

IN THE COURT OF APPEALS 1/16/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00651 COA

KATRINA LEIGH MICHAEL

APPELLANT

v.

**MICHAEL KEITH SMITH AND MEYER LAMINATES, INC. A/K/A WHOLESALE
CABINET SUPPLY**

APPELLEES

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

TRIAL JUDGE: HON. BARRY W. FORD

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOHN BOOTH FARESE

ATTORNEYS FOR APPELLEES:

WILLIAM C. MURPHREE AND BO RUSSELL

NATURE OF THE CASE: CIVIL: PLAINTIFF WAS INJURED IN AN AUTOMOBILE
ACCIDENT

TRIAL COURT DISPOSITION: JURY FOUND PLAINTIFF AND DEFENDANT EQUALLY
NEGLIGENT AND AWARDED \$15,184.68 FOR THE PLAINTIFF AND \$2,647.17 FOR THE
DEFENDANT WHICH WAS REDUCED BY FIFTY PERCENT FOR BOTH PARTIES

BEFORE THOMAS, P.J., COLEMAN, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

Katrina Leigh Michael filed a complaint against Michael Keith Smith and Meyer Laminates, Inc., a/k/a Wholesale Cabinet Supply. Michael was driving her car on Fellowship Road in Lee County, Mississippi, when she and Smith, who was driving a delivery truck for Meyer Laminates, collided. The jury awarded Michael \$15,184.68 on her claim and Meyer Laminates \$2,647.17 on a counterclaim it had filed. The jury found both parties equally at fault and the court, after reviewing the special interrogatory concerning fault, reduced each party's award by fifty percent. Feeling aggrieved, Michael appeals to this Court and asserts the following assignments of error:

I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL AS TO DAMAGES ALONE, MOTION FOR AMENDED JUDGMENT, OR, IN THE ALTERNATIVE, MOTION FOR ADDITUR.

II. THE COURT ERRED IN NOT ACCEPTING JUROR AFFIDAVITS STATING THAT THEY WERE CONFUSED BY THE FORM OF THE VERDICT AND INTENDED THE APPELLANT TO GET THE FULL \$15,184.62 IN DAMAGES.

III. THE TRIAL COURT IMPROPERLY CEASED JURY DELIBERATIONS AND USED THE PLAINTIFF'S FORM OF THE VERDICT WITHOUT ASCERTAINING WHETHER THE JURY INTENDED THE SAME TO BE USED OR UNDERSTOOD ITS CONTENT.

We find that the trial court erred in refusing to either grant an additur for Michael or a new trial on damages, at the defendants' option.

STATEMENT OF THE CASE

Michael filed a complaint against Smith and Meyer Laminates in the Circuit Court of Lee County, Mississippi, for a personal injury automobile accident. Smith and Meyer Laminates answered the complaint and denied any negligence. Subsequently, Smith and Meyer Laminates filed a counterclaim against Michael seeking \$2,647.17 in damages from Michael as a result of her negligence in causing her car to collide with the delivery truck.

All the parties stipulated that Michael had medical expenses of \$9,449.33. The parties also stipulated that Michael's car was valued at \$5,733.75, and was a total loss. The final stipulation involved Michael's towing fee of \$80 and Meyer Laminates' damages to its truck in the amount of \$2,647.17.

The jury awarded the following: (1) \$15,184.68 to Michael, (2) \$2,647.17 to Meyer Laminates, (3) and found the parties equally at fault for the accident. The trial court reduced both party's damages

by fifty percent. Post-trial motions filed by Michael were denied.

Subsequently, Michael appealed to this Court.

FACTS

On August 5, 1992, Michael was driving her car on Fellowship Road in Lee County, Mississippi. Smith was driving a delivery truck for Meyer Laminates in the opposite lane on the same road when the two vehicles collided near a sharp curve in the road. Smith was uninjured but the truck sustained damages.

Michael claimed the accident occurred because Smith's truck was in the middle of the road as she drove around the curve and this caused the accident. Michael claimed she could not avoid Smith's truck. Smith denied that his truck was in the middle of the road. Smith stated that as Michael's car came around the curve, Michael hit the brakes, turned her wheels to the right and, since the road was wet, slid into his truck.

