded jurors in the exercise of fair and impartial judgment could not have arrived at a conclusion that Adcock did not run the red light. However, this jury panel arrived at that conclusion in complete contradiction to the evidence presented. Clearly, they were not reasonable or fairminded with regards to the issue of liability.

With regard to Koger's back and leg pain, Dr. Summers testified that he could state, to a reasonable degree of medical certainty, that the pain that Koger was experiencing in his leg and back was a direct result of the accident in question. Adcock argues that Dr. Summers' testimony relating Koger's pain to the accident was based on the assumption that Koger was pain free before the

accident and that Eugene Adcock testified that Koger was not pain free before the accident. Once again, Eugene Adcock gave four (4) different versions of what Koger said. Moreover, Eugene Adcock testified that he really could not remember the conversation that he had with Koger at the accident scene. Koger, on the other hand, testified that he had never had pain in his back prior to the accident in question. Koger's wife testified that she had never heard Koger complain of back pain prior to the accident. Adcock did not produce any medical documents where Koger had complained of back or leg pain prior to the accident in question, because no such documents exist. Adcock failed to present any evidence showing that Dr. Summers' opinion was inaccurate. Adcock presented no other physicians to contradict Dr. Summers' testimony. Dr. Summers is a credible witness who's specialties are in anesthesiology and pain management. Dr. Summers has years of experience in the field of pain management. The jury panel totally dismissed all of Dr. Summers' testimony. Likewise, they also dismissed everything that Donald and Patricia Koger testified to. Adcock put on no evidence proving that Koger's injuries were not caused by this accident. Obviously, these jurors were not reasonable or fairminded when they found in favor of Adcock.

Since the facts and inferences pointed so overwhelmingly in favor of Koger that reasonable and fairminded jurors in the exercise of fair and impartial judgment could not have arrived at a contrary verdict, the trial court was required to grant Koger's Motion for Judgment Notwithstanding the Verdict. *Jesco, Inc. v. Whitehead*, 451 So. 2d 706, 713 (Miss. 1984). Therefore, the trial court erred when it denied Koger's Motion.

**B. The trial court erred when it denied Koger's Motion for a New Trial.**

Koger was entitled to a new trial because (1) the verdict was against the overwhelming weight of the evidence; (2) the jury was confused by Jury Instruction No. 16, which was a faulty jury instruction; and (3) the jury departed from its oath and its verdict is the result of bias, passion and

prejudice. Miss. R. Civ. P. 59. Koger hereby incorporates all of the facts, laws and arguments made under sections II and III below to the argument herein. Section II lays out the "overwhelming weight of the evidence" argument in great detail, while section III discusses Jury Instruction No. 16 in great detail.

Allowing this verdict to stand would certainly sanction an unconscionable injustice. For all the reasons stated above and further argued in Koger's brief, Adcock's argument, that the Circuit Court properly denied Koger's post-trial Motion for a New Trial, fails. The weight of the evidence was in Koger's favor. The evidence showed that Adcock's actions were the sole proximate cause of the car wreck and that Koger's injuries were a direct result of Adcock's negligence. Therefore, the trial judge abused his discretion when he denied the Plaintiff's Motion for a New Trial. Because this verdict was so contrary to the overwhelming weight of the evidence, a new trial should be granted in order to prevent unconscionable injustice.

### C. The trial court erred when it denied Koger's Motion for an Additur.

Koger was entitled to an additur. Adcock highlights the words "in which money damages were awarded" in his brief when quoting Miss. Code Ann. § 11-1-55. However, money damages do not have to be awarded in order for this Court to grant an additur. For example, in *Whitten v. Cox*, 799 So. 2d 1, 18 (Miss. 2000), the Supreme Court of Mississippi rendered an award of nominal damages in the amount of $10 in favor of Whitten whom the jury had given $0 to. Also, in *Cortez v. Brown*, 408 So. 2d 464, 465 (Miss. 1981), the jury found for the Plaintiff but assessed her damages at $0. The trial judge granted an additur of $16,000. *Id.* On appeal, the Supreme Court of Mississippi affirmed the circuit court's judgment and held that the jury "failed to give any consideration whatsoever to the [Plaintiff's] testimony as to pain that she suffered or the doctors' testimony that her back surgery was necessitated by the automobile collision even though she did

have a preexisting back injury." *Id.* at 471. The Court also held that "the jury wholly failed to give any consideration whatsoever to the [Plaintiff's] hospital and medical expenses." *Id.* The exact same circumstances apply to this case.

