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 BRIEF

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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 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
5.	Trace D. McRaney Dukes, Dukes, Keating & Faneca, P.A.	Attorney for Appellee
6.	Honorable Lawrence P. Bourgeois, Jr.	Circuit Court Judge

SO CERTIFIED this the 25th day of October, 2010.

ROBERT H. TYLER

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STATEMENT OF THE ISSUES

1. WHETHER THE JURY'S VERDICT OF $5,000.00, $36.99 OVER AND ABOVE KRISTA RHODES' MEDICAL BILLS, IS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE?

2. WHETHER THE CIRCUIT COURT JUDGE'S DECISION DENYING RHODES'S MOTION FOR AN ADDITUR, OR IN THE ALTERNATIVE, A NEW TRIAL ON DAMAGES, WAS AN ABUSE OF DISCRETION?

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case arises from an automobile accident that occurred when Ronnie Raffeo ("Raffeo") ran into the rear of the vehicle in which Krista Rhodes ("Rhodes") was a passenger. Liability was admitted shortly before (eight days) trial and the only issue submitted to the jury for resolution was the amount of compensation to which Rhodes was entitled as a result of the injuries she sustained.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

As noted above, Raffeo admitted negligence and Rhodes' claim was submitted tothe jury damage assessment. The jury returned a verdict of $5,000.00 for Rhodes, the amount of her medical bills plus $36.99. She timely filed her Motion for a New Trial, or in the Alternative for an Additur. The trial court entered an Order denying the relief requested (RE-000005). This appeal was then timely filed.

STATEMENT OF FACTS

On July 18, 2007, Rhodes was a passenger in a vehicle being driven by her then husband, Eddie Rhodes. [1] At the time of the accident, Rhodes was six (6) months pregnant. She was taken by ambulance to the emergency room at Ocean Springs Hospital in Ocean Springs, Mississippi. As might be expected, her primary complaint and concern was the welfare and well being of her child to be.

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[1] At the time of trial, Rhodes was divorced from Eddie Rhodes and had reverted to her maiden name, Goff (R. 18)

The initial stress and anxiety Rhodes experienced is best evidenced by the following testimony:

> Q. Now, how did you feel immediately after the collision?
>
> A. Hysterical. I mean, I was crying. I was worried about, you know, if I was going to lose her, is she was ok mainly, because I mean, I'd had complications through the pregnancy, and I did not want anything to happen to her, and I wanted everything to be okay. I mean, I was not worried about myself.

R.21

Once her child was born, Ms. Rhodes continued to suffer pain and discomfort in her low back which did not ease, but only increased with the passage of time. As her grandmother, Dorothy Ann Goff, testified, Rhodes was having increasing difficulty taking care of her children and was relying upon family members to assist her.

> Q. From the time after the accident to the time Krista delivered Kaydence, did you notice anything that indicated to you that she was experiencing physical difficulties in her back?
>
> A. Yes, sir. She called me all the time complaining about her back. And she said, does it have to do with the pregnancy? I don't know what I'm doing. It's hurting. And I told her then, I said, Krista, I said, the only thing you can do is put a heating pad on it or maybe ice because of you being pregnant.
>
> Q. What can you tell the jury you observed about Krista after the baby was born?
>
> A. Well, after the baby was born she had a hard time bathing her, lifting her, and taking care of her. So I would go over during the day, because I work at night, and I would go over during the day and help bathe the baby and help take care of her. And then in the

evening, her mama was home, because her mama worked during the day.

R.50

Rhodes' grandmother suggested over the counter pain medications and heat/cold packs but Rhodes continued to complain:

Q. And did eventually you change your opinion about what should be done?

A. When she kept telling me, Maw Maw, I'm having these spasms, they hurt me, and I kept telling her, I said, well, Krista, you know, the only thing I can tell you right now is we're going to have to get to a doctor. And she kept saying, Maw Maw, I don't have any insurance. And I finally said, well, you know, when it gets to the point that she called me that morning and told me that her leg was hurting her so bad she could not stand up on it, and I told her then, I said, Krista, I will pay for it, go to a chiropractor. She said, well, Maw Maw -- I said, look, I'm coming to get you. So I took her to the chiropractor.

Q. Now, had you had any experience with chiropractors?

A. Yes, sir. I worked for a chiropractor.

Q. And so you got your granddaughter, Krista, to go to a chiropractor?

A. Yes, sir.

Q. And did she start getting better?

A. Well, immediately she started getting a little bit of relief. And he was telling her, you know, use the heating pads and all too. But he was constantly seeing her. When you go to a chiropractor and they start working on you, they want to see you like every other day, and that is because they're wanting your body to get used to the therapeutic thing that they're doing to the body.

Q. And did Krista eventually get better?

A. Yes, sir, she did.

R.51-52

Dr. Johnson testified, by deposition, without contradiction that the treatment rendered to Ms. Rhodes was causally related to the automobile accident.

> Q. Now, Doctor, based on the history that you received from Ms. Goff and the automobile accident description, your treatment of her, and your education and experience as a chiropractor, do you have an opinion based upon a reasonable medical probability whether or not a rear end accident occurring on July 18th, 2007 was the cause of the condition that you've described for us today?
>
> A. I definitely believe it had something to do with it.
>
> 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.

Only through speculation and argument was defense counsel able to suggest that Ms. Rhodes' low back problems and the need for chiropractic treatment "could" have been caused by something (minor impact, prior injuries, complication of pregnancy) other than the automobile accident. However, there was no evidentiary basis for the jury to conclude otherwise. Raffeo called no witnesses and presented no expert testimony to rebut the testimony of Dr. Johnson. The best defense counsel could elicit from Dr Johnson was that a pregnant person could have back pain. See Johnson deposition, p.23-24. As a result, and under prevailing law, the verdict of the jury is against the overwhelming weight of the evidence and Rhodes is entitled either to an additur or a new trial on damages.

SUMMARY OF THE ARGUMENT

The record lacks substantial, credible evidence to support the jury's verdict or the Circuit Court Judge's finding that the Rhodes was not entitled to an additur or a new trial on damages. The record does reflect that the Rhodes incurred $4963.01 in medical bills. The defendant did not contest the ambulance bill or emergency room bill. Dr. Johnson testified his bill was reasonable and related to the automobile accident. Johnson deposition, p.18. The jury's award of $5,000.00 compensated Rhodes only $36.99 for pain, suffering and resulting mental anguish. The amount awarded to Rhodes 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. It is well settled in Mississippi that if a jury ignores evidence of pain and suffering and mental anguish on the part of the injured plaintiff, by awarding little or nothing for those intangible elements, then an additur is warranted or, at least a new trial on the damage issue. Denial of the same is an abuse of discretion and is subject to reversal.

ARGUMENT

A. STANDARD OF REVIEW

It is well-settled that when considering a trial judge's denial of a motion for additur this Court's standard of review is that of an abuse of discretion. *McClatchy Planning Co. v. Harris*, 807 So.2d 1266 (Miss. 2001) "The party seeking the additur bears the burden of proving his injuries, loss of income and other damages." *Maddox v. Muirhead*, 738 So.2d 742, ¶5 (Miss.1999). Stated otherwise, jury awards will only be set aside if they are "so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Rodgers v. Pascagoula Public School District*, 611 So.2d 942, 945 (Miss. 1992). It is submitted that

a jury award of $36.99 over and above the amount of medical bills is unreasonable and clearly against the overwhelming weight of the evidence.

B. ARGUMENT

Particularly instructive is the Supreme Court's decision in *Cortez v. Brown*, 408 So.2d 464 (Miss. 1981). Brown was a passenger in a vehicle that was rear-ended by Cortez. Some three months prior to the automobile accident, Brown slipped and fell on a wet floor while in the course of her employment with the City of Biloxi. This fall resulted in her suffering pain in her low back which required her to consult with an orthopaedic surgeon. In fact, Brown had just been released from the hospital after undergoing painful diagnostic testing on her low back on the evening that the automobile accident occurred. Cortez ran into the rear of the Brown vehicle Brown, traveling less than ten (10) miles per hour, with resulting damage to the Brown vehicle being $233.18. Cortez's headlights were not broken nor were the tail lights on the on the Brown vehicle. 408 So.2d at 465-466. Brown eventually had low back surgery; however, the medical bills for the surgery and hospitalization were submitted to the City of Biloxi for payment. Eventually, the City settled the workers' compensation claim and Brown continued with her lawsuit against Cortez. *Id.* at 467. At the conclusion of the first trial, the jury found for Brown, but awarded zero damages. The trial court overruled a motion for an additur, but granted a motion for a new trial on the issue of damages only. The second trial also resulted in a verdict for the plaintiff but again with zero damages. After proper motion, the trial court granted an additur in the amount of $16,000.00. *Id.* at 470. 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.

In *Brown v. Cuccia*, 576 So.2d 1265 (Miss.1991), the Plaintiff was a passenger in a car that was rear ended in a motor vehicle accident as here. Brown suffered contusions and alleged two herniated discs as a result of this accident. 576 So.2d at 1266. The jury awarded Mrs. Brown a verdict of $3,000.00. *Id.* Her medical expenses totaled $2,436.00. *Id.* at 1267. The trial court denied a request for an additur. This Court reversed, notwithstanding testimony that the damage to Brown's car was minimal and "scratches...at most,". The Court found that the jury verdict awarding less than $600 for pain and suffering was "so low as to evince bias," and awarded the Plaintiff an additur in the amount of $10,000.00. *Id.* at 1267. In *Brown*, the Plaintiff had significantly lower medical bills than Rhodes case but received significantly more for her pain and suffering than Rhodes. If an award of $564 for pain and suffering is "so low as to evince bias" on medical bills of $2436.00, $36.99 for pain and suffering with medical bills totaling $4963.01 should be equally shocking to the conscience of the Court.

There are numerous other cases holding that jury awards which approximate medical bills incurred but with little or nothing for pain and suffering require additurs or new damage trials. These verdicts are characterized as contrary to the evidence and evincing bias, passion or prejudice on the jury's part. See, e.g., *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). *Maddox v. Muirhead*, 738 So.2d 742, (Miss.1999)(additur of $10,000 on jury award of $2900.00, uncontradicted medical expenses of $2831.25).

This Court, in *Harvey v. Wall*, 649 So.2d 184 (Miss. 1995) stated that additurs are necessary "when we have found a jury's verdict did not sufficiently compensate a plaintiff for pain and

suffering." 649 So.2d at 187. In *Harvey*, as in this case, "the proof is uncontradicted that he did sustain some pain and suffering." *Id.* at 188. Harvey was a involved in a motor vehicle accident which resulted in his being transported by ambulance (as here) to the hospital where they treated his cuts and x-rayed his leg. At trial, testimony from his doctor's deposition was introduced and the doctor estimated that the injury to Harvey's leg resulted in a 10% impairment. Further, the doctor predicted future pain associated with the motor vehicle accident injury. The jury awarded him a verdict of $5300.00, $95.80 over his medical bills. This Court found that it was "inadequate compensation." *Id.* at 189.

Additionally, this Court, in *Rodgers v. Pascagoula Public School District*, 611 So.2d 942 (Miss. 1992), found that an additur was required when the jury awarded no damages for pain and suffering. The *Rodgers* case and this case are very similar. Both cases involve motor vehicle accidents that injured a Plaintiff, resulting in jury verdicts that awarded them, respectively, no damages for pain and suffering and only $36.99 for pain and suffering. Another similarity of these two cases is that both involve a "dispute as to the extent of injuries." Here, Raffeo disputes that Ms. Rhodes' injuries required the attention of a chiropractor and speculates that the treatment *could* even be from a prior injury or from pregnancy. But here, as in *Rodgers*, our case involves uncontradicted evidence of pain and suffering and "proof that his damages included not only medical expenses but also some pain and suffering." 611 So.2d at 945. Under *Rodgers*, "[a] jury verdict awarding damages for medical expenses alone is against the overwhelming weight of the evidence." *Id.* This Court found that even if the extent of Rodgers' pain and suffering was only headaches, an additur was still required. It is uncontradicted that Ms. Rhodes suffered pain and suffering and mental anguish; thus, an award of $36.99 for pain and suffering is against the overwhelming weight of the evidence .As such, Ms. Rhodes, just as the plaintiff in *Rodgers*, is entitled to an additur or a new trial on damages.

CONCLUSION

Every litigant has the justifiable right to expect reviewing courts, both at the trial and appellate level, to give due deference to jury findings. This expectation is grounded in the constitutional right to trial by jury. However, as this Court recognized in *Dunn v. Butler*, 252 Miss. 40, 172 So.2d 430 (1965):

> In order to insure the preservation, integrity and vitality of the right to trial by jury, this court has throughout its history exercised its constitutionally ordained duty to set aside verdicts whenever the jury manifestly failed to respond to reason. This power must be exercised with conscious self-restraint and caution, but it must be exercised in a proper case *for trial by a jury that will not respond to reason is a denial of the right itself.*

172 So.2d at 431(emphasis added).

It has been said that the question of the adequacy or inadequacy of damages is one of the most troublesome and perplexing questions with which reviewing courts struggle. *See, e.g., Schoppe v. Applied Chemical Div., Mobley Co.*, 418 So.2d 833, 836 (Miss. 1982); *Dickey v. Parham*, 295 So.2d 284, 285 (Miss. 1974); *Burlingame v. Southwest Drugstores of Miss., Inc.*, 203 So.2d 74, 76 (Miss. 1967). It is submitted that, under the facts contained in the record in this case, the issue should not be so troublesome. There simply is no concrete evidence upon which the jury could reject the proof offered by Rhodes that the chiropractic treatment rendered by Dr. Johnson was related to the automobile accident. Once that premise is accepted, it should be easy for the Court to conclude that the failure to award more that $37.00 for intangible elements of damages was due to the jury's failure to follow the court's instructions.

For whatever reason, jurors sometimes simply do not respond to reason, evidence or the court's instructions and render verdicts that are excessive or insufficient. When juries do so, it is the

duty of the court to set aside such verdicts. The verdict in this case was woefully insufficient and should be set aside.

This the 25th day of October, 2010.

Respectfully submitted,

KRISTA RHODES

By: _____
ROBERT H. TYLER
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 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 25th day of October, 2010.

ROBERT H. TYLER

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 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 25th day of October, 2010.

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