

**IN THE SUPREME COURT OF MISSISSIPPI
NO. 2008-TS-01059**

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

VS.

SUSIE P. CAVIN, INDIVIDUALLY, ET AL. APPELLEES

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

**BRIEF OF THE APPELLANTS TERRY'S ENTERPRISES, INC. AND
BARRY TERRY, JR.**

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ORAL ARGUMENT REQUESTED

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, individually and also as representative of all wrongful death beneficiaries of Jessie R. Cavin, Deceased, 9344 Huntington Avenue, Denham Springs, Louisiana
2. Evan Ray Cavin, Plaintiff and Wrongful Death Beneficiary, 913 Bruce Drive, Denham Springs, Louisiana
3. Theresa Ann Cavin, Plaintiff and Wrongful Death Beneficiary, 222 Pin Oak Street, Denham Springs, Louisiana
4. Jeremy Paul Cavin, Sr., Plaintiff and Wrongful Death Beneficiary, 24503 Millicon Drive, Denham Springs, Louisiana
5. Carolyn Cavin Callendar, Plaintiff and Wrongful Death Beneficiary, Denham Springs, Louisiana
6. Brandon Steve Cavin, Plaintiff and Wrongful Death Beneficiary, 222 Pin Oak, Denham Springs, Louisiana
7. William B. Gill III, Gill, Ladner & Priest, PLLC law firm, Attorney for Plaintiffs, 403 South State Street, Jackson, Mississippi 39201-5020
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10. Terry Enterprises, Inc., a Mississippi Corporation, Defendant Barry Terry, Sr. and Mary Terry, Corporate Representatives, 419 Wilmot Road, Greenville, Mississippi 38701
11. Barry J. Terry, Jr., Defendant, 419 Wilmot Road, Greenville, Mississippi 38701
12. Edwin W. Tindall, Lake Tindall, LLP law firm, 127 S. Poplar Street, Greenville, Mississippi 38701, attorney for Defendants/Appellants
13. Heath S. Douglas, Lake Tindall, LLP law firm, 127 S. Poplar Street, Greenville, Mississippi 38701, attorney for Defendants/Appellants
14. Honorable W. Ashley Hines, Presiding Trial Judge, 900 Washington Avenue, Greenville, Mississippi 38701

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VS.

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I. STATEMENT OF ISSUES – ASSIGNMENT OF ERRORS

Defendants/Appellants identify the Issues on Appeal, and assign as error, the following matters.

- I. Whether the Trial Jury was Improperly Instructed (Plaintiffs' Instruction P-8 and Defendants' Instruction D-4) on Plaintiffs' Recoverable Damages.
 - A. Instruction P-8 allowed consideration of Plaintiff's Future Medical Expenses, Pain and Suffering and Disability, i.e., Loss of Enjoyment of Life, over Defendants' objections. The personal injury award by the Trial Jury, of \$1,000,000.00, individually and separately to Susie P. Cavin, is unsupported by the evidence and is contrary to the great weight of the evidence, considering the modest medical expenses underlying the same (roughly \$32,000.00), the absence of any substantial or probative evidence of either alleged future medical expenses, alleged future pain and suffering, or any alleged future "impairment/or disability" i.e., "loss of enjoyment of life".
 - B. The Trial Court erred in submitting to the Jury (Plaintiffs' Instruction P-8) Susie P. Cavin's separate claim for "emotional distress, mental anguish, given the absence of sufficient evidence presented at trial, to support the same as specifically relates:

1. Granting of Plaintiffs' Jury Instruction P-8, allowing consideration, as recoverable damages, over Defendants' objection, for Mrs. Cavin's alleged emotional distress and mental anguish; and
 2. Denying Defendants' Instruction D-4, describing the necessary evidentiary requirements for any award of damages for "emotional distress and/or mental anguish".
- II. The Trial Court erred in not sustaining/granting Defendants' Post Trial Motion for *Remittitur*, of the personal injury award to Susie P. Cavin or alternatively, Motion for New Trial as the same relates to:
- A. The Trial Court's submission of possible recovery of damages for future medical expense, future pain and suffering and/or future "disability", i.e., loss of enjoyment of life; and
 - B. The Trial Court's submission to the Jury of possible recovery, without sufficient proof and/or requisite evidentiary foundation, for Susie P. Cavin's personal claim for mental anguish/emotional distress, absence any proof of "manifestation" of the same.
- III. The Personal Injury Award of \$1,000,000.00 to Susie Cavin is against the great weight of the evidence, establishing bias, passion and/or prejudice, and resulting in an unsustainable verdict.

