

**IN THE SUPREME COURT OF MISSISSIPPI**

**No. 2008-TS-01059**

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

**APPELLANTS/  
CROSS-APPELLEES**

**VS.**

**SUSIE P. CAVIN, INDIVIDUALLY AND ON  
BEHALF OF THE WRONGFUL DEATH BENEFICIARIES  
OF JESSIE RAY CAVIN, DECEASED**

**APPELLEE/  
CROSS-APPELLANT**

**APPEAL FROM THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI**

**BRIEF OF THE APPELLEE/CROSS-APPELLANT**

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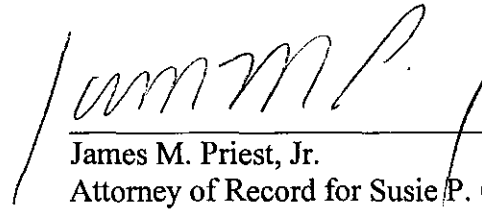
**CERTIFICATE OF INTERESTED PERSONS**

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 Mississippi Supreme Court and/or the Judge of the Court of Appeals may evaluate possible disqualification or recusal.

1. Susie P. Cavin, Plaintiff
2. Evan Ray Cavin, Wrongful Death Beneficiary
3. Theresa Ann Cavin, Wrongful Death Beneficiary
4. Jeremy Paul Cavin, Sr., Wrongful Death Beneficiary
5. Carolyn Cavin Callendar, Wrongful Death Beneficiary
6. Brandon Steve Cavin, Wrongful Death Beneficiary
7. William B. Gill, III, Gill, Ladner & Priest, PLLC, Attorney for Plaintiff
8. Kirk G. Ladner, Gill, Ladner & Priest, PLLC, Attorney for Plaintiff
9. James M. Priest, Jr., Gill, Ladner & Priest, PLLC, Attorney for Plaintiff
10. John Arthur Eaves, Eaves Law Firm, Attorney for Plaintiff
11. Terry Enterprises, Inc., Defendant (Barry Terry, Sr. and Mary Terry, Corporate Representatives)
12. Barry J. Terry, Jr., Defendant

13. Edwin W. Tindall, Lake Tindall, LLP, attorney for Defendants
14. Heath S. Douglas, Lake Tindall, LLP, attorney for Defendants
15. Honorable W. Ashley Hines, Circuit Court Judge

SO CERTIFIED this 3<sup>rd</sup> day of June, 2009.



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James M. Priest, Jr.  
Attorney of Record for Susie P. Cavin

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## STATEMENT OF ISSUES

The following issues are presented by the Defendants' direct appeal:

- I. The trial court properly instructed the jury regarding Susie Cavin's recovery of damages for future medical expenses and future pain and suffering.**
- II. The trial court properly instructed the jury regarding Susie Cavin's recovery of damages for emotional distress.**
- III. The trial court did not err in denying Defendants' motion for remittitur or new trial because the jury verdict in favor of Susie Cavin on her individual personal injury claims was not excessive and was not based on improper instructions.**

The following issue is presented by Plaintiff's cross-appeal:

- IV. The trial court erred in denying Plaintiff's motion for additur or new trial because the jury verdict for Jessie Cavin's wrongful death beneficiaries was inadequate and resulted from an improper instruction.**

## **STATEMENT OF THE CASE**

This is a negligence case arising from an October 18, 2005 motor vehicle collision in which the Plaintiff Susie P. Cavin was injured and in which her husband Jessie Cavin was killed. The Defendants are Barry Terry, Jr., the driver of the tractor-trailer rig which collided with the Cavins' van, and Terry's Enterprises, Inc., the owner of the rig and Barry Terry, Jr.'s employer.

