

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00330 COA**

**ANGELA HARROD AND HUSBAND, JAMES
HARROD**

APPELLANTS

v.

ELLEN P. LOMENICK

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	02/08/96
TRIAL JUDGE:	HON. GEORGE B. READY
COURT FROM WHICH APPEALED:	DESOTO COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JOHN H. COCKE
ATTORNEY FOR APPELLEE:	THAD JAMES MUELLER
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	DENIAL OF MOTION FOR ADDITUR OR IN THE ALTERNATIVE FOR A NEW TRIAL ON THE ISSUE OF DAMAGES.
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE THOMAS, P.J., HERRING, AND HINKEBEIN, JJ.

THOMAS, P.J., FOR THE COURT:

Angela Harrod and her husband, James, appeal a jury verdict in the amount of \$20,856.95 raising the following issues as error:

**I. WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT PLAINTIFFS'
MOTION FOR AN ADDITUR, OR IN THE ALTERNATIVE, A NEW TRIAL.**

II. WHETHER THE VERDICT WAS SO LOW AS TO EVIDENCE BIAS, OR PREJUDICE AGAINST THE PLAINTIFFS, AND WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

III. WHETHER THE JURY VERDICT ENTERED IN THIS CAUSE IS ERRONEOUS ON ITS FACE FOR FAILURE TO AWARD ELEMENTS OF DAMAGE TO THE PLAINTIFFS AS INSTRUCTED BY THE COURT AND WHICH WERE UNCONTRADICTED AT TRIAL.

Finding no error, we affirm.

FACTS

On August 31, 1993, Angela Harrod and Ellen P. Lomenick were involved in an accident. The accident was the fault of Lomenick, and she stipulated to the liability at trial. The only issue to be decided at trial was the amount of damages. Angela injured her wrist in the accident. Later that evening, Angela went to the emergency room. Angela was given pain medication and sent home. Angela's pain never subsided, and she eventually went to an orthopedic clinic where she was diagnosed as having a torn ulna collateral ligament of the right hand. Approximately six weeks later, Angela had surgery to repair a small tear in the triangular fibrocartilage in her wrist.

The doctor who performed the surgery on Angela testified that when she was released from his care, he thought "she had reached her maximum medical improvement at that time and did not feel further surgery would be helpful to her." The doctor gave Angela a fifteen percent partial permanent physical impairment of her right upper extremity secondary to the injury because of the loss of motion in the wrist and loss of grip strength. Angela's total medical expenses were \$8,929.75.

James Harrod testified that his wife's home life has changed significantly since the accident. Both James and Angela testified that she now has to bring work home in order to complete her job duties. Both also testified that Angela's relationship with her children has suffered since the accident because she is no longer able to play certain games with her children. Angela admitted that she played volleyball with her children, but that this caused her pain in her wrist. James stated that the frequency of intimacies with his wife have been cut in half since the accident. James has also since had to take on many of the household duties that his wife was once able to complete. Angela testified that she was unable to lift a skillet from the stove and also do other household chores because of her injury. However, her doctor testified through a deposition that Angela was able to exercise her wrist using a three pound weight, and the doctor concluded that it was a "little unusual" that Angela was unable to lift a skillet. Angela herself testified that she would go inner-tubing with her family which entailed her holding on to the handles of the tube while the tube was being pulled behind a boat.

At the close of the evidence, it was stipulated that Angela was entitled to recover the full amount of her medical expenses and her lost wages. The jury was instructed as follows:

In determining your award of damages to the Plaintiff Angela Harrod, you should include an amount for each of the following elements of damage which have been proved by a

preponderance of the evidence:

- 1) Medical bills in the amount of \$8,929.75;
- 2) Mental anguish proximately caused as a result of the Defendant's negligence;
- 3) Pain and suffering proximately caused as a result of the Defendant's negligence;
- 4) Loss of wages in the amount of \$1,927,20;
- 5) Permanent disability proximately caused as a result of the Defendant's negligence; and
- 6) Permanent disfigurement proximately caused as a result of the Defendant's negligence.

The jury was also instructed as to James Harrod:

You should return a verdict for the Plaintiff James Harrod if you find that he has suffered damages related to the loss of consortium and/or services of his wife due to injuries to Angela Harrod caused by the Defendant's negligence.

The jury returned a verdict on two separate sheets of paper. On the first sheet of paper, the jury awarded Angela Harrod \$8,929.75 for her medical expenses, \$1,927.20 for loss of wages, and \$10,000 for her pain and suffering. The total amount was \$20,856.95. On the second sheet of paper, the jury awarded James Harrod \$0 for his loss of consortium claim. Angela and James Harrod filed a motion for an additur, or in the alternative, for a new trial on the issue of damages only. The circuit court denied the motion.