II. STATEMENT OF THE CASE

This appeal rises from a two (2) day trial, and a Jury Verdict, which concluded in the Circuit Court of Washington County, Mississippi on March 4, 2008, the Honorable Ashley Hines, Circuit Judge, presiding. The claims presented were:

1. The personal injury claim of Susie P. Cavin, a guest passenger in a van driven by her husband Jessie Cavin, arising from a “head-on collision” with a gravel truck, owned and operated by Terry’s Enterprises, a Mississippi Corporation, and being driven by Terry’s Enterprises employee Barry Terry, Jr., with a resulting Jury Verdict to Mrs. Cavin, individually and personally, of \$1,000,000.00; and
2. The wrongful death claim, separately asserted by Susie P. Cavin, for the death of her husband, Jessie Cavin, as a result of the collision described, which she presented on behalf of all wrongful death beneficiaries, namely Susie P. Cavin (herself), and the surviving children of the decedent, Evan Ray Cavin, Theresa Cavin, Jeremy Cavin, Carolyn Callendar and Brandon Cavin, for which the Trial Jury awarded damages in the amount of \$500,000.00.

Terry’s Enterprises and Barry Terry, Jr., Appellants, have appealed, with *supersedeas*, only the clearly separate verdict, for personal injuries, of \$1,000,000.00 awarded to Susie P. Cavin, individually. The wrongful death verdict of \$500,000.00, to all wrongful death beneficiaries, has been paid in full, but said beneficiaries, as Cross-Appellants, have perfected their own separate appeal, alleging that the wrongful death award was insufficient.

The head-on collision underlying this litigation occurred on October 18, 2005, just north of Hollandale, Washington County, Mississippi on U. S. Highway 61, a two-lane highway running generally North and South. There is no dispute that the Terry’s Enterprises’ truck, driven by Barry

Terry, Jr., crossed the highway centerline, where it collided head-on with the Cavin's van. All evidence indicates that Jessie Ray Cavin died instantly, while Susie Cavin suffered personal injuries, most notably a comminuted fracture of her left wrist. It is the damage award for Mrs. Cavin's personal injury which is the subject of this Appeal, as Terry's Enterprises and Barry Terry, Jr. maintain that insufficient evidence was produced at trial to support a Jury Award for mental anguish and/or emotional distress, any future medical expenses, and/or future pain and suffering, all of which damages claims were, Defendants submit, improperly submitted to the Trial Jury. Absent sufficient proof to sustain these damage claims, the Jury Award of \$1,000,000.00, to Mrs. Cavin, whose medical expenses were roughly \$32,000.00, and who made a successful recovery, within six (6) months of the accident, is an award unsupported by the evidence, clearly excessive and *prima facie* indicative of bias, passion or prejudice by the Jury either against Terry's Enterprises and Barry Terry, Jr., or sympathy for Susie P. Cavin.

Terry's Enterprises and Barry Terry, Jr.'s Post Trial Motions, for *remittitur* or New Trial, in the alternative, alleging these same grounds for post trial relief, were denied.

III. SUMMARY OF ARGUMENT

Issues raised in this Appeal, by Defendants Terry (Terry Enterprises, Inc. and Barry Terry, Jr.), are limited to the Trial Jury's award, and underlying procedural and evidentiary errors related thereto, of One Million (\$1,000,000.00) dollars for the personal injury claim presented for Plaintiff (individually), Susie P. Cavin.

This Summary of Issues is two-fold, first as to instructional error, and, second, is likewise two-fold as to its evidentiary and procedural error, and is best described by the restatement of those damage issues as:

1. The personal injury award (excluding consideration of the issue of "mental anguish/mental distress"), is clearly excessive and unsupported by sufficient competent evidence, as Mrs. Cavin:
 - a. Suffered, personally, a broken wrist, with corresponding medical treatment totaling approximately \$32,000.00, with virtually "full and successful resolution" within six (6) months; and
 - b. Plaintiffs' Instruction P-8, granted over Defendants' objection, allowed the Jury to consider and award damages for "future medical expenses, future pain and suffering and future disability, i.e., loss of enjoyment of life", despite no competent evidence supporting such award; and
2. The Jury's consideration of damages for Susie P. Cavin's alleged "mental anguish/emotional distress", under Plaintiffs' Instruction P-8 was error, considering:
 - a. The total absence of any competent proof supporting any such award, or even its consideration by the Trial Jury; and

- b. The combined insufficiency of “jury instruction”, namely Plaintiffs’ Instruction P-8 (granted over Defendants’ objection as to the elements necessary to establish any “mental anguish/emotional distress” award), and the Court’s refusal of Defendants’ Instruction D-4, offered to correctly instruct the Jury about the requisite, legal elements necessary for any award for “mental anguish/emotional distress” damages.

The confluence of these instructional errors resulted in a procedurally unsustainable damage award (\$1,000,000.00) to Susie P. Cavin, individually, which is neither;

1. Supported by competent evidence, is against the great weight of the evidence, and is clearly excessive, so as to evidence bias, passion or prejudice against these Defendants, or impermissible sympathy for Plaintiff, Susie P. Cavin, all of which;
2. Warranted *remititur*, under Defendants’ post trial motion, which *remititur* motion was erroneously denied.

IV. ARGUMENT

ISSUE I:

**WHETHER
THE TRIAL JURY WAS IMPROPERLY INSTRUCTED ON APPLICABLE LAW
CONCERNING PLAINTIFFS' RECOVERABLE DAMAGES, GIVEN THE PROOF
PRESENTED AT TRIAL – PLAINTIFFS' INSTRUCTION P-8 (GIVEN OVER
DEFENDANTS' OBJECTION), AND INSTRUCTION D-4 (REFUSED).**

Defendants assign as error the Trial Court's granting of Instruction P-8 and its refusal of Defendants' Instruction D-4. The end result of granting P-8 and refusing D-4 was miss-instruction of the Jury on "damage issues", to the prejudice of Defendants.

The standard of Appellate Review for Jury Instructions has been stated by this Court as follows:

The instructions are to be read together as a whole, with no one instruction to be read alone or taken out of the context. A Defendant is entitled to have jury instructions given which present his theory of the case. However, the Trial Judge may also properly refuse the instructions if he finds them to incorrectly state the law or to repeat a theory fairly covered in another instruction or to be without proper foundation in the evidence of the case. *Blake v. Clein*, 903 So. 2d 710, 719 (Miss. 2005).

When any granted Jury Instruction is challenged, two questions must be asked: Does the instruction contain a correct statement of the law, and is the instruction warranted by the evidence. (Emphasis provided). *Church v. Massey*, 697 So. 2d 407, 410 (Miss. 1997)(citing *Hill v. Dunaway*, 487 So. 2d 807, 809 (Miss. 1986)). Stated more succinctly, to have an instruction granted, the proponent must show that:

1. The instruction is supported by the evidence and that,
2. The instructions are correct statements of the law. (Emphasis provided).

Church, 697 So. 2d at 411, *Copeland v. City of Jackson*, 548 So. 2d 970, 973 (Miss. 1989).

Plaintiffs' Instruction P-8 was not, in material respects, supported by the evidence presented at trial, and its submission to the Jury rendered the resulting award of damages erroneous. This assignment of error has two (2) separate components, for purposes of this appeal. First, there was inadequate proof to support any claim for future medical expenses, future pain and suffering, or Plaintiff Susie Cavin's future "disability" i.e., her alleged loss of enjoyment of life activities. Secondly, Instruction P-8 authorized the Jury to consider damages for Susie Cavin's alleged mental anguish and/or emotional distress, for which no competent evidentiary predicate was produced.

Instruction P-8 read as follows:

The Court has instructed you to find for the Plaintiff Susie P. Cavin as to her claims for personal injuries, and you must determine an amount that is fair compensation for all of Susie P. Cavin's damages. These damages are called compensatory damages. The purpose of compensatory damages is to make Susie P. Cavin whole, that is, to compensate her for the damages that she has suffered, or will reasonably incur in the future.

You shall award \$32,801.66 which the parties stipulate is the reasonable medical expense incurred by Susie P. Cavin as a proximate result of her injury.

In addition, you should consider each of the following elements of damage, to the extent you find them proved by a preponderance of the evidence:

1. Reasonable medical and other expenses proximately caused by the injury, and medical and other expenses which Plaintiff will reasonably incur in the future as a proximate result of the injury;
2. Past and future pain and suffering proximately caused by the injury, including inability of Plaintiff to enjoy the pleasures of life proximately caused by the injury;
3. Past and future demonstrable harm from emotional distress and mental anguish proximately caused by the injury and which was reasonably foreseeable to the Defendant.
4. Past and future demonstrable harm from emotional distress and mental anguish proximately caused by Plaintiff's witnessing the death of her husband Jessie Ray Cavin.

(Emphasis added to delineate, specifically, those portions of Instruction P-8 for which there is no evidentiary support).