### **I. Nature of the case, course of proceedings, and disposition in the court below**

Susie Cavin filed suit against the Defendants in the Circuit Court of Washington County asserting her own individual personal injury claims and claims on behalf of Jessie Cavin's wrongful death beneficiaries. (R. at 4-8). After discovery, the case proceeded to trial on March 3, 2008. At trial, the Defendants admitted some degree of fault for the collision but attempted to assign some degree of fault to a non-party driver. (Tr. at 148-50). The Plaintiff testified, as did her and Jessie Cavin's five children. (Tr. at 73-98, 106-23). The Plaintiff also presented the testimony of the Mississippi Highway Patrol sergeant who was qualified as an expert witness in the field of accident reconstruction (Tr. at 29-45), the testimony of Marcus Thurston (the other driver to whom Defendants attempted to apportion fault) (Tr. at 50-53), eyewitness Charles Dennis (Tr. at 45-50), economist Carl Brooking (Tr. at 99-105), and Mrs. Cavin's orthopedic surgeon Michael Robichaux, M.D. (See Tr. at 113-14). Plaintiff called Defendant Barry Terry, Jr. as an adverse witness in her case-in-chief. (Tr. at 54-62). At the close of Plaintiff's case, the Defendants presented no further testimony. (Tr. at 124).

After being instructed by the trial court, hearing closing statements, and deliberating, the jury returned a verdict in the amount of \$1,000,000 for Susie Cavin on her individual personal injury claim and \$500,000 for Jessie Cavin's beneficiaries on the wrongful death claim. (R. at 279). The trial court entered judgment in the amount of \$1,500,000 on the total jury verdict. (R. at



280-83). The Defendants then filed a motion for new trial or remittitur arguing that the verdict on Susie Cavin's personal injury claims was excessive. (R. at 284-92). Plaintiff filed a motion for new trial or additur arguing that the verdict on the wrongful death claim was inadequate. (R. at 295-305). The trial court denied both motions on May 9, 2008. (R. at 320-22). Defendants filed a notice of appeal (R. at 351) to this Court and the Plaintiff filed a notice of cross-appeal. Defendants posted bond for supersedeas in the amount of \$1,000,000 only. (R. at 337-38). After Plaintiff initiated garnishment proceedings, Defendants tendered \$500,000 which the Plaintiff accepted. The parties agreed that the Plaintiff's acceptance of payment for the unbonded portion of the judgment would not waive any of the Plaintiff's rights on appeal.

## **II. Statement of facts relevant to the issues presented for review**

Jessie Ray Cavin and Susie Cavin were married on May 7, 1969. (Tr. at 74:22). Jessie was 17 years old and Susie was 15 years old. (Tr. at 74:19-20). Over the course of their marriage, Jessie and Susie had five children: Ray, Carolyn, Jeremy, Theresa, and Brandon. (Tr. at 75:15-18). Ray was born when his father was still 17 years old. (Tr. at 95:29). For the next 36 years, Jessie and Susie remained married. Jessie's and Susie's children for the most part remained in the same small town (Denham Springs, Louisiana) where their parents lived. (Tr. at 74:2-3, 85:12-14, 106:23-24, 114:28-29, 121:19-28). Even as adults, the children visited their parents almost every day. (Tr. at 86). The large family remained extraordinarily close.

On October 18, 2005, Jessie and Susie were headed to Tennessee for vacation. (Tr. at 78). Jessie and Susie, traveling north on U.S. Highway 61, had made it to Hollandale, Mississippi. (Tr. at 31). Jessie was driving. Barry Terry, Jr. (in the course and scope of his employment with Terry's Enterprises, Inc.) was driving south in his tractor/semi-trailer rig on

Highway 61, a two-lane highway with an improved shoulder, at Hollandale. (Tr. at 54). Mr. Terry was talking on his cell phone. (Tr. at 56:18-22). Traffic slowed abruptly in front of Mr. Terry, and he steered across the center line into oncoming traffic. (Tr. at 56-59). Mr. Terry's truck collided with the Cavins' van. The resulting crash was horrendous. (See photographs Ex. P-1 through P-27).

