

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-CA-00008 COA**

**LINDA SPENCER**

**APPELLANT**

**v.**

**JITNEY JUNGLE STORES OF AMERICA, INC. AND  
WALKER & SONS, A MISSISSIPPI GENERAL  
PARTNERSHIP**

**APPELLEES**

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

DATE OF JUDGMENT:	6/15/95
TRIAL JUDGE:	HON. JAMES E. GRAVES, JR.
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	WILLIAM B. RAIFORD, III
ATTORNEYS FOR APPELLEES:	ALAN C. GOODMAN LAUROE R. WILLIAMS
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	DAMAGES AWARDED TO PLAINTIFF JAMES SPENCER; MOTION FOR NEW TRIAL, OR ALTERNATIVELY, ADDITUR DENIED AS TO APPELLANT, LINDA SPENCER.
DISPOSITION:	AFFIRMED - 2/24/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	4/7/98

EN BANC.

McMILLIN, P.J., FOR THE COURT:

**I.**

**Preliminary Discussion**

Linda Spencer sought loss of consortium damages that she claimed arose out of an injury her husband, James Spencer, received in a fall at a Jitney Jungle grocery store in Fulton. The store was

operated by the defendant, Walker and Sons, and Spencer's suit named both Jitney Jungle of America and Walker and Sons as defendants. Spencer's loss of consortium claim was tried in the Circuit Court of Hinds County in the same proceeding as her husband's tort claim. The jury returned a verdict in favor of James Spencer but declined to award Linda Spencer any amount by way of loss of consortium. Linda Spencer filed a motion with the trial court for a new trial or, in the alternative, an additur; however, the court denied the motion. She then perfected an appeal to this Court, raising as her only issue a claim that the trial court committed an abuse of discretion in failing to grant her post-verdict relief in the form of either an additur or a new trial. Finding no error, we affirm.

## **II.**

### **The Form of the Verdict**

Because James Spencer advanced separate theories of negligence against the two defendants for his injuries, and because his own contributory negligence in the fall was an issue at trial, the jury was given a special form of the verdict. The verdict form required the jury to answer questions regarding findings as to the negligence of all three of these entities. The jury was then instructed to answer the following question:

If your verdict is for the Plaintiff James Spencer, what do you find to be the total amount of his damages unreduced by any fault which you may attribute to Mr. Spencer?

Next, the jury was asked to answer the following question:

If your verdict is for the Plaintiff Linda Spencer, what do you find to be the total amount of her damages?

The jury was then instructed to assess percentages of fault for the accident against each defendant and James Spencer. The jury, however, was not separately instructed as to the form its verdict should take if it found for James Spencer but against Linda Spencer on her loss of consortium claim. Given this limited range of options, the jury assessed James Spencer's damages at \$70,000 and inserted the number 'zero' in the appropriate blank to answer the question quoted above related to Linda Spencer's claim. Despite the somewhat confusing language in the special form of the verdict, this Court interprets the jury's response to the question concerning Linda Spencer's damages as the equivalