IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00855

KRISTA RHODES — APPELLANT

VERSUS

RONNIE RAFFEO — APPELLEE

APPEAL FROM THE
CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

APPELLANT'S REPLY BRIEF

ROBERT H. TYLER
ATTORNEY AT LAW
MSB N[redacted]
JENNIFER TYLER BAKER
MSB N[redacted]
TYLER LAW FIRM
160 PORTER AVENUE
P.O. BOX 1124
BILOXI, MS 39533-1124
TELEPHONE: (228) 436-4682
FACSIMILE: (228) 436-3991

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-CA-00855

KRISTA RHODES **APPELLANT**

VERSUS

RONNIE RAFFEO **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1.	Krista Rhodes (now Goff)	Appellant
2.	Ronnie Raffeo	Appellee
3.	Safeway Insurance Company	Insurer for Appellee
4.	Robert H. Tyler Tyler Law Firm	Attorney for Appellant
6.	Jennifer Tyler Baker Tyler Law Firm	Attorney for Appellant
7.	Trace D. McRaney Dukes, Dukes, Keating & Faneca, P.A.	Attorney for Appellee
8.	Honorable Lawrence P. Bourgeois, Jr.	Circuit Court Judge

SO CERTIFIED this the 22nd day of February, 2011.

JENNIFER TYLER BAKER

TABLE OF CONTENTS

Certificate of Interested Persons i

Table of Contents ii

Table of Authorities iii

Reply Argument 1-5

Conclusion 6

Certificate of Service 7

Certificate of Filing 8

TABLE OF AUTHORITIES

Brown v. Cuccia, 576 So.2d 1265 (Miss. 1991). 3

Cortez v. Brown 408 So.2d 464 (1981). 2

Dobbins v. Vann, 981 So.2d 1041 (Miss. 2008). 4

Dunn v. Butler, 252 Miss. 40, 172 So.2d 430, 431 (1965). 6

Harvey v. Wall, 649 So.2d 184 (Miss. 1995). 5

McClatchy Planning Co. v. Harris, 807 So.2d 1266 (Miss. 2001). 5

Rodgers v. Pascagoula Public School District, 611 So.2d 942 (Miss. 1992). 5

Scott Prather Trucking v. Clay, 821 So.2d 819 (Miss.2002). 5

Thompson v. Nguyen, 2002 WL 34591654 (Miss. App.). 1, 2

REPLY ARGUMENT

Raffeo argues that the amount of the verdict awarded to Rhodes was the total amount of the emergency room bill and ambulance bill, plus $3375.99 for pain and suffering. This is speculation, at best, and Raffeo has no evidence to suggest that the jury apportioned damages in that way. A more logical inference is that the jury awarded damages for all the medical expenses, plus $36.99 for pain and suffering to round out to an even $5,000.00. The record reflects that Rhodes incurred $4963.01 in medical bills. Two of those bills, the ambulance and the emergency room bills, were uncontested by Raffeo. The remaining amount were the charges of the treating chiropractor. Dr. Johnson testified that his treatment and corresponding bill were related to the accident and were reasonable. That testimony was not refuted by any expert called by Raffeo. As such, the logical inference, the one supported by the evidence presented to the jury, is that the jury awarded Rhodes a mere $36.99 for pain and suffering. Rhodes is entitled to an additur and it was an abuse of discretion of the trial court to deny the motion for New Trial or in the alternative, additur, was denied.

In *Thompson v. Nguyen*, 2002 WL 34591654 (Miss.App.2011), Thompson was rear ended by Nguyen in a collision that resulted in "no obvious vehicular damage or injury to either of the passengers" *Id.* at *1. Subsequently, Thompson began experiencing pain in her neck and back, underwent physical therapy and two surgeries. She produced a medical expense itemization totaling $234,316.49. At trial, Nguyen admitted liability. *Id.* at *1-2. The jury returned a verdict for Thompson in the amount of $9,131.00, which was the exact amount of her physical therapy bill. Thompson in turn sought an additur, or in the alternative, a new trial on damages and the trial court denied the motion, only to be reversed by this Court for a new trial on damages. *Id.* at *3-4. As in *Thompson*, Rhodes put on proof that she incurred medical expenses in the amount of $4963.01 and that "[t]he medical expenses were testified to as being reasonable and necessary." *Id* at *4. At trial,

Nguyen tried to put causation between the accident and medical expenses incurred at issue. Nguyen drew Thompson's credibility into question, elicited evidence of a past accident and admitted evidence showing no damage to her car. "Even so, we find the jury's award to be unreasonable." *Id* at *5-6. Nguyen had a far stronger causation argument than Raffeo. Here, there was damage to the truck Rhodes was a passenger in and Rhodes had no prior motor vehicle accidents, only a minor, one time complaint years before of back pain.

This Court stated that the discrepancy between the medical bills and the verdict "suggests that the verdict may have been unresponsive to the evidence..." *Id* at *4. While the amount of medical bills in *Thompson* and the bills of Rhodes are different, the pattern is the same. The discrepancy between what Rhodes was awarded for pain and suffering and her actual proven medical expenses does suggest that the verdict was "unresponsive to the evidence." *See Id.*

The Defendant, in his argument that *Cortez v. Brown,* 408 So.2d 464 (1981) provides no precedent for this Court to rely upon, is mistaken in two key points. First, Rhodes did not, as Raffeo suggests, fail to inform the Court of the procedural aspect of that case. Rhodes does not deny, and even thoroughly details in her Brief, that the issue before the Supreme Court was the award of a $16,000 additur that the trial court had granted after a verdict was returned for the Plaintiff awarding zero damages. 408 So.2d at 470. Second, the importance of *Brown* is not the procedural aspects of the case. Raffeo attempts to argue that because the procedure of *Brown* differs from this case, the ruling is irrelevant and the Court should ignore those findings. If that was a rational rule of legal analysis, there would never be any guidance to look to, because no one case ever proceeds in the exact same way as another. The importance of *Brown* and the guidance that it provides in this case is on the issue of damages. Brown had a low back injury prior to the car wreck with Cortez, that resulted in minimal damage to the automobile. Even with those facts, the Supreme Court affirmed

the additur in a five-four decision notwithstanding the fact, highlighted by the dissent, that the jury had before it medical testimony about the prior fall and the failure of the orthopaedic surgeon to attribute the back surgery or injuries to the "slight rear end accident". *See*, 404 So.2d at 475.

The argument of causation is based on pure speculation by Raffeo. Raffeo argues that *Brown v. Cuccia,* 576 So.2d 1265 (Miss. 1991) does not apply to this appeal, since in *Brown* there was no question of causation. However, just as there was no question of causation in *Brown*, no legitimate question of causation occurs here, as both trials contained testimony regarding "unquestioned medical expenses." 576 So.2d at 1267. Further, the cases are similar in that both Plaintiffs were awarded verdicts "so low as to evince bias, and Mrs. Brown [was] entitled to a new trial on damages or an additur," just as Rhodes is now entitled to a new trial on damages or an additur. 576 So.2d at 1267. The verdict in *Brown* was less than $600 above the medical expenses. The verdict in this case was less than $37 above Rhodes' uncontested medical expenses. Certainly, in light of *Brown*, Rhodes' pain and suffering award is so small in relation to her injuries that it must be the result of bias, passion or prejudice on the part of the jury. It is most certainly is against the overwhelming weight of the evidence

Raffeo, relying on an incomplete portion of the record, and not on the record as a whole, states that Dr. Johnson only testified that the accident "had something to do" with the injuries he treated Rhodes for. A more complete reading of the record reflects that Dr. Johnson further testified:

> Q. I mean, when you said "had something to do with it," do you hold the opinion within a reasonable degree of medical probability that the accident either caused or contributed to the condition?
>
> A. It caused it, yes.

Johnson deposition, p.17-18.

Again, it is self-serving speculation, at best, that Rhodes' injuries were caused by anything other than the car wreck caused by Raffeo. The "ample evidence" Raffeo claims proved that the bills of Dr. Johnson were not related to the car wreck is limited to the only testimony defense counsel could elicit from Dr Johnson, in that a pregnant person *could* have back pain. See Johnson deposition, p.23-24. Dr. Johnson testified that the accident caused the injuries from which Rhodes suffered from and Dr. Johnson *never* testified that he held the opinion,within a reasonable degree of medical probability, that the pregnancy either caused or contributed to the condition of Rhodes. As such, the verdict is against the overwhelming weight of the evidence. Presiding Justice Hawkins, concurring in *Brown*, summed up the efforts of defense counsel best when he stated "[f]rom the record I glean no serious challenge at trial to [Dr. Johnson's] medical opinion regarding [Rhodes.] 576 So.2d at 1268.

The only case Raffeo independently relies upon in his argument is *Dobbins v. Vann*, 981 So.2d 1041 (Miss. 2008). Rhodes is correct in stating that there is some similarity between that case and the case at bar. Dobbins waited eight months to seek treatment for his injuries sustained in the automobile accident. Rhodes waited ten months to seek treatment for her injuries sustained in the accident caused by Raffeo's negligence because she was pregnant and her obstetrician told her, in response to her complaints of back pain "you'll be okay," and to "just wait and see." (R. 25, 40). Rhodes delayed seeking medical treatment for her injuries because she trusted her doctor and had no funds to pay for it. It is not clear why Dobbins delayed treatment. Dobbins' delay, along with the severity of the accident, a prior motor vehicle accident and his credibility were put into evidence. Even with those facts, the jury awarded Dobbins a verdict of $50,000.00, more than $11,000.00 over his medical expenses of $38,627.85. 981 So.2d at 1046. The only independent case Raffeo can find is one in which the Plaintiff received roughly a third above his medical expenses for pain and

suffering. Rhodes received less than $37 over her medical expenses, significantly less than even a twentieth of her medical expenses. While it is true that an additur was requested at the trial court level, denied, and affirmed by this Court, Dobbins received significantly more than $37.00 over his medical expenses. Thus, the case Raffeo relies upon so strongly, when compared with the facts of this case, showcase how grossly inadequate and against the overwhelming weight of the evidence the jury's award to Rhodes was and how clearly an additur or a new trial on damages is the proper recourse here.

It is curious that Raffeo can find no argument with the Supreme Court's ruling in *Harvey v. Wall*, 649 So.2d 184 (Miss. 1995) or its applicability to the facts of this case. Notwithstanding his silence, Rhodes once again points out that if $95.80 over medical expenses has been found to be "inadequate compensation." then certainly, $36.99 is inadequate compensation for pain and suffering. 649 So.2d at 189. See also *Scott Prather Trucking v. Clay,* 821 So.2d 819 (Miss.2002)(upholding additur where jury's verdict clearly left out compensation for pain and suffering). *McClatchy Planning Co. v. Harris*, 807 So.2d 1266 (Miss. 2001)(affirming an additur of $75,000.00 on a $25,000.00 jury award to a minor; medical expenses stipulated as $12,832.30.)

Raffeo suggests that *Rodgers v. Pascagoula Public School District*, 611 So.2d 942 (Miss. 1992), does not apply to the situation at bar, and is even a red herring. In an effort to avoid being repetitive, as *Rodgers* is discussed in detail in her Brief, the argument that a case so similar to the facts of the case at bar does not apply is meritless. Raffeo, just like the Pascagoula Public School District, contests "the extent of injuries" of the respective Plaintiffs, here Rhodes. 611 So.2d at 945. Rhodes, like Rogers, is entitled to compensation for her uncontradicted pain and suffering, compensation above the $36.99 the jury awarded her. Raffeo can find no case that support such a minimal, almost non-existent, award for pain and suffering, and grasps at straws when trying to

distance himself from case law that clearly indicates the award to Rhodes was against the overwhelming weight of the evidence.

Conclusion

The jury's award to the Krista Rhodes was grossly inadequate and against the overwhelming weight of the evidence. The jury ignored credible evidence about Rhodes' injuries and her uncontested medical bills. Less than $37.00 for pain and suffering is nothing if not inadequate and indicates that the jury ignored the evidence presented at trial, the evidence that was not rebutted by any defense expert or any concrete evidence to the contrary. This "jury manifestly failed to respond to reason" and, as such, the verdict should be set aside. *Dunn v. Butler*, 252 Miss. 40, 172 So.2d 430, 431 (1965).

This the 22nd day of February, 2011.

Respectfully submitted,

KRISTA RHODES

By: _____
JENNIFER TYLER BAKER
Attorney for Appellant

CERTIFICATE OF SERVICE

I, ROBERT H. TYLER, do hereby certify that I have this day served by United States mail, first class postage prepaid, a true and correct copy of the above and foregoing Appellant's Reply Brief on:

Honorable Lawrence P. Bourgeois, Jr.
Circuit Court of Harrison County
P.O. Box 1461
Gulfport, MS 39502

Trace D. McRaney, Esquire
Dukes, Dukes, Keating & Faneca, P.A.
2909 13th Street, Sixth Floor
Gulfport, MS 39501

This the 22nd day of February, 2011.

JENNIFER TYLER BAKER

CERTIFICATE OF FILING PURSUANT TO MISSISSIPPI RULES OF APPELLATE PROCEDURE RULE 25(a)

I, Janet Ivy Smith, do hereby certify that I have this day deposited into the United States Mail a package containing the original and three (3) copies of the above and foregoing Appellant's Reply Brief, which was addressed to Kathy Gillis, Clerk, Supreme Court of Mississippi, P.O. Box 249, Jackson, MS, 39205-0249, and contained first class, prepaid postage.

SO CERTIFIED on this the 22nd day of February, 2011.

Janet Ivy Smith
JANET IVY SMITH

ROBERT H. TYLER
Attorney at Law
MSB No [redacted]
JENNIFER TYLER BAKER
Attorney at Law
MSB N[redacted]
Tyler Law Firm
160 Porter Avenue
P.O. Box 1124
Biloxi, MS 39533-1124
Telephone: (228) 436-4682
Facsimile: (228) 436-3991