Jessie Cavin died at the scene of the collision. Susie Cavin was trapped in the van with her husband until paramedics arrived and could remove her. (Tr. at 79:25-29). She realized that he had died. (Tr. at 79:21-24). By the time witnesses arrived on the scene, Susie was bleeding, and she "was hollering, telling her husband to wake up." (Tr. at 49:4-8). Paramedics transported Susie to Delta Regional Medical Center in for treatment of multiple traumatic injuries she received in the collision, including a severe fracture to her left arm/wrist. (Plaintiff's Exhibit List<sup>1</sup> at 28-101).

Susie underwent treatment for a severely comminuted fracture of the left distal radius under an orthopedic surgeon. (Ex. P-49, Transcript of Depo. of Michael R. Robichaux, Jr., M.D. at 8). Id. at 9-10. Her treatment involved surgical fixation and a revision operation. She underwent physical therapy. Id. at 14. Surgical hardware remains in her left arm, and her orthopedic surgeon has diagnosed her with arthritic changes at the site of the injury.<sup>2</sup> (Id. at 16-18. At trial, Mrs. Cavin presented undisputed evidence that she has incurred \$32,801.66 in medical expenses as a result of her injuries. (R. at 187-88).

Beyond the physical injuries she received, the collision took a severe emotional toll on Susie Cavin. Shortly afterwards, she became obsessed with whether her husband's body had

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<sup>1</sup> Exhibits introduced at trial by the Plaintiff are included in the trial court record in a separate volume with a table of contents captioned "Plaintiff's Exhibit List".

<sup>2</sup> Mrs. Cavin's treatment, diagnosis, and prognosis for her physical injuries are discussed in more relevant detail in the argument section *infra*.

been mutilated. (Tr. at 94, 110, 122-23). Even by the time of trial, she was still having tremendous difficulty sleeping, and she was still easily upset.<sup>3</sup>

At trial, Susie testified extensively about her relationship with her husband of 36 years, and the tremendous loss she has suffered as a result of his death. (Tr. at 73-84). Each of Jessie Cavin's children also testified regarding the extraordinarily close relationship that each of them had enjoyed with Jessie. The children also described in heartbreaking detail the devastation which the loss of Jessie's life had wreaked on their mother and each other. (Tr. at 85-98; 106-111; 114-118; 119-120; 121-123).

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<sup>3</sup> Mrs. Cavin's emotional injuries are also discussed in more relevant detail *infra*.

## **SUMMARY OF THE ARGUMENT**

The trial court was correct in denying Defendants' motion for remittitur or new trial as to Susie Cavin's personal injury claim. Mrs. Cavin produced undisputed evidence that she suffered a severe fracture to her wrist which had already resulted in over \$32,000 in medical expenses. Mrs. Cavin also presented undisputed evidence that orthopedic hardware remains in her arm, and she had developed arthritis in her wrist as a result of the fracture and surgical fixation. Further, Mrs. Cavin presented undisputed testimony that she suffered severe emotional distress following the collision, both as a result of her own physical injuries and as a result of witnessing the death of her husband of 36 years. The trial court properly instructed the jury that it could award damages to Mrs. Cavin for her future medical expenses, future pain and suffering, and emotional distress. The jury's verdict was not excessive and gave no indication of bias or prejudice.

On the other hand, the trial court improperly instructed the jury as to the form of its verdict on the claims of Jessie Cavin's wrongful death beneficiaries. As dictated by this Court in River Region Medical Corp. v. Patterson, 975 So. 2d 205 (Miss. 2007), the trial court should have instructed the jury to consider the economic loss resulting from Mr. Cavin's death, and then to consider each individual wrongful death beneficiary's claim for loss of society and companionship. Instead, the trial court provided a form of the verdict instruction which required the jury to arrive at a single figure for both economic and noneconomic damages arising from Mr. Cavin's death. The improper instruction minimized the fact that each wrongful death beneficiary had suffered a loss of society and companionship and resulted in an inadequate verdict. Therefore, the trial court should have granted Plaintiff's motion for additur or new trial on the wrongful death case.