A.

**Future Pain and Suffering/Future Medical Expenses/
Future Disability and/or Loss of Enjoyment of Life**

The only evidence submitted at trial, by any physician arguably competent to address Susie Cavin's future medical need, pain and suffering or disability i.e., loss of enjoyment of life, was that of Dr. Michael Robichaux, Jr., whose testimony merely established that Mrs. Cavin suffered a broken wrist which required two (2) surgical procedures for its repair, with her incurred medical expenses totaling roughly \$33,000.00. (See Trial Exhibit 49, Robichaux deposition transcript, Page 8, lines 2 through 25; Page 9, lines 1 through 11; Page 10, lines 6 through 8, Page 12, lines 3 through 25; and Page 13, lines 1 through 7; and Page 18, beginning at line 25 through Page 21, Line 3). Robichaux's proof limited Mrs. Cavin's "period of disability" to March 8, 2006, being roughly six months. (Trial Exhibit 49, Robichaux deposition transcript, Page 16, lines 2 through 20). The only medical proof presented to the contrary suggested the mere possibility that, in the future, Mrs. Cavin might experience "mild arthritic problems", for which the occasional use of Tylenol, Advil, or some other non-steroidal anti-inflammatory medication should be sufficient for pain management. (Trial Exhibit 49, Robichaux deposition transcript at Page 16, line 21 through Page 23, line 11).

The video deposition of Dr. Robichaux fails to establish or support any viable claim for future pain and suffering or future medical expenses. Yet Plaintiffs' Jury Instruction P-8, discussed *supra*, granted over Defendants' objection, put such elements before the Jury, for its consideration. Dr. Robichaux awarded no permanent impairment rating, envisioned no future surgery, prescribed no future medication, and predicted only that Mrs. Cavin may need to take some over the counter pain/inflammation medicine in the future. (Trial Exhibit 49, Robichaux deposition transcript at Page 21, line 14 through Page 23, line 11). Further, Dr. Robichaux had not treated Mrs. Cavin, nor prescribed any medication for her, since March of 2006, nearly two years prior to the time of this

trial. (Trial Exhibit 49, Robichaux deposition transcript at Page 21, line 14 through Page 23, line 11). Dr. Robichaux made no prediction as to any future medical procedures, and accordingly made no predictions as to any future costs the Plaintiff may incur.

Any award for future pain and suffering or future medicals is unsupported by the evidence, and should not have been included in Jury Instruction P-8. Neither was the Jury's consideration of a possible award for future "disability" supported by any substantial, credible medical evidence. The Court's recent decision in *City of Jackson v. Spann*, 2009 WL 141848 (Miss. 2009), establishes the criteria for submission of such damage claims, and requires the medical evidence presented to demonstrate some level of certainty, and not be conjecture. *Id* at 7 (Citing *Catchings v. State*, 684 So. 2d 591, 598 (Miss. 1996)).

The *Spann* criteria merits comment, as applies to this Appeal. In *Spann*, a testifying medical doctor, in essence, "guessed" as to the cost of possible future surgery (\$20,000.00). This Court found such "evidence" insufficient to support an award for future medical costs. *Spann* at 7. Likewise, this Court held that an award of \$150,000.00 for disability/future medical costs was improper, considering that the testifying doctors offered only "equivocal testimony regarding future surgery". *Spann* at 7. In the case *sub judice*, the medical testimony is even more sparse than in *Spann*, while the award was much larger. The submission of Paragraph 1 of Instruction P-8 (future medical costs) was not supported by the evidence.

As to future pain and suffering and any alleged future "loss of enjoyment of life" (Paragraph 2 of Instruction P-8), a similar case by this Court has overturned an award of \$500,000.00 for future pain and suffering, for its lack of evidentiary support. (See *Entergy Miss., Inc. v. Bolden*, 854 So. 2d 1051 (Miss. 2003)). In *Bolden*, the Plaintiff sustained injuries to her left side, including her knee, shoulder and ankle. She had surgery to her left knee and ankle. *Id* at 1054. *Bolden* claimed lost

wages of \$9,600.00 and medical expenses of \$31,686.06 (almost exactly the same as the case *sub judice*). She received an impairment rating of 15% for her left knee, and 10% to her for her left ankle. In that case, Mrs. Bolden could not return to her regular employment, unlike Mrs. Cavin, who did return to her job at Wal-Mart. (Record Transcript, Volume I of II, Page 94, excerpts of testimony by Evan Ray Cavin, and Record Transcript, Volume II of II, Page 110, excerpt of trial testimony of Theresa Cavin). This Court, based on this evidence, found an award of \$500,000.00 improper and unsupported by the evidence. The Court opined:

We conclude the scant testimony offered in support of damages for pain and suffering does not justify such a large award of damages for pain and suffering. . . *Id* at 1058.