Koger was entitled to an additur. Koger proved, by a preponderance of the evidence, that Adcock's actions were the sole proximate cause of this accident and that his injuries were a direct result of Adcock's negligence. Koger also proved that he incurred $18,996.66 in medical bills and $4,567.64 in lost wages, as a result of this accident. The jury awarded Koger zero dollars. Koger was entitled to at least $23,564.30. That amount, of course, does not include pain and suffering, which he was also entitled to. This verdict was so inadequate as to shock the conscience and to indicate bias, passion and prejudice on the jury's part. This verdict also shows that the jury failed to respond to reason. Therefore, the trial court erred when it denied Koger's Motion for an Additur.

### D. Conclusion

The trial court erred when it denied Koger's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial on Damages Only or, in the Alternative, for a New Trial on Liability and Damages or, in the Alternative, for Additur. Therefore, Koger requests that this court reverse the verdict of the jury and grant a new trial on damages only or grant an entirely new trial on all issues.

## II. THE VERDICT OF THE JURY WAS SO AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE AS TO EVINCE BIAS AND PREJUDICE ON THE PART OF THE JURY, OR WOULD SHOW CONFUSION AND MISUNDERSTANDING OF THE LAW AND FACTS ON THE PART OF THE JURY, AND WOULD RENDER AN UNCONSCIONABLE INJUSTICE TO KOGER.

The facts at hand are similar to those in *Knight*. The Court of Appeals of Mississippi held in *Knight* that the verdict was against the overwhelming weight of the evidence. In *Knight*, the trial

court instructed the jury to find for Knight. They did so but assessed him zero (0) dollars in damages. Knight moved for a new trial on the issue of damages. He argued that "the jury verdict was inadequate, not supported by the evidence and a result of bias, prejudice or passion on the part of the jury." *Knight*, 881 So. 2d at 296. The Court of Appeals agreed and held that the jury verdict was against the overwhelming weight of the evidence. The Court then reversed the verdict and remanded the case to the trial court for a new trial on the issue of damages only.

The Court of Appeals specifically held as follows:

> In the case sub judice, there was actually no award of damages since the jury assessed them at zero dollars. This cannot be viewed as an inadequate award of damages, but instead as no award at all. Knight presented several expert witnesses at trial by way of their depositions, each stating that Knight suffered some injury from the accident. Knight testified that his medical bills total $23,000. Dr. Danielson testified that his bill for services rendered to Knight was $7,560. Dr. Danielson stated that Knight suffered from an aggravation of a pre-existing back condition due to the accident which resulted in surgery. Knight stated that he still continued to experience pain and discomfort at the time of trial, several years after the accident. Upon reviewing the evidence presented at trial in the light most favorable to Brooks, it is clear that Knight suffered some injury from this accident. The jury verdict is, therefore, against the overwhelming weight of the evidence and is reversed. We remand this case to the trial court for a new trial solely on the issue of damages.

*Id.* at 297-298.

The Plaintiff in *Knight* was rear-ended by the Defendant on May 3, 1994. Like Koger, the Plaintiff was not transported by ambulance from the accident scene. Knight had an individual from his place of business come to the accident scene to pick him up. *Id.* at 295. Also, like Koger, Knight did not see a physician until the day following the accident. *Id.* at 295-296. However, at least Koger went to the MEA Clinic the day after the accident for injuries that he received as a result of the automobile accident. Knight, on the other hand, went to his family physician for a complete physical, not for injuries that he had received in the accident. Knight did not even complain about any pain due to the accident on the day following the accident. He waited six months after the

accident to complain about any injuries that he had received due to that accident. In November of 1994, Knight complained to an orthopedic surgeon, Dr. Christopher Wiggins, about pain in his left elbow. Furthermore, over one year's time passed before Knight went to see a neurosurgeon regarding the recurring headaches, back pain and neck pain that he had been suffering as a result of the 1994 accident. *Id.*

Knight's physicians linked his injuries to his 1994 accident. First, his orthopedic surgeon, Dr. Wiggins, testified that Knight suffered from an avulsed distal tendon as a result of the 1994 accident. He also testified that "Knight sustained 'fifteen percent permanent partial disability to the left upper extremity because of pain and loss of strength.'" *Id.* at 296. Second, Knight's neurosurgeon, Dr. Harry Danielson, testified at trial that Knight's accident on May 3, 1994, "worsened the pre-existing back condition Knight suffered as a result of the 1992 accident." *Id.* Dr. Danielson had treated Knight in 1992 following another automobile accident. He had performed surgery on Knight in 1993 for injuries that he had suffered in that 1992 accident. In July of 1995, Knight went back to Dr. Danielson for injuries that he sustained in the 1994 accident. "Dr. Danielson concluded that Knight suffered from a 'herniated disk at the C5-6 level.'" *Id.* When Knight's condition did not improve, Dr. Danielson suggested that Knight undergo surgery. The surgery was performed on April 5, 1996 by Dr. Danielson. *Id.*

Like Knight's physicians, Dr. Summers testified that he believes, to a reasonable degree of medical certainty, that the leg and back pain for which he treated Koger were related to and/or caused by the automobile accident in question. Dr. Summers testimony to the same was as follows:

> Q. All right. Doctor, based upon the history that you took of Donald Koger having been involved in an accident on or about June 2nd or 3rd of 2002, and based upon the other medical records and charts that you reviewed and based upon your examination and treatment of him, do you have an opinion which you can state with a reasonable degree of medical probability as to the relationship, if any, there is between the

injuries, what you found and treated and the car accident of June 2nd or 3rd of 2002?
A. I feel that it's a reasonable certainty that they were related.
Q. And you can say that to a reasonable medical probability?
A. Yes, sir.

Exhibit P-7(ID), Transcr. Depo. Dr. Summers 19:15-20:4.

Dr. Summers' evidentiary videotaped deposition was presented to the jury as evidence during the trial of this matter. Dr. Summers testified that Koger was referred to him for consideration of epidural steroid injections by Dr. Winston Capel, a neurosurgeon. Exhibit P-7(ID), Transcr. Depo. Dr. Jeffrey Thomas Summers 12:20-23 (Sept. 20, 2007). Dr. Summers testified that he treated Koger from July 11, 2002 through March 21, 2003. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 8:9-10; 14:6-10; 14:23-24; 15:18-19; 16:13-14; 17:13-14; 18:4-5; 18:22-24; 19:5-6.

Dr. Summers testified that Koger complained of leg and back pain that he had developed after the motor vehicle accident in question. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 8:14-20. He then testified as to how he treated Koger for his leg and back pain. According to Dr. Summers' testimony, he treated Koger by way of epidural steroid injections. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 12:20-13:15; 14:4-16:12; 18:4-19:12. Dr. Summers also testified that he recommended that Koger undergo physical therapy, take Neurontin, do a Williams' flexion program and take an anti-inflammatory medication called Lodine. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 16:21-19:4.

The Plaintiff in *Knight* testified that he had post-accident medial bills totaling $23,000.00. Dr. Danielson testified that his charges for the treatment that he provided to Knight for the 1994 accident were $7,650.00. *Knight*, 881 So. 2d at 296.

Likewise, Koger testified that he had post-accident medical bills totaling $18,996.66 and post-accident lost wages totaling $4,567.64. Tr. Transcr. vol. 3, 150:5-25 and vol. 4, 151:1-152:15 (Oct. 8-9, 2007). Dr. Summers testified that his professional component charges for Koger's

injections were at least $2,911. He testified that he believed that that total sounded too low; however, the billing department later verified that $2,911 was the correct amount. Dr. Summers further testified there were also additional charges involved with Koger's injections in the amount of $8,370, which consisted of the charges for the nurses, the x-ray equipement, the medication and the recovery room. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 20:12-22:22.

Therefore, there was undisputed evidence that, at least, $11,281.00 of Koger's medical bills were directly related to this accident. Moreover, all of his other medical bills would also be related, as he was seen at the other medical clinics for the same injuries for which Dr. Summers treated him and was eventually referred to Dr. Summers after seeing each of the other physicians. Dr. Hale Byrd, with the MEA Clinic, referred Koger to Dr. Winston Capel. Dr. Capel, a neurosurgeon, referred Koger to Dr. Jeffrey Summers, a pain management specialist. Obviously, there is a direct link in the chain of treatment, as the MEA Clinic was the first place that Koger went, which was on the day following this accident.