## ARGUMENT

- I. The trial court properly instructed the jury regarding Susie Cavin's recovery of damages for future medical expenses and future pain and suffering.**
- A. The trial court's instruction regarding Susie Cavin's future medical expenses and future pain and suffering was supported by the evidence.**

The Defendants contend that the trial court erred in granting Jury Instruction P-8 which permitted the jury to consider Susie Cavin's future medical expenses and future pain and suffering in reaching its verdict.<sup>4</sup> On appellate review of a jury instruction, this Court asks "Does the instruction contain a correct statement of law and is the instruction warranted by the evidence?" Beverly Enterprises, Inc. v. Reed, 961 So. 2d 40, 43 (Miss. 2007) (citing Hill v. Dunaway, 487 So.2d 807, 809 (Miss.1986)). The Defendants have not challenged Instruction P-8 on the basis it contained an incorrect statement of the law. Therefore, if Instruction P-8 was supported by "credible evidence in the record", then the trial court was proper in granting it. Hill, 487 So. 2d at 809.

At trial, Mrs. Cavin presented the following evidence as to the physical damages she suffered as a result of the collision:

- As a result of the collision, she suffered a severely comminuted fracture of the left distal radius (i.e., the bone in her wrist was broken into multiple pieces).

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<sup>4</sup> Somewhat puzzlingly, the Defendants argue that the trial court should not have instructed the jury to consider future "disability". Instruction P-8 does not mention disability. See R. at 187-88. The Defendants appear to equate disability with loss of enjoyment of life. See Appellant Br. at 2. However, Miss. Code Ann. § 11-1-69 (2002) specifically allows recovery of damages for loss of enjoyment of life as a component of pain and suffering damages. To the extent the submission of the question of future pain and suffering to the jury was proper, so was the submission of the issue of future loss of enjoyment of life.

(Robichaux dep. at 8).

- This fracture required fixation by with multiple screws and a pin by an orthopedic surgeon. Id. at 9.
- Mrs. Cavin had to undergo a second operation for removal of the pin. The pin had become painful before it was removed. Id. at 10.
- Mrs. Cavin had to undergo physical and occupational therapy. Id. at 14.
- Mrs. Cavin suffers an unspecified degree of impairment in her left arm. Id. at 23.
- Mrs. Cavin did not work for several months during her recovery.
- Dr. Robichaux testified that Mrs. Cavin already exhibits mild arthritic changes in her left wrist. Dr. Robichaux expects pain, stiffness, and weakness from arthritis to become progressively worse over time. Dr. Robichaux expects that the pain from arthritis will require treatment with Advil, Aleve, or injections. Id. at 16-18.
- Mrs. Cavin currently has a plate and screws in her wrist.
- Mrs. Cavin has already incurred \$32,801.66 in medical expenses. Id. at 187-88.

This evidence clearly demonstrates that Mrs. Cavin will suffer future pain and debilitation and will probably require future medical treatment.

In APAC Mississippi, Inc. v. Johnson, \_\_ So. 2d. \_\_, No. 2007-CA-01009-COA, 2009 WL 596000, (Miss. Ct. App. Mar. 10, 2009), at \*8, the Court of Appeals found that the trial court properly instructed the jury to consider the plaintiff's future medical expenses and pain and suffering despite the fact that the plaintiff had not received medical treatment for over two years before trial. The evidence presented in that case was that the plaintiff was extracted from her vehicle by the "jaws of life", experienced fractured vertebrae but did not require surgery, and continued to experience neck pain for which she took over-the-counter and prescription

medications. APAC v. Johnson, 2009 WL 596000, at \*12. The evidence of Mrs. Cavin's future medical bills and future pain and suffering in this case is even stronger – she has orthopedic hardware in her arm, Dr. Robichaux testified that arthritic changes are present, and Dr. Robichaux testified that as a result of the arthritic changes, Mrs. Cavin will experience soreness and weakness in her wrist requiring at least over-the-counter medication and maybe an injection. (Robichaux Dep. at 18). Thus, based on Dr. Robichaux's testimony alone, the trial court had before it an adequate evidentiary basis to instruct the jury to consider future medical expenses and pain and suffering.

**B. The Defendants have waived any assignment of error regarding the jury instruction as it pertained to future medical expenses.**

Mississippi Rule of Civil Procedure 51 requires that a party who objects to a jury instruction make a specific objection on the record. Uniform Circuit and County Court Rule 3.07 requires a party objecting to an instruction to “dictate into the record their specific objections to the requested instructions stating the grounds for each objection.” Although Defendants objected to Instruction P-8 regarding future pain and suffering, the Defendants stated absolutely no objection to the consideration of future medical expenses. (Tr. at 128-131). “Failure to object to an instruction at trial bars that issue on appeal.” Missala Marine Services, Inc. v. Odom, 861 So. 2d 290, 296 (Miss. 2003) (citing Jones v. State, 776 So.2d 643, 653 (Miss.2000)). The Court, therefore, should not address trial court's granting of Instruction P-8 to the extent the instruction called for the consideration of future medical expenses.

**II. The trial court properly instructed the jury regarding Susie Cavin's recovery of damages for emotional distress.**

The Defendants argue that the trial should not have permitted the jury to consider Mrs.

Cavin's mental anguish and emotional distress because she had no "physical manifestation" of such emotional injuries. Defendants argument is flawed on multiple levels. First, the Defendants seem to ignore the obvious – that Mrs. Cavin was seriously physically injured in the horrendous collision which demolished the van in which she was a passenger. The law has long recognized that emotional distress damages are recoverable when such emotional distress arises as a result of physical injury. See, e.g. Miss. Valley Gas v. Estate of Walker, 725 So. 2d 139, 150-51 (Miss. 1998) (finding trial court properly instructed jury to consider mental pain and anguish of plaintiffs who suffered physical injury); Occhipinti v. Rheem Mfg. Co., 252 Miss. 172, 182, 172 So. 2d 186, 190 (1965) ("jury is allowed to consider the case with all its facts, and to take into account not only the physical pain, but also mental suffering, in determining damages").

The law also does not require a "physical manifestation" in a pure emotional injury case. See Adams v. U.S. Homecrafters, Inc., 744 So. 2d 736, 743 (Miss.1999) ("proof [of emotional distress] may solely consist of evidence of a mental injury without physical manifestation"). A case relied on by Defendants states, "In such a case of ordinary negligence a plaintiff may not recover damages for emotional distress without showing a physical manifestation of injury *or demonstrable harm.*" Paz v. Brush Engineered Materials, Inc., 949 So.2d 1, 4 (Miss. 2007) (emphasis added). The case stated that in an "ordinary negligence" case proof of emotional injury requires proof that "the injury is medically cognizable and treatable ." Paz, 949 So. 2d at 4. As discussed in detail below, this is not an ordinary negligence case with regard to Mrs. Cavin's emotional injury – it is a case for "bystander liability". However, assuming that the standard for proving emotional injury in an ordinary negligence case applies, Mrs. Cavin presented sufficient evidence at trial to meet that standard. She testified that her family doctor



(Dr. Whaley) prescribed Lexapro to her for depression and anxiety. That prescription is documented in her pharmacy records which are in evidence. Mrs. Cavin's children also testified at length regarding the emotional toll the accident has taken on her. The children testified that their mother can hardly sleep in her own bed, that she does not otherwise sleep well, and that she seems to become easily upset. Mrs. Cavin's son Ray Cavin testified that during her initial hospitalization following the accident, his mother exhibited an obsession with whether Jessie Ray Cavin's foot was amputated in the collision.

Even though Mrs. Cavin proved a demonstrable and medically cognizable emotional injury, such proof was not even necessary for submission of the emotional distress issue to the jury. In Entex, Inc. v. McGuire, 414 So. 2d 431, 444 (1982), the Mississippi Supreme Court recognized that a plaintiff may recover damages as a result of witnessing the death or injury of a loved one:

- (1) When the "plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it";
- (2) When the shock resulted from "a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence"; and
- (3) When "plaintiff and the victim were closely related. . ."