Plaintiff, Susie Cavin, in this case provided evidence far below the thresholds set either by *Spann* and/or *Bolden* for recovery of future medical expense and future pain and suffering. Again, there was no competent medical evidence establishing any identifiable impairment rating, no future surgery was predicted, no future medications were identified, beyond “over the counter medicines”, nor was any estimate given for future costs. The evidence presented at trial left the Trial Jury with nothing except speculation and conjecture, legally insufficient, to sustain any award for any “future damages”. For this reason alone, reversal and remand is required, as Susie Cavin’s future damages, which the Jury was instructed it “. . . should consider. . .”, were unsupported by any evidence. This instruction was error and was prejudicial to Defendants.

B.

Emotional Distress/Mental Anguish

Plaintiffs’ Jury Instruction P-8 also authorized the Jury to consider damages for mental anguish/mental distress, which claim is not supported by competent evidence within this record. The only emotional distress issue presented to the Jury was for garden variety negligent infliction.

Further, the Court refused Defendants' Instruction D-4, which would have correctly instructed the Jury of the elements necessary to sustain damages for mental anguish and/or emotional distress.

Defendants' Instruction D-4, which the Trial Court denied, was as follows:

You may only award damages to the Plaintiffs for emotional distress if the Plaintiff proves, by a preponderance of the evidence, that Plaintiff suffered a physical injury, a physical illness or assault upon her mind, nervous system or personality of the Plaintiff which is medically cognizant and which requires treatment by a medical professional, and the injury/affect was a reasonably foreseeable result of the Defendants' negligence, unless, in the absence of a physical injury/affect which is medically cognizant, the Plaintiffs may only recover for emotional distress if you find, by a preponderance of the evidence, that the Defendants' conduct was willful, wanton, malicious, outrageous or intentional.

Instruction D-4 was an accurate description of Mississippi's Negligent Infliction of Emotional Distress case law as of March, 2008 (the trial date). Plaintiffs' instruction (P-8) was not supported by sufficient evidence, as it did not include any reference to any cognizable manifestation of any emotional injury, and thereby, in conjunction with the Court's denial of D-4, deprived the Jury of adequate instruction on the elements necessary to support any mental anguish/emotional distress award.

Concerning "medical manifestation", and corresponding treatment for emotional distress, Mrs. Cavin testified that a physician, whose records are not in evidence, gave her a prescription for Lexapro, an anti-depression medication, about five (5) months after the subject accident, with which she experimented for a period of something less than one month. (See Transcript at Pages 81, 83, & 84). There was no testimony, medical or otherwise, linking the Lexapro prescription to Mrs. Cavin's alleged separate and personal "emotional distress". She testified that she did not finish the one month prescription, nor did she ever follow-up with that, or any other physician, for any treatment for mental or emotional distress. (See Transcript at P. 84). No proof, beyond Mrs. Cavin's vague testimony, addresses the requirement for some medically cognizable manifestation of

mental/emotional distress, which still was required to have been proximately related (and there is no such proof) to Mrs. Cavin's alleged emotional distress claim.

Additionally, three (3) of five (5) of Mrs. Cavin's adult children testified, very briefly, that Mrs. Cavin had trouble sleeping at times, that she was sad, and cried "a lot". The entirety of the proof elicited about Mrs. Cavin's inability to sleep, her sadness and crying comprises only parts of four (4) pages of the Trial Transcript, and is summarized as follows:

1. Evan Ray Cavin, Record Transcript Page 94, lines 9 through 21;
2. Theresa Cavin, Transcript Page 110, lines 13 through 16;
3. Brandon Cavin, Transcript Page 122, lines 24 through 29;
and Page 123, lines 1 through 19.

The concept of recovery for alleged negligent infliction of emotional distress has seen considerable development and discussion in Mississippi *jurisprudence* over the past ten to twenty years. This Court has stated that "mental anguish is a nebulous concept. . . and requires substantial proof for recovery". *Summers ex rel v. St. Andrews Episcopal School, Inc.*, 759 So. 2d 1203, 1211 (Miss. 2000)(citing *Morrison v. Means*, 680 So. 2d 803 (Miss. 1996)).