Knight testified that he could not participate in certain activities because of the pain he suffered in the 1994 accident. He also testified that he could not stand or ride in a vehicle for a long period of time anymore. *Knight*, 881 So. 2d at 296. Likewise, Koger testified that he continues to suffer with back and leg pain. As a result of that pain, Koger testified that he can't walk or stand like he used to. Tr. Transcr. vol. 4, 153:10-24 (Oct. 8-9, 2007). He also testified that he has trouble sleeping. Tr. Transcr. vol. 4, 156:3-7 (Oct. 8-9, 2007). Koger testified that he has not sought more treatment because his only options are surgery and pain medication. He testified that surgery is expensive, and he would have to take off a lot of time from work. Therefore, he has not undergone surgery yet. As far as pain medication goes, Koger testified that he has "seen too many people that get hooked on pain medicine." Tr. Transcr. vol. 4, 154:19-155:1 (Oct. 8-9, 2007).

Nevertheless, Koger testified that Dr. Caple informed him that he would have to undergo back surgery somewhere down the line or else he would eventually get to the point where he couldn't walk or put weight on that leg. Tr. Transcr. vol. 4, 155:2-12 (Oct. 8-9, 2007). Koger did testify that he intends to have the surgery some day; however, Koger said that he needs to work for as long as he can before doing so. Tr. Transcr. vol. 4, 155:13-15 (Oct. 8-9, 2007). As Patricia Koger stated at trial, Donald Koger is the sole household provider. Patricia Koger no longer works. She has retired. Therefore, if Donald Koger does not work, then no one in their household would be providing a living for the two of them. Tr. Transcr. vol. 3, 119:18-21 (Oct. 8-9, 2007).

Furthermore, Patricia Koger testified as follows with regard to Koger's current condition.

> Q. Okay. As far as him, what can he not do now that he used to could do?
> A. He can't walk for any distance, he can't stand for an extended period of time, he can't sit for an extended period of time without moving and adjusting his position. He has difficulty doing things around the house that he's always done such as the yard work, the mowing, the leaf raking, weed eating, getting upon a ladder to paint the portions of the house that needs repainted.

Transcr. vol. 3, 119:2-11 (Oct. 8-9, 2007).

The only difference between the Koger case and *Knight* is that in *Knight*, the jury found in Knight's favor because it was instructed to do so. However, while the jury was instructed to find in Knight's favor, it awarded Knight zero (0) dollars in damages. Since there was no issue in the case at hand of whether Adcock ran a red light, the jury should have returned a verdict in Koger's favor.

Adcock claims that Koger's pre-existing back condition, degenerative disc disease, was an issue to be decided during the trial of this matter. This was never an issue. All throughout the trial of this matter, Koger's attorney put on evidence that Koger did, in fact, have degenerative disc disease prior to the accident in question. Dr. Summers testimony regarding Koger's pre-existing back condition was as follows:

Q. **All right. In looking at his situation in regard to -- his disease wasn't caused by the accident.**
A. **Correct.**
Q. **But the pain developed, could you say to a reasonable degree of medical probability was caused from the accident?**
A. **Yes, sir, I believe it was.**
Q. **And without the accident you wouldn't have had to do all what you did ordinarily, would you, treatment-wise?**
A. **Correct. Most people with this condition are asymptomatic. In other words, they don't have any problems.**

Exhibit P-7(ID), Transcr. Depo. Dr. Summers 24:21-25:8.

Furthermore, the fact that Koger testified that he had been rejected from joining the military due to a back problem was also irrelevant. Koger testified that he had never had pain in his back prior to this accident, and his wife testified that she had never heard him complain of back pain prior to this accident. Adcock did not produce any medical documents where Koger had complained of back or leg pain prior to the accident in question, because no such documents exist. Adcock failed to present any evidence showing that Dr. Summers' opinion was inaccurate. Adcock presented no rebuttal physician testimony. Dr. Summers is a credible witness who's specialties are in anesthesiology and pain management. Dr. Summers has years of experience in the field of pain management. The jury ignored Dr. Summers' testimony. Likewise, they dismissed all of Donald and Patricia Koger's testimony.