Entex does not require a plaintiff under such circumstances to prove a "physical manifestation" of the emotional injury or that the emotional injury is "medically cognizable".

In a case analogous to Entex (and even more analogous to this case), the New Mexico Supreme Court held that it is sufficient for a plaintiff to establish a case for negligent infliction of emotional distress to prove: (1) the plaintiff and the victim enjoyed a marital or intimate

family relationship, (2) the plaintiff suffered severe shock from the contemporaneous sensory perception of the accident, and (3) the accident caused physical injury or death to the victim. Folz v. State, 797 P.2d 246, 260 (N.M..1990). That court further stated that it is not “mandatory for the plaintiff to produce expert medical testimony in order to establish the claim for emotional injury.” Folz, 797 P.2d at 260. More to the point with regard to this case, the New Mexico court stated, “When the plaintiff suffers physical injury, apart from the emotional injury, the severe shock from contemporaneous sensory perception involving a family member need not be distinguished from distress attributable to the plaintiff’s physical injury.” *Id.*

Mrs. Cavin submitted more than ample evidence to support her claim for emotional distress under Entex. Obviously, Mrs. Cavin and Jessie Ray Cavin, to whom she had been married for 36 years, were closely related. Mrs. Cavin was not only near the scene of the accident – she was actually in it. From the testimony at trial it was obvious that Mrs. Cavin suffered a direct emotional impact resulting in severe shock. Just by way of example, Mrs. Cavin testified that she was trapped in the van in which her husband had just died, and eyewitness Charles Dennis, testified that she was screaming “Wake up!” at her husband while she was trapped in the van. (Tr. at 49). Mrs. Cavin’s son Ray Cavin further testified to his mother’s distraught — and sometimes hysterical — behavior following the collision. (Tr. at 58-90).

**III. The trial court did not err in denying Defendants’ motion for remittitur or new trial because the jury verdict in favor of Susie Cavin on her individual personal injury claims was not excessive and was not based on improper instructions.**

The Court may grant a remittitur only if it finds that the damages are excessive “for the reason that the jury . . . 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 (2002). Whether a verdict is excessive “can be determined only by the circumstances of the particular case.” Biloxi Elec. Co. v. Thorn, 264 So. 2d 404, 405 (Miss. 1972). Damage “[a]wards fixed by jury determination are not merely advisory and will not under the general rule be set aside unless so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable and outrageous.” Mississippi State Hwy. Comm. v. Antioch Baptist Church, Inc., 392 So. 2d 512, 514 (Miss. 1981). In order to set aside or modify a verdict, the Court must find the damages “so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable, and outrageous, and such as manifestly show the Jury to have been actuated by passion, partiality, prejudice, or corruption. In short, the damages must be flagrantly outrageous and extravagant, where they have no standard by which to ascertain the excess.” Wells Fargo Armored Service Corp. v. Turner, 543 So. 2d 154, 159 (Miss.1989) (citing Detroit Marine Engineering v. Robert McRee, 510 So. 2d 462 (Miss.1987)). This Court will reverse a trial court’s ruling on the issue of remittitur only if [the trial judge] has abused or exceeded his discretion.” Royal Oil Co., Inc. v. Wells, 500 So. 2d 439, 449 (Miss.1986).

The jury’s verdict as to Mrs. Cavin’s personal injury claim was well-supported by the evidence. The extent of Mrs. Cavin’s past medical expenses and past physical pain, suffering, and debilitation was uncontested at trial. Further, Defendants offered no evidence to dispute that Mrs. Cavin will suffer future pain and debilitation as a result of her physical injuries. The jury was properly instructed as to Mrs. Cavin’s emotional distress damages. Mrs. Cavin presented evidence of medical treatment of her emotional injury, and the testimony presented established the depth of her emotional injury beyond question. The verdict on the personal injury case was certainly not against the overwhelming weight of the evidence.