This Court has historically dealt with negligent infliction of emotional distress cases (as was the case *sub judice*) in one of two ways. A "restrictive view" has been applied in the majority of decisions, under which the Plaintiff must show a demonstrative, medically cognizable injury (or physical manifestation) due to the alleged distress. A more "permissive view" does not, seemingly, require "physical manifestation", but only that some significant/demonstrable emotional distress occurred which was reasonably foreseeable to the Defendant. (See *American Banker's Ins. Co. of Florida v. Wells*, 889 So. 2d 1196 (Miss. 2001) for the "restrictive view" and *Adams v. U. S. Homecrafters, Inc.*, 744 So. 2d 736 (Miss. 1999) for the "permissive view").

Even under the “permissive” interpretation, a Plaintiff must present evidence greater than simple worry, lack of sleep, crying or generally being upset. Such scant evidence, which is very similar to the evidence presented at the trial of the case *sub judice*, does not give rise to the right to emotional distress damages. *Adams*, 744 So. 2d at 743-44 (citing *Strickland v. Rossini*, 589 So. 2d 1265 (Miss. 1991)). In *Adams*, the Court noted that only four sentences in the transcript were related to any claimed emotional distress. *Id* at 744. In Mrs. Cavin’s case, the testimony offered was very similar, totaling only parts of seventeen (17) sentences in the transcript.

If the “majority/restrictive” line of cases is followed, there is no doubt that Instruction P-8, and any resulting emotional distress damages, was improper. The “physical manifestation/medically cognizable” test has been applied by this Court many times over the past decade. See *American Bankers; Summers; Wilson v. G. M. Acceptance Corp.*, 883 So. 2d 56, 65 (Miss. 2004); *Illinois Central R.R. v. Hawkins*, 830 So. 2d 1162, 1174 (Miss. 2002); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1 (Miss. 2007). In all of these cases, the Court held the Plaintiff had to prove a demonstrable physical harm/manifestation to recover for negligent infliction of emotional distress.

In *American Bankers*, the Plaintiff offered testimony concerning sleepless nights and worry. This Court stated that this proof was insufficient, holding that the Plaintiff must prove an actual physical manifestation of the emotional distress. *American Bankers*, 889 So. 2d at 1209.

The Court, in *Paz*, went even further, holding that a Plaintiff seeking to recover emotional distress damages must put on additional proof of a medically cognizable physical manifestation of the emotional distress evidencing treatment. *Paz*, 949 So. 2d at 4.

In perhaps the most analogous case to the one *sub judice*, the Mississippi Court of Appeals upheld summary judgment for the Defendants in *Randolph v. L. Lambert, LLC Properties, Inc.*, 926 So. 2d 941 (Miss. Ct. App. 2006), where the Plaintiff put on proof both that she suffered high blood

pressure and was prescribed medication for anxiety/depression. *Id* at 946. In *Randolph*, the Plaintiff presented no medical evidence to support her claims of emotional distress or that the prescriptions bore any causational relationship to her alleged emotional distress. *Id* at 946. This case was very similar to the claims of Mrs. Cavin, but perhaps even stronger, proof-wise, as Mrs. Cavin makes no claim of any possible manifestation like high blood pressure. Mrs. Cavin also offered no causational proof linking any alleged emotional distress to her one time prescription for Lexapro. In affirming summary judgment, the Court stated in *Randolph* “Plaintiff cannot recover for emotional distress damages resulting from ordinary negligence without proving some sort of physical manifestation of injury or demonstrable harm.” *Id* at 946. Such should be the outcome in the case *sub judice*.

This Court has made a distinction, it would seem, for negligent infliction cases involving breach of contract claims. (See *Univ. of Southern Miss. v. Williams*, 891 So. 2d 160, 172-73 (Miss. 2004). In such cases, this Court has held no actual physical harm must be proven. *Id* at 172-73 (See also *Morris Newspaper Corp. v. Allen*, 932 So. 2d 810, 818-19 (Miss. 2005)(discussing the contract distinction)). Such a distinction has not been applied in tort cases, such as the one in *Paz*, and in the case *sub judice*. Defendants, therefore, believe the physical manifestation standard should be applied in this case.

Vague testimony related to a one month “trial prescription”, months after the accident, for an antidepressant, for which there is no medical testimony linking it to any claimed emotional distress, does not meet this Court’s previously stated evidentiary burden. The Plaintiff, in the case *sub judice*, can not meet the “restrictive” burden (or even the “permissive” burden), making the Trial Court’s granting Instruction P-8 and denial of Instruction D-4, allowing consideration of emotional distress and/or mental anguish, error.

Plaintiffs' reliance, in prior pleadings, on *Entex, Inc. v. McGuire*, 414 So. 2d 437 (Miss. 1982), in support of any award for emotional distress damages is both misplaced and inaccurate. Defendants' do not contend that Section "4" of Instruction P-8 was inaccurate as to the "zone of danger" damages claimed in that section, if such damages/theory is still proper (which seems less than certain). *Entex*, and its resulting theory of recovery, was called into doubt with this Court's decision in *Summers*, and also in *Campbell v. Beverly Enterprises*, 724 F.Supp. 439 (S.D. Miss. 1989). Defendants point out that none of Plaintiffs' proof addressed, in any way, the so-called "zone of danger argument". *Entex* addresses, in essence, "third party" emotional distress recovery. Defendants contend that the granting of Section "3" and Section "4" of Instruction P-8 was error and unsupported by the evidence. As *Entex* is irrelevant to Section "3", and Section 4 of Instruction P-8 has no supporting proof, again, *Entex* should not be considered by this Court.

ISSUE II:

WHETHER THE TRIAL COURT ERRED IN NOT SUSTAINING DEFENDANTS' POST TRIAL MOTION FOR *REMITTITUR* OF THE PERSONAL INJURY AWARD TO SUSIE P. CAVIN, OR ALTERNATIVELY, MOTION FOR NEW TRIAL.

Appellate Courts proceed on a case by case basis when determining whether *remittitur* should have been granted or where a Jury Award is excessive. *Community Bank v. Courtney*, 2004 WL 1277167 (Miss. 2004). The standard of review for an appeal of a denial of a *remittitur* motion is abuse of discretion, applied using an objective/case by case standard. *Case v. Walker*, 771 So. 2d 403 (Miss. 2000).

As previously stated, Defendants filed their *Remittitur* Motion, as to only the \$1,000,000.00 personal injury award Judgment to Susie P. Cavin by the Jury in Washington County Circuit Court on March 4, 2008. The Trial Court denied said Motion, and Defendants appeal that denial. Miss. Code Ann. § 11-1-55, The *Remittitur/ Additur* Statute, provides the following:

The Supreme Court or any other Court may overrule a Motion for New Trial or affirm on direct or cross appeal . . . if the Court finds that the damages are excessive or inadequate for the reason that the Jury or Trier of Fact was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence.

The relief contemplated by Miss. Code Ann. § 11-1-55 is now encompassed within Mississippi Rule of Civil Procedure 59 Motions. In this case, the award of \$1,000,000.00 to Mrs. Cavin evidences bias, passion and/or prejudice by the Jury, and was also against the overall weight of the evidence.

The incorporation of any damages for future medical costs, future pain and suffering, future "loss of enjoyment of life" and/or mental anguish, whether past or future, for which there is no supporting evidence, is against the weight of the evidence. Given the \$1,000,000.00 verdict, in conjunction with the paucity of the evidentiary record for the damages is clear evidence of extreme bias, passion and/or prejudice by the Jury. This bias/prejudice strongly suggests that the award entered was not commensurate with any reasonable figure that could have been awarded, by any reasonable Trial Jury, given the actual physical injuries sustained by Mrs. Cavin, their relatively limited duration, the absence of any evidence to support future medical expenses, the absence of any proof to support future pain and suffering, the absence of any proof of future loss of enjoyment of life, and the absence of any significant proof of any manifestation of the mental anguish or mental distress.

The Jury Award to Mrs. Cavin falls under both the bias/prejudice and credible weight standards set forth in Miss. Code Ann. § 11-1-55. This Court has reduced awards (larger and smaller) upon which the evidentiary record was much more extensive than the one *sub judice*. In *Bolden*, discussed *supra*, the Plaintiff's damages, both physical (injuries to the knee, shoulder and ankle, which required surgery) and economic (\$42,000.00 in medicals and lost wages including future lost wages), were larger and more significant, while the award, for which *remittitur* was still ordered,

was much smaller (\$500,000.00, being only one half of the award *sub judice*). In that case, the Court reduced the damage award by \$300,000.00 (to \$200,000.00). *Bolden*, 854 So. 2d at 1054-58.

In another analogous case, this Court reduced an award of \$30,000.00, finding it excessive, specifically noting that although the Plaintiff complained of nervousness and loss of sleep, a doctor testified he did not expect the Plaintiff to be in any pain at the time of trial, no future medical expenses were expected, Plaintiff did not visit a doctor for treatment or take any prescription drugs for several months, and the Plaintiff worked for two years before the time of trial. *Stringer v. Crowson*, 797 So. 2d 368 (Miss. 2001). (For further analogous *remittitur* cases see *Rawson v. Midsouth Rail Corp.*, 738 So. 2d 280 (Miss. 1999); *Stratton v. Webb*, 513 So. 2d 587 (Miss. 1987)).