Michael was admitted to the emergency room at Northeast Medical Center in Tupelo, Mississippi. Dr. James L. White, an orthopedic surgeon, treated Michael and stated her second toe of her right foot was dislocated and the large right tibia and fibula (shinbone) were fractured with some small pieces broken. Michael had surgery and White attached an "external fixation device." This device is composed of pins which are inserted through the bone that come out through the skin. The pins are stabilized with a steel bar attached to each pin on the outside of the patient's leg. After six to eight weeks, the external device was removed and, as is normal, Michael's right leg was shorter than her left leg by approximately one quarter inch. White stated that Michael regained full motion in her ankle, knee, and foot. Michael lost only a small amount of motion in her toe. White explained that Michael could perform "sitting work or something like that" but that she should not do any walking or heavy lifting from August 5, 1992 to March 16, 1993.

One week prior to the accident, Michael had given her employer two weeks notice before she left employment because she intended to return to school. Michael had obtained a Federal Pell Grant in order to pay for school.

DISCUSSION

I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL AS TO DAMAGES ALONE, MOTION FOR AMENDED JUDGMENT, OR, IN THE ALTERNATIVE, MOTION FOR ADDITUR.

Michael claims that her stipulated damages were \$19,849.58, that she had one percent permanent partial impairment to her leg, and permanent scarring on her right leg. Smith and Meyer Laminates deny that they stipulated to damages of \$19,849.58. However, Smith and Meyer Laminates do agree that they stipulated to: (1) Michael's medical expenses of \$9,449.33; (2) the value of Michael's car being \$5,733.75; and (3) Michael's towing fee of \$80. In fact, the stipulated damages are exactly what Smith and Meyer Laminates stated: \$15,265.08. Each party also agrees that an additur in the amount of \$40.22, which is half the towing fee, should be granted.

In reviewing a grant or denial of a motion for a new trial, this Court employs the same rule as the Mississippi Supreme Court and holds that this is a matter within the sound discretion of the trial judge. *Moody v. RPM Pizza, Inc.*, 659 So. 2d 877, 881 (Miss. 1995) (citations omitted). Our supreme court has consistently stated:

The credible evidence must be viewed in the light most favorable to the non-moving party. The credible evidence supporting the claims or defenses of the non-moving party should generally be taken as true. When the evidence is so viewed, the motion should be granted only when upon a review of the entire record the trial judge is left with a firm and definite conviction that the verdict, if allowed to stand, would work a miscarriage of justice. Our authority to reverse is limited to those cases wherein the trial judge has abused his discretion.

Id. (citations omitted).

Section 11-1-55 of the Mississippi Code provides the authority for this Court to order an additur and states:

The supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for 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 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.

Miss. Code Ann. §11-1-55 (1972).

Pursuant to this statute, a court can grant an additur where "(1) the jury or trier of fact was influenced by bias, prejudice, or passion, or (2) the damages awarded were contrary to the overwhelming weight of credible evidence." *Green v. Grant*, 641 So. 2d 1203, 1208 (Miss. 1994) (citations omitted). Our supreme court has stated "the only evidence of corruption, passion, prejudice or bias on the part of the jury is an inference, if any, to be drawn from contrasting the amount of the verdict with the amount of the damages." *Biloxi Elec. Co. v. Thorn*, 264 So. 2d 404, 406 (Miss. 1972). The party who requests an additur must prove "injuries, damages, and loss of income." *Leach v. Leach*, 597 So. 2d 1295, 1297 (Miss. 1992).

A court should be very careful in granting an additur as this is "a judicial incursion into the traditional habitat of the jury." *Gibbs v. Banks*, 527 So. 2d 658, 659 (Miss. 1988). Damage "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." *Rodgers v. Pascagoula Public Sch. Dist.*, 611 So. 2d 942, 945 (Miss. 1992).