The recent Court of Appeals case APAC Mississippi, Inc. v. Johnson, \_\_ So. 2d \_\_, No. 2007-CA-01009-COA, 2009 WL 596000 (Miss. Ct. App. Mar. 10, 2009), provides clear guidance on the issue of whether the verdict for Mrs. Cavin was excessive. In that case (arising from the same trial court as the present case), the defendants' negligence caused the plaintiff to lose control of her car. She had to be extracted from her vehicle with the "jaws of life", and she was transported by ambulance to Delta Regional Medical Center for initial care. She was then transported to University of Mississippi Medical Center for additional care. The plaintiff was initially diagnosed with vertebral fractures, but she did not require surgery. She wore a neck brace for five weeks, and a follow-up MRI indicated no fracture. The plaintiff's physician prescribed her a TENS unit, and she underwent physical therapy for two months. APAC v. Johnson, 2009 WL 596000, at \*1. The jury awarded the plaintiff \$12,621.00 in actual damages and \$337,378.34 for pain and suffering. Id. at \*2.

In affirming the trial court's denial of the defendant's motion for remittitur, the Court of Appeals stated, "we find the award of 27.7 times the amount of medical expenses does not raise an automatic presumption that the award was excessive." Id. at 12. The court quoted one of its previous cases which noted, "'Due to the uncertainty of the monetary value placed on pain and suffering and future damages, [this Court] ha[s] affirmed damages up to fifty-one times the actual damages shown.'" Id. (quoting Kroger Co. v. Scott, 809 So. 2d 679, 684 (Miss. Ct. App. 2001)).

Unlike the plaintiff in APAC v. Johnson (who did not require surgery), Mrs. Cavin has undergone two operations on her left arm, and her surgeon has noted arthritic changes at the surgery site. Also, the plaintiff in APAC v. Johnson appears to have presented no evidence of emotional injury.

Given the evidence presented, the jury's verdict was by no means "flagrantly outrageous and extravagant". Nor did the verdict result from bias, prejudice, or passion on the part of the jury in favor of the Plaintiff. Indeed, as discussed below with regard to the wrongful death claim, this same jury was reserved to the point of returning an inadequate verdict on behalf of the beneficiaries in light of the evidence presented. The trial court did not err in denying remittitur or new trial as to Mrs. Cavin's personal injury claim.

**IV. The trial court erred in denying Plaintiff's motion for additur or new trial because the jury verdict for Jessie Cavin's wrongful death beneficiaries was inadequate and resulted from an improper instruction.**

The jury awarded \$500,000 for the wrongful death beneficiaries of Jessie Ray Cavin. It was undisputed at trial that the economic loss due to the death of Jessie Ray Cavin is valued at \$212,927.00 as testified to by Dr. Carl Brooking. It was also undisputed that the amount of funeral expenses were \$7,033.86. Additionally it was undisputed that Mr. Cavin had a life expectancy of 26 years and that he had a wife and five adult children at the time of his death.

Plaintiff submitted an instruction (Instruction P-11) regarding the form of verdict on the wrongful death case which directed the jury to affix economic damages for the present net cash value of Jessie Ray Cavin's life and funeral expenses. (R. at 200-01). The proposed form of verdict instruction further directed the jury to affix a separate award for loss of society and companionship for each of Jessie Ray Cavin's six wrongful death beneficiaries. Id. The trial judge refused Instruction P-11 (Tr. at 131-33, 135). Instead, the trial court gave its own form of the verdict instruction (C-5) which combined the forms of the verdicts for Susie Cavin's personal injury case and the wrongful death case and which contained a single blank for the form of the verdict for the wrongful death case. (R. at 277). The jury returned its verdict as to both the personal injury case and the wrongful death case in the form given by the trial court. (R. at

279).