The issue in this case was whether the wreck caused the **pain** that Koger was suffering in his back and leg, and Dr. Summers testified that the wreck did cause that pain. Dr. Summers also testified that Koger would not have had to receive treatment for the same had it not been for this accident. Adcock presented no evidence to the contrary.

The evidence showed that Adcock's actions were the sole proximate cause of this accident and that Koger's injuries were a direct result of Adcock's negligence. Therefore, the jury obviously departed from its oath when it found in favor of Adcock, unless it was confused by Jury Instruction

No. 16. If the jury was not confused by this faulty jury instruction, then there is no question that the verdict in this case was the result of bias, passion, and prejudice. No reasonable, hypothetical juror could have found in favor of Adcock. Therefore, a new trial should be granted in order to prevent unconscionable injustice.

## III. THE LOWER COURT ERRED IN GRANTING ADCOCK'S JURY INSTRUCTION, JURY INSTRUCTION NO. 16, IN REGARDS TO PRE-EXISTING CONDITIONS OF KOGER PRIOR TO THE MOTOR VEHICLE ACCIDENT IN QUESTION.

The lower court erred when it allowed a faulty jury instruction to be given to the jury during the trial of this matter. As such, Koger should be granted a new trial.

Jury Instruction No. 16 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 conditions.

The word "caused" in the first sentence is a problem because Koger's previous back condition of degenerative disc disease did not "CAUSE" the pain or the symptom of pain. No evidence was presented showing that Koger would have suddenly developed pain, had he not been involved in the subject accident. His condition before this accident was one that exhibited no symptoms. Koger does have a condition in his back that makes him more likely to suffer further damage and develop symptoms in his back if he experiences trauma to that area. However, the key here is that, first, Koger must first undergo some type of trauma to that area that would result in further damage to his condition, which would exacerbate and/or aggravate said condition. Koger presented evidence, through Dr. Summers, that while his condition is not a result of the subject accident, the pain he began experiencing was a direct result of this accident.

The second sentence is the most prejudicial statement against Koger, as it states that Adcock can not be liable or responsible for the injuries of Koger as basically, Koger had a back condition before the accident in question; and therefore, he can not collect any money for any further injury and/or symptoms because the accident was not the actual cause/result of that condition. However, Koger did not claim that the condition was from the accident. Koger claimed that the exacerbation and/or aggravation of the condition and/or development of pain (a new symptom), was from the accident. The jury should have considered this when determining Koger's damages. This was a damage of the Plaintiff. By stating in the Instruction that Adcock is not responsible for the injuries of Koger which are the sole proximate result of his pre-existing conditions, the Instruction overlooks the fact that Koger was not claiming that his degenerative disc disease developed from the subject accident. The Instruction also falsely directs the jury to find that Koger can not collect damages from this accident, because he already had a back condition and the jury could not consider any aggravation of injuries. However, the fact that a person with degenerative disc disease is more likely to receive a symptom as a result of trauma than someone without that condition does not and should not preclude a Plaintiff from recovering when the same occurs. For example, the fact that the Plaintiff in *Knight* had undergone surgery to his neck before his second accident did not preclude him from collecting in his second accident for the surgery that he had to undergo due to the exacerbation of his preexisting condition. The Supreme Court held that Knight suffered some injury in the second accident, even though the jury awarded him zero (0) dollars.

A person can have a **condition** that exhibits no **symptoms**. Koger had a back condition of degenerative disc disease, in which he was suffering no symptoms prior to the subject accident. Following this accident, Koger's condition may have been exacerbated and/or aggravated by the accident, as he developed symptoms immediately following the accident. The main symptom that

Koger developed was pain. However, as Dr. Summers testified, Koger's pain could also be the result of Koger's disc bulge or the tightness in his nerve foramen. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 23:6-24:20.

The jury should have been instructed that there is a difference between a condition and a symptom. This distinction was not clearly addressed, and, as a result, the jury was confused by a faulty jury instruction. The trial court should have explained the difference between a "condition" and a "symptom" in that a condition is a medical problem that one suffers from (i.e., disease), but that, one can have a condition without having any symptoms (i.e., pain). For example, an individual may have degenerative disc disease in his back and never know it without undergoing an MRI, because he is not having any symptoms. In fact, that individual may never have any issues with his back, even though he does actually have a condition and/or medical problem in his back. Also, the trial court should have established the fact that a symptom is the result that can arise from a condition when trauma occurs.

