

**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**

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

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The Appellee/Cross-Appellant submits this reply brief pursuant to Mississippi Rules of Appellate Procedure 28(c) and 31(b). This brief addresses only the Appellant/Cross-Appellee's response to the single issue raised by the Appellee/Cross-Appellant on cross-appeal: whether 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.

### **REPLY ARGUMENT**

As pointed out in Mrs. Cavin's principal brief, the jury awarded \$500,000 for the wrongful death beneficiaries of Jessie Ray Cavin. The undisputed evidence at trial was that the economic value of Jessie Ray Cavin's lost life expectancy was \$212,927.00 and the funeral expenses were \$7,033.86. As also previously discussed, the evidence 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. Thus, he had six beneficiaries under Miss. Code Ann. § 11-7-13 (2004).

Plaintiff submitted proposed jury instruction P-11 which was a form of verdict on the wrongful death case. The proposed instruction read in full as follows:

"We the jury find for the Plaintiff Susie P. Cavin, on behalf of the wrongful death beneficiaries of Jessie Ray Cavin, and award damages for the present net cash value of the life of the deceased in the sum of \$ \_\_\_\_\_.

We the jury find for the Plaintiff Susie P. Cavin on behalf of the wrongful death beneficiaries of Jessie Ray Cavin and award damages for funeral expenses in the sum of \$ \_\_\_\_\_.

We the jury find for the Plaintiff Susie P. Cavin, on behalf of the wrongful death beneficiaries of Jessie Ray Cavin, and award damages for the survivors' loss of society and companionship of Jessie Ray Cavin as follows:

Susie P. Cavin	\$ _____
Ray Cavin	\$ _____
Carolyn Cavin	\$ _____
Jeremy Cavin	\$ _____
Theresa Cavin	\$ _____
Brandon Cavin	\$ _____."

Thus, the proposed instruction directed the jury to affix economic damages for the present net cash value of Jessie Ray Cavin's life and funeral expenses and then to affix a separate award for loss of society and companionship for each of Jessie Ray Cavin's six wrongful death beneficiaries.

The trial judge refused quoted instruction P-11 (Tr. at 131-33, 135) and 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 damages on wrongful death case. (R. at 277). Defendants argue that this instruction was proper and that any argument for an instruction requiring the jury to consider each individual beneficiary's claim for loss of society and companionship is based upon *dicta* by this Court in a previous case. (Reply Br. of Appellant/Cross-Appellee at 13.)

Quite to the contrary of Defendants' position, in River Region Medical Corp. v. Patterson, 975 So. 2d 205, 208 (Miss. 2007), the Court clearly and explicitly held that in a wrongful death case, each beneficiary must prove his own individual damages 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<sup>1</sup>. For a jury verdict to realize the individual loss of society and companionship claims of the beneficiaries existing under the wrongful death statute, the trial court would have to instruct the jury to affix an individual damage award for each beneficiary's loss of society and companionship. Instruction P-11 would have done so, in accordance with the Patterson case.

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<sup>1</sup>The Court also addressed another category of damages available under Miss. Code Ann. § 11-7-13, the decedent's pain and suffering before death. Id. at 207. Such damages were not sought in the instant case.

In her principal brief, the Plaintiff discussed Bridges v. Enterprise Products Co., 551 F. Supp. 2d 549 (S.D. Miss. 2008) not because it is binding on this Court but because it is an application of the principles recognized in the Patterson case with regard to jury instructions. In that case, the 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.

Plaintiff presented undisputed evidence of \$219,960.86 in economic losses as a result of Jessie Cavin's death. Therefore, \$280,039.14 of the wrongful death verdict was for the beneficiaries' loss of society and companionship. Each beneficiary presented extensive undisputed testimony 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 demonstrated an extraordinarily close bond between Mr. and Mrs. Cavin and their five children. This unique relationship had persisted as the children matured to adulthood, and would have continued but for Mr. Cavin's untimely death.

The jury awarded only \$46,673.19 to each wrongful death beneficiary for his or her loss of society and companionship with Jessie Cavin. This inadequate award resulted from the trial court's refusal to instruct the jury that it was to assess damages for loss of society and companionship for each of the six wrongful death beneficiaries. Instead of being instructed to consider the devastating loss that six individuals had suffered, the trial court required the jury to fill in two blanks (one for the personal injury case and one for the wrongful death case) awarding damages to Susie Cavin. Because its mis-instruction of the jury resulted in an inadequate

verdict, 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 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, as to the issue on cross-appeal, 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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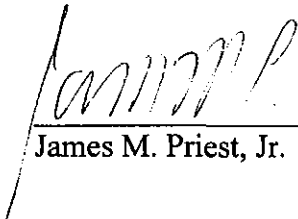
**CERTIFICATE OF SERVICE**

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 15<sup>th</sup> day of July, 2009.

  
\_\_\_\_\_  
James M. Priest, Jr.