ANALYSIS

I.

WHETHER THE TRIAL COURT ERRED IN REFUSING TO GRANT PLAINTIFFS' MOTION FOR AN ADDITUR, OR IN THE ALTERNATIVE, A NEW TRIAL.

II.

WHETHER THE VERDICT WAS SO LOW AS TO EVIDENCE BIAS, OR PREJUDICE AGAINST THE PLAINTIFFS, AND WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

III.

WHETHER THE JURY VERDICT ENTERED IN THIS CAUSE IS ERRONEOUS ON ITS FACE FOR FAILURE TO AWARD ELEMENTS OF DAMAGE TO THE PLAINTIFFS AS INSTRUCTED BY THE COURT AND WHICH WERE UNCONTRADICTED AT TRIAL.

As these three assignments of error are in essence three similar standards under one issue, they will be treated under one assignment of error. *Moody v. RPM Pizza, Inc.*, 659 So. 2d 877, 880 (Miss. 1995).

The Harrods argue that they are entitled to an additur or, in the alternative, a new trial on the issue of damages because they contend the jury failed to award Angela Harrod any amount for her disability and mental anguish. The Harrods also contend that the jury failed to consider James Harrod's loss of consortium claim. Lomenick contends that the jury verdict was proper and therefore should not be disturbed.

Mississippi Code Annotated § 11-1-55 (Rev. 1991) provides the authority to impose an additur:

The Supreme Court or any other court of record in a case in which money damages were awarded may overrule a motion for a new trial or affirm on direct or cross-appeal, upon condition of an additur or remittitur, if the court finds that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of the credible evidence. If such additur or remittitur be not accepted then the court may direct a new trial on damages only. If the additur or remittitur is accepted and the other party perfects a direct appeal, then the party accepting the additur or remittitur shall have the right to cross appeal for the purpose of reversing the action of the court in regard to the additur or remittitur.

"Pursuant to Miss. Code Ann. § 11-1-55, an additur may be granted by the court upon finding that the finder of fact was influenced by bias, prejudice or passion, or that the amount of the award was contrary to the overwhelming weight of the evidence." *Wallace v. Thornton*, 672 So. 2d 724, 729 (Miss. 1996). Further, in reviewing a request for an additur, the supreme court has stated:

The scope of appellate review in an additur appeal is limited to determining whether the trial court abused its discretion. . . . This Court has further noted that the party seeking the additur has the burden of proving his injuries, damages and loss of income. In determining whether this burden is met, this Court must view the evidence in the light most favorable to the defendant, giving that party all favorable inferences that reasonably may be drawn therefrom. . . . Awards 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 in amount and outrageous. . . . This is because the amount of damages awarded is primarily a question for the jury. . . . Additurs represent a judicial incursion into the traditional habitat of the jury, and therefore should never be employed without great caution.

Rodgers v. Pascagoula Public School District, 611 So. 2d 942, 945 (Miss. 1992) (citations omitted).

In the case at hand, Angela put on proof that she incurred \$8,929.75 for her medical expenses and \$1,927.20 for her loss of wages. Lomenick stipulated to these amounts, and they were included in the jury's verdict. The issue to be resolved is whether the \$10,000 amount the jury awarded for pain and suffering was sufficient as toward Angela and James Harrod. We conclude that it was and hold that the jury verdict was not contrary the overwhelming weight of the evidence.

A.

EMPLOYMENT

Angela testified that the injury made her job more difficult to perform. She was working for Backyard Burgers at the time in the accounting department. Angela testified that she learned to use her left hand to complete tasks that she normally completed with her injured right hand. At the time, Backyard Burgers was in its infancy stage and was preparing for a public offering. Backyard Burgers merged with another company, and this caused Angela's workload to increase. Angela put on proof of her time lost from work, but she failed to prove how the accident caused her job performance to suffer. She admitted she would have to take work home at night and on the weekends to catch up, but one of Angela's supervisors testified that Angela's work was always done, and that the accounting department in general had to work extra hours to complete the workload.

Angela left Backyard Burgers and got a new job at Elite Packaging. Her departure from Backyard Burgers had nothing to do with the accident with Lomenick. Angela's duties at Elite Packaging include handling all the payroll for the corporate permanent employees, handling all of the banking transactions, handling the office management, and being responsible for anything related to the financial aspects of the company. Angela's job both at Backyard Burgers and Elite Packaging dealt with the stress and anxiety of meeting deadlines. Angela testified that she had not missed any days from work with Elite Packaging due to her wrist injury.