The jury should have been instructed that a person with a condition, such as the one that Koger has, may be more susceptible to an exacerbated and/or aggravated injury to that same area when faced with a trauma, such as a car wreck, which can cause a symptom, such as pain. Dr. Summers testified as follows with regard to this issue:

> Q. Now, would you explain to the jury the situation whereby you take an x-ray or MRI of someone and you find they have degenerative disc disease or have these problems that you know that were there before the accident but they weren't having any pain or any problem and after the accident they're having severe pain, could you explain or interpret that for the jury?
>
> A. Some people can have a terrible looking MRI with disc bulges and have no pain, none whatsoever, and some people can have a fairly normal looking MRI with severe pain.
>
> So you have to match those findings to the patient's physical examination. That's the most important thing and then you add the history in on top of that. When I say the bulges weren't significant, they weren't significant in

themselves, but if a particular bulge was the cause of his pain, and that one was more significant.

But I can't state that the disc bulge was causing his pain because it could have been the tightness in the nerve foramen, which is the hole where the nerve comes out.

It could have been degenerative changes exacerbated by his injury. I can't tell you structurally which of those problems was causing his pain.

Q. All right. When you say exacerbated, what do you mean by that? If he didn't have pain before and he has a car wreck and he has pain, is that what you mean?

A. Well, yes, but those changes weren't caused by the car wreck, but they could have predisposed him to an injury. I think somebody with foraminal stenosis is more likely to have an injury that is symptomatic.

In other words, develops back and leg pain in somebody that doesn't. But even somebody that doesn't have degenerative changes can develop a back and leg pain after an accident.

Exhibit P-7(ID), Transcr. Depo. Dr. Summers 23:6-24:20.

Obviously, Koger suffered some type of back injury as a result of this accident, which caused him to experience pain in his back and leg. Whether the pain was caused by a bulging disc, tightness in the nerve foramen or degenerative changes exacerbated and/or aggravated by his injury, is something that could not be answered according to Dr. Summers. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 24:1-8. Regardless, Dr. Summers testified that he believes, to a reasonable degree of medical certainty, that the leg and back pain for which he treated Koger were related to and/or caused by the automobile accident in question.

**A. Jury Instruction No. 16 was a peremptory instruction.**

Jury Instruction No. 16 was a peremptory instruction because the trial court explicitly directed that the jury return a verdict for Adcock if they found that Koger suffered from any pre-existing condition. Koger did suffer from a pre-existing condition, which was degenerative disc disease. However, that was absolutely irrelevant due to the fact that Dr. Summers, the only doctor who testified in this trial, testified to a reasonable degree of medical certainty that, had it not been for this wreck, Koger would not have suffered the **pain** in his back and leg and would not have had

to receive treatment for the same. Exhibit P-7(ID), Transcr. Depo. Dr. Summers 24-25. Dr. Summers testified that although Koger's degenerative disc disease was a pre-existing condition, this did not mean that Koger had pain due to that condition prior to this accident. He stated that the accident brought about the back and leg pain which Koger was suffering. Dr. Summers also testified that: "even somebody that doesn't have degenerative changes can develop back and leg pain after an accident." Exhibit P-7(ID), Transcr. Depo. Dr. Summers 24. Jury Instruction No. 16 should have been denied since the evidence was sufficient to support a verdict for the party against whom the peremptory instruction was requested.

**B. Jury Instruction No. 16 was misleading.**

Jury Instruction No. 16 was also extremely misleading. Any juror would have believed that he must find in favor of Adcock if he finds that Koger had degenerative disc disease prior to the accident in question. During the trial, Adcock was misleading the jury in continuously arguing that Koger's condition, degenerative disc disease, was something that he had prior to this accident and that the jury should bring back a verdict in favor of Adcock if they find that Koger had degenerative disc disease prior to this accident. Jury Instruction No. 16 also implied that if the jury finds that Koger had the condition of degenerative disc disease prior to this accident, then Adcock should not be held responsible for Koger's injuries. Obviously, this instruction was very misleading to the jury.

**C. Jury Instruction No. 16 was a misstatement of the law.**

Moreover, Jury Instruction No. 16 was a misstatement of the law. Adcock represented to the trial court that Jury Instruction No. 16 is in line with current Mississippi law and Mississippi Model Jury Instruction 15:4. Jury Instruction No. 16 is not in line with current Mississippi law and Mississippi Model Jury Instruction 15:4.