Generally, in cases where our supreme court has granted an additur, the negligent party either (1) admits liability; (2) there was no contributory negligence on the part of the injured party; or (3) the defendant failed to contest evidence regarding physical pain and suffering and permanent disability. *See Moody v. RPM Pizza, Inc.*, 659 So. 2d 877, 882 (Miss. 1995); *Rodgers v. Pascagoula Public Sch. Dist.*, 611 So. 2d 942, 946 (Miss. 1992). Where our supreme court has refused to grant an additur, the defendant generally disputes liability, contests evidence of physical pain and suffering and future disablement, or the plaintiff was contributorily negligent. *Green v. Grant*, 641 So. 2d 1203, 1209 (Miss. 1994); *Brake v. Speed*, 605 So. 2d 28, 34-35 (Miss. 1992); *Leach v. Leach*, 597 So. 2d 1295 (Miss. 1992). In *Motorola Communications & Electronics v. Wilkerson*, 555 So. 2d 713, 722-23 (Miss. 1989), our supreme court refused to grant a remittitur because the issue of whether the plaintiff was contributorily negligent was an issue for the jury to determine.

In *Leach*, the plaintiff was denied an additur after the plaintiff produced evidence that he sustained injuries and incurred \$2085.90 in medical bills. The jury in a general verdict awarded the plaintiff only \$2,000. *Leach*, 597 So. 2d at 1296. The defendant showed that he hit the plaintiff with a board in self-defense and that, despite doctor's orders not to leave the hospital, the plaintiff refused to obey the doctor and left. Our supreme court held that the jury could determine the plaintiff's contributory negligence and reduce the award accordingly. *Id.* at 1298. The *Leach* court stated, if we were to hold otherwise, this "would be tantamount to holding that a jury is to be instructed that they must return a verdict for all alleged damages. This should not be the law." *Id.* at 1299.

Our problem with the amount of the verdict in the case sub judice lies in the form of the verdict itself. In many of the prior refusals by our supreme court to grant an additur, the verdict form was a general verdict. As such, the supreme court was unable to determine how much the jury awarded the plaintiff for pain and suffering and how much contributory negligence the jury imputed to the plaintiff. *See Brake v. Speed*, 605 So. 2d 28, 35 (Miss. 1992); *Leach v. Leach*, 597 So. 2d 1295 (Miss. 1992).

For example, in *Brake*, the jury returned a general verdict of \$5,600 for Brake. *Brake v. Speed*, 605 So. 2d 28, 29 (Miss. 1992). Brake demonstrated no verification of her loss of wages concerning employment except a 1983 tax return which was three years prior to the accident in question. *Id.* at 35. Since there was a general verdict, the supreme court could not determine what the jury awarded for pain and suffering, medical expenses, and lost wages. The supreme court stated, "the jury may not have credited her testimony concerning her loss of wages, choosing instead to award damages for pain and suffering and medical expenses." *Id.* As a result, the supreme court refused to grant the additur as they noted that the jury could have awarded something for pain and suffering.

On the other hand, special verdicts and stipulated and/or undisputed damages are a different matter. Here, the parties stipulated that Michael incurred medical damages in the amount of \$9,449.33. The parties also stipulated that Michael's car was valued at \$5,733.75 and was a total loss. The final stipulation involved Michael's towing fee of \$80. Thus, the total stipulated damages were \$15,265.08. The jury then found both Michael and Smith fifty percent negligent. The jury found Michael's total damages (100%) to be \$15,184.68. The parties stipulated on appeal that an additur of \$80 to be

reduced by fifty percent for Michael's towing fee was necessary. As a result of these stipulated damages, we know from the verdict form itself that the jury awarded nothing for pain and suffering. Obviously, a broken leg will cause pain and suffering and requires us to grant an additur.

We wish to emphasize that we are not substituting our judgment for the jury's judgment. If the award was exactly the same as above and there was a general verdict form without an agreement as to Michael's damages, we would affirm the verdict even if we disagreed with it. Affirmance would be required because we would not know whether the jury awarded some amount for pain and suffering, and as long as they award something, we cannot substitute our judgment for theirs.

To illustrate, suppose a person is injured in a car accident without any contributory negligence and surgery is required. Total undisputed medical damages are \$50,000. The jury answers the following special interrogatories and/or verdict as follows: (1) what is your award for medical expenses? \$50,000; and finally, (2) what is your award for pain and suffering? 0. In this situation, we would grant an additur because surgery necessarily entails some type of pain and suffering.