In River Region Medical Corp. v. Patterson, 975 So. 2d 205, 208 (Miss. 2007), the Court held that in a wrongful death case each beneficiary must prove his own individual claim for loss of society and companionship. On the other hand, economic damages such funeral expenses and loss of net cash value of the decedent's life expectancy are to be divided equally between the beneficiaries. River Region v. Patterson, 975 So. 2d at 208. Instruction P-11 would have properly instructed the jury with regard to the economic and noneconomic wrongful death damages in accordance with the Patterson case.

Bridges v. Enterprise Products Co., Inc., 551 F. Supp. 2d 549 (S.D. Miss. 2008) applied the principles recognized in the Patterson case. The federal district court gave the jury a form of verdict instruction which directed the jury make a separate determination as to each beneficiary's damages for loss of society and companionship, and the jury awarded unequal amounts to the beneficiaries. Bridges, 551 F. Supp. 2d at 557. Examining River Region v. Patterson, the court determined that it had given a correct form of verdict instruction. Id. at 558.

As noted earlier, Plaintiff presented undisputed evidence of \$219,960.86 in economic losses as a result of Jessie Cavin's death. Thus, just slightly over half of the \$500,000 wrongful death verdict is attributable to the beneficiaries' loss of society and companionship. Each beneficiary testified extensively regarding his or her own relationship with Jessie Cavin as well Mr. Cavin's relationships with the other beneficiaries. (Tr. at 73-98, 106-11, 114-23). The testimony was undisputed.

The testimony showed that Ms. Cavin had been married for 36 years to Jessie Cavin. The testimony was clear that Mr. and Mrs. Cavin shared an unparalleled closeness and truly were soul mates. (Tr. at 97-98). In fact his tombstone bears an engraving of two rings tied

together with a ribbon that says "soul mates." Likewise, Mr. Cavin's children had an extraordinarily close relationship with their father. Based upon the amount of economic damages, the life expectancy of Jessie Cavin, the undisputed damage testimony as to the loss of society and companionship, and the number of wrongful death beneficiaries (six), the award of \$500,000 is inadequate and against the overwhelming weight of the evidence. The award resulted from the trial court's refusal to properly instruct the jury as to the assessment of damages for loss of society and companionship for each of the six wrongful death beneficiaries. Therefore, the trial court should have either granted an additur to fix an adequate damage award for the wrongful death beneficiaries or should have granted a new trial as to damages in the wrongful death case. See Fiddle, Inc. v. Shannon, 834 So. 2d 39, 45 (Miss. 2003); Bobby Kitchens, Inc. v. Miss. Ins. Guar. Ass'n, 560 So.2d 129, 132 (Miss.1989).




### CONCLUSION

The jury's verdict for \$1,000,000 for Susie Cavin on her personal injury claim was not excessive, was well supported by the evidence, and was reached after the jury received proper instructions from the trial court. This Court, therefore, should affirm the trial court's judgment and denial of Defendants' motion for remittitur or new trial as to the personal injury case. However, as to the wrongful death case, the verdict was inadequate in light of the evidence of the six wrongful death beneficiaries' loss of society and companionship. The inadequate verdict resulted from the trial court's faulty instruction regarding the form of the verdict which failed to instruct the jury to make separate awards for loss of society and companionship for each of the beneficiaries. Therefore, this Court should either grant an additur for an adequate award of damages to the wrongful death beneficiaries or reverse and remand the wrongful death case for a new trial as to damages.

Respectfully submitted,

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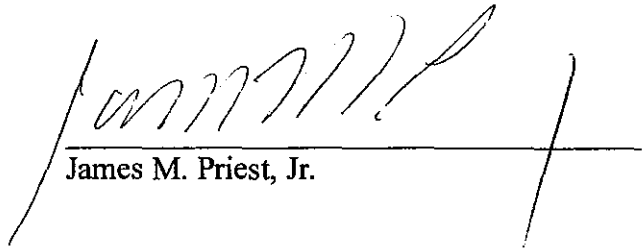
**CERTIFICATE OF SERVICE**

I certify that I have served a copy of the foregoing via first class U.S. Mail, postage prepaid, upon:

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This 3<sup>rd</sup> day of June, 2009.

  
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