When considering the reasonableness of Jury Verdicts under Miss. Code Ann. § 11-1-55, the “sky is not the limit”. *Gatewood v. Simpson*, 812 So. 2d 212 (Miss. 2002). The Jury Award at issue here evidences a “sky is the limit” mentality, and is ripe for *remittitur* and/or new trial under Miss. Code Ann. § 11-1-55.

The Trial Court should have granted Defendants’ Motion for *Remittitur* and/or for New Trial on Damages under Miss. Code Ann. § 11-1-55, as the Jury Award of \$1,000,000.00 (31 times the “actual damages”) for Mrs. Cavin’s personal injury claim was both indicative of bias, prejudice and/or passion by the Jury, and was unsupported by the great weight of the evidence presented at trial. The Appellants request this Court to either reduce the verdict to the highest reasonable verdict amount, commensurate with the evidence produced at trial, or award a new trial on damages.

Issue III:

**WHETHER
THE VERDICT WAS AGAINST THE OVERALL WEIGHT OF THE
EVIDENCE.**

This Court should only disturb a Jury Verdict, on appeal, if it is so contrary to the overwhelming weight of the evidence that the result is unconscionable. *Burr v. Miss. Baptist Med. Center*, 909 So. 2d 721, 730 (Miss. 2005). Defendants concede that under this standard, great deference should be afforded to all Jury Verdicts. *Burr*, 909 So. 2d at 730.

Even given this stringent standard of review, once applied to the Jury Verdict rendered, the evidentiary record of the case *sub judice* is so blatantly deficient, that it cannot legitimately sustain the \$1,000,000.00 verdict for the personal injury claim of Susie Cavin. Specifically, no “deference” to the subject Jury Verdict is warranted at all, as this record is devoid of any evidence upon which to base any award for:

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

The Jury’s award of thirty one times the Plaintiff’s actual damages, with no credible support for any of the foregoing elements of damage, was far beyond the scope of reasonableness, and the award is improper and unconscionable. Any such verdict must be overturned, as being against the great weight of the evidence. Like this Court’s holding in *Bolden*, 854 So. 2d, at 1058 . . .the size of the award here, given the facts of the case at bar, “shocks the conscience of this Court. . .”.

Defendants respectfully urge that reversal and remand, for a new trial for damages, is warranted, if this Court chooses not to limit damages to its own determination of what award is the

highest, conscionable award which any reasonable Jury could have awarded, given the evidence produced.

V. CONCLUSION

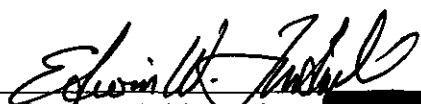


The sole issue raised by Terry's Enterprises, Inc. and Barry Terry, Jr.'s appeal is whether the award by a Washington County Jury of \$1,000,000.00, for Susie Cavin's personal injuries, limited by legitimate proof to a showing only that she suffered a broken wrist, requiring two surgical procedures for repair, at a cost of \$32,801.66, and for which she made a full recovery, within six (6) months, is sustainable. It is not, as it evidences bias, passion or prejudice which should shock this Court. Coupled with that shocking and unsustainable result are clear instructional errors which allowed, indeed even mandated, the Jury's consideration of damages for future medical expense, future pain and suffering, future loss of enjoyment of life and mental anguish and/or emotional distress, for which there was no evidentiary support, as required by Mississippi Law.

Defendants/Appellants, Terry's Enterprises, Inc. and Barry Terry, Jr., respectfully urge that reversal is appropriate.

THIS THE ¹⁴12 DAY OF MARCH, 2009.

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

BY:


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VI. CERTIFICATE OF SERVICE

I, Edwin W. Tindall, do hereby certify that I have mailed, postage prepaid, a true and correct copy of the foregoing document to:

William B. Gill III, Esquire
Kirk G. Ladner, Esquire
James H. Priest, Jr., Esquire
Gill, Ladner & Priest, PLLC
403 South State Street
Jackson, Mississippi 39201-5020

Honorable Ashley Hines
Washington County Circuit Judge
P. O. Box 1315
900 Washington Avenue
Greenville, MS 38702-1315

This, the 12th day of March, 2009.


EDWIN W. TINDALL