On the other hand, assume the defendant in the above example contested the reasonableness or necessity of the medical expenses. If there were no special interrogatories, and there was a general verdict of \$50,000, we would affirm. Affirmance would be required because we would have no knowledge of how the jury arrived at the amount. We would be forced to assume that the jury found some medical expenses unreasonable and/or not necessary and awarded some amount, however little, for pain and suffering.

Pham v. Welter, 542 So. 2d 884 (Miss. 1989), cited by Michael is an appropriate example of the problem we have here with the jury's finding of \$15,184.68 as total damages for Michael. Interrogatories were used in *Pham*, an automobile accident case, and the jury found Pham sixty percent negligent and Welter forty percent negligent. *Id.* at 885. Pham proved without dispute \$28,682.70 in special damages, yet the jury found total damages of only \$30,000. *Id.* at 887. Our supreme court awarded Pham an additur or, if not accepted by Welter, a new trial on damages, holding that the jury failed to take into account past and future pain and suffering. *Id.* at 894.

The supreme court granted an additur despite the jury verdict which did in fact award some money for pain and suffering. Here, we know from the verdict itself that the jury failed to award any money for pain and suffering. Thus, we are compelled to grant an additur.

The total damages set by the jury in the case sub judice were contrary to the overwhelming weight of the evidence. After careful examination of the record we order an additur of \$40.22 (half the towing fee) and \$10,000 to Michael's total damages, the \$10,000 to be reduced by fifty percent based on the jury's finding of fault on the part of Michael. Smith and Meyer Laminates shall have twenty days after the clerk of this Court issues the mandate in this case or twenty days after final disposition of any petition for rehearing, if any is filed, to accept the additur or have a new trial on the sole issue of damages incurred by Michael.

II. THE COURT ERRED IN NOT ACCEPTING JUROR AFFIDAVITS STATING THAT THEY WERE CONFUSED BY THE FORM OF THE VERDICT AND INTENDED THE APPELLANT TO GET THE FULL \$15,184.62 IN DAMAGES.

III. THE TRIAL COURT IMPROPERLY CEASED JURY DELIBERATIONS AND USED THE PLAINTIFF'S FORM OF THE VERDICT WITHOUT ASCERTAINING WHETHER THE JURY INTENDED THE SAME TO BE USED OR UNDERSTOOD ITS CONTENT.

As these two issues are intertwined, they will be addressed collectively.

Michael contends that since the verdict was so inadequate, the trial court should have allowed evidence of six juror affidavits which stated that the jury meant to award Michael the entire \$15,184.62 without reduction for her negligence; in other words, the jury should have returned its interrogatory stating Michael's total damages were \$30,369.24, leaving to the trial court the duty to reduce the award by fifty percent. Rule 606 (b) of the Mississippi Rules of Evidence and our prior case law prohibit the jury from impeaching its own verdict, and the trial court properly declined to consider the juror affidavits.

THE JUDGMENT OF THE CIRCUIT COURT OF LEE COUNTY IS AFFIRMED WITH AN ADDITUR OF \$10,000 TO MICHAEL REDUCED BY FIFTY PERCENT PURSUANT TO THE JURY'S FINDINGS FOR A TOTAL OF \$5,000, OR A NEW TRIAL AT THE DEFENDANTS' OPTION. THE STIPULATED ADDITUR OF \$40.22 FOR THE TOWING FEE IS ALSO AFFIRMED. THE DEFENDANTS HAVE TWENTY DAYS FROM THE MANDATE BEING ISSUED BY THE CLERK OF THE COURT OR TWENTY DAYS AFTER A PETITION FOR REHEARING, IF ANY, IS FILED BY EITHER SIDE AND DISPOSED OF, WHICHEVER IS LATER, WITHIN WHICH TO ACCEPT THE ADDITUR; IF THE DEFENDANT DECLINES TO ACCEPT THE ADDITUR, A NEW TRIAL ON DAMAGES SHALL AUTOMATICALLY BE GRANTED. COSTS ARE TAXED EQUALLY TO BOTH PARTIES.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.