From this, the jury could have concluded that Angela was able to adequately perform her job duties. Angela admitted that her job was stressful and that she had a large workload to perform. One of her superiors admitted that she worked in a department that generally had to put in extra time to complete the workload. Angela has failed to prove how her 15% disability has detrimentally affected her employment.

B.

HOUSEHOLD DUTIES

Angela testified that the injury hampered her ability to do household chores. Angela testified that duties which she once did herself, James now has to help her with. Angela did testify that James was no longer required to travel in his job, and that he was home almost every night. She testified that she usually uses her left hand when doing household chores. Angela stated that she could not lift a skillet off of the stove because it was too heavy. James testified that he normally lifts anything off the stove that is heavy, and also stated that he does other household chores to help Angela.

Angela's doctor did testify that she was able to work out with a three pound weight and concluded that it was a "little unusual" that Angela was unable to lift a skillet from the stove. Angela also testified that she would play volleyball with the kids, and that she went inner-tubing on three separate occasions with her family. From this, the jury could have concluded that Angela's injury was not that serious. The jury could have also concluded that because both Angela and James worked, and James was no longer forced to travel in his job, this was a factor in James's helping with the household duties.

C.

FAMILY LIFE

Angela testified that her relationships with both her children and her husband have suffered as a result of the accident. Angela stated that she was no longer able to play with her children the way she once did. However, as stated previously, there was testimony that Angela went inner-tubing with her family and also played volleyball with her family after the accident. The jury could have reasonably concluded that Angela's relationship with her children was not diminished by her accident with Lomenick.

As to James's loss of consortium claim, James testified that the frequency of intimacies with his wife had been cut in half since the accident. James argues that the award of \$0 was grossly inadequate, and he is entitled to be awarded some compensation for his injuries.

The case *sub judice* is similar in fact and conclusion to *Alldread v. Bailey*, 626 So. 2d 99 (Miss. 1993). In that case, Mrs. Alldread was involved in an automobile accident with Bailey. *Id.* at 99. Evidence presented proved that Mrs. Alldread "was not able to do things with the children she did before, she performed very fewer domestic duties, and her personality had 'changed completely.'" *Id.* at 100. Mr. Alldread testified that his once "very enjoyable, very pleasurable, very frequent" sex life with his wife was changed to "very little, if any." *Id.* at 101. The jury returned a verdict in favor of Mrs. Alldread in the amount of \$20,000, but denied any recovery to Mr. Alldread in his loss of consortium claim. *Id.* at 99. In *Alldread*, the supreme court stated "[r]egarding sexual frequency, or the lack thereof, it is always difficult to prove the validity of this element of a claim for loss of consortium." *Id.* at 103. The supreme court, in upholding the jury's award of \$0, came to the conclusion that the evidence supported the jury's verdict in denying Mr. Alldread's claim for damages even though the jury entered a verdict in favor of Mrs. Alldread on her negligence claim, and even though Mr. Alldread presented evidence in his favor regarding the changes in his intimacies with his wife since the automobile accident. *Id.* at 102-03. The court found that the jury had the opportunity to hear and weigh all the testimony presented at trial, and the jury was unconvinced that Mr. Alldread had proven damages in his claim for loss of consortium. *Id.* at 103.

In the case at bar, Angela testified that her job was very stressful due to the fact that she was constantly forced to meet deadlines. Angela had not missed a day of work since she started working for Elite Packaging due to her wrist injury. Angela and James are raising two minor children. Angela testified that she had discontinued medical treatments and had not seen a doctor in approximately seventeen months prior to the trial. From this, the jury could readily have concluded that James suffered no loss of consortium arising out of the accident between Angela and Lomenick. As stated in *Alldread*, "[t]o rule for plaintiffs on this issue would be, in essence, to direct a verdict for them on a question that we believe rightly went to the jury." *Alldread*, 626 So. 2d at 103 (quoting *Anderson v. Mutert*, 619 S.W.2d 941, 946 (Mo. Ct. App. 1981)).

In concluding, the jury was properly instructed on compensatory damages as well as damages for pain and suffering. The jury awarded \$10,000 for pain and suffering. The jury was also properly instructed on James's loss of consortium claim. The jury awarded \$0 for James's loss of consortium. Looking at the evidence in the light most favorable to Lomenick, we cannot say that the jury's verdict was against the weight of the evidence or was the result of bias, passion or prejudice. We, therefore, find that the trial court did not err in refusing to grant an additur or, in the alternative, a new trial on the issue of damages.

THE JUDGMENT OF THE DESOTO COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANTS.

BRIDGES, C.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR. McMILLIN, P.J., AND PAYNE, J., NOT PARTICIPATING.