Mississippi Model Jury Instruction 15:4 and Jury Instruction No. 16 are vastly different.

Mississippi Model Jury Instruction 15:4 reads:

> In order to be a proximate cause, the negligence of the defendant must be a substantial factor in producing plaintiff's injury. If the plaintiff would have been injured even if the defendant had not been negligent, the defendant's negligence is not a substantial factor and not a proximate cause.

When you substitute the word "pain" in place of the word "injury" in the first sentence of Mississippi Model Jury Instruction 15:4 and substitute the words "suffered pain" in place of the words "been injured" in the second sentence, that would be a fair jury instruction. Likewise, if you substitute the word "degenerative disc disease" in place of the word "injury" in the first sentence of Mississippi Model Jury Instruction 15:4 and substitute the words "suffered degenerative disc disease" in place of the words "been injured" in the second sentence, that too would be a fair jury instruction. However, the two instructions have completely different meanings. If Mississippi Model Jury Instruction 15:4 had been used during the trial in question, then the jury could have found in favor of Koger by basically replacing the word "injury" with the word "pain." Furthermore, if the jury had played around with the word "injury" during deliberation and chose to substitute that word with the words "pre-existing condition," there would not have been an issue of how to find in that situation because Koger agreed that he had degenerative disc disease prior to this accident. This also would not have prejudiced Koger's chances of receiving a verdict in his favor because that jury instruction does not say that the jury can not find in his favor if he suffered from a pre-existing back condition like Jury Instruction No. 16 does. Please refer to the two different scenarios below:

> In order to be a proximate cause, the negligence of the defendant must be a substantial factor in producing plaintiff's **pain**. If the plaintiff would have **suffered pain** even if the defendant had not been negligent, the defendant's negligence is not a substantial factor and not a proximate cause.

> In order to be a proximate cause, the negligence of the defendant must be a substantial factor in producing plaintiff's **degenerative disc disease**. If the plaintiff would have **suffered degenerative disc disease** even if the defendant had not been

negligent, the defendant's negligence is not a substantial factor and not a proximate cause.

The two instructions are completely different, and both instructions would be fair. Mississippi Model Jury Instruction 15:4 is self explanatory and can be easily interpreted. Unlike Mississippi Model Jury Instruction 15:4, Jury Instruction No. 16 is extremely misleading, confusing and is certainly a misstatement of the law.

**D. Jury Instruction No. 16 was a misstatement of the facts.**

Finally, for the reasons stated above and further argued in Koger's brief, Jury Instruction No. 16 was also a misstatement of the facts.

**E. Conclusion**

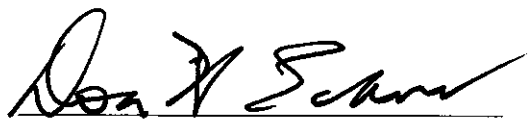
Clearly, Jury Instruction No. 16 was peremptory, misleading, a misstatement of law and a misstatement of the facts. Moreover, the jury was not properly instructed, and the instruction should have been denied. As such, Koger should be given a new trial.

## CONCLUSION

The lower court erred when it denied Koger's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for a New Trial on Damages Only or, in the Alternative, for a New Trial on Liability and Damages or, in the Alternative, for Additur. Furthermore, the trial court erred when it gave Jury Instruction No. 16, which was a faulty jury instruction. Therefore, Koger respectfully requests that this Court reverse the verdict of the jury and grant a new trial on damages only or grant an entirely new trial on all issues. If Koger has prayed for improper relief, then he asks that this Court grant him the appropriate relief.

RESPECTFULLY SUBMITTED,

DONALD KOGER

BY: 
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**CERTIFICATE OF SERVICE**

I, Don H. Evans, attorney for Appellant, do hereby certify that I have served, via U.S. Mail, postage prepaid, a copy of the foregoing *Reply Brief of Appellant* to the following:

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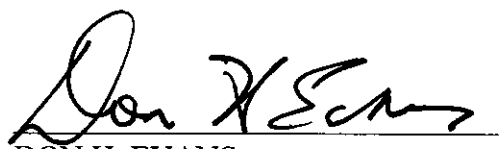
On this the 19th day of May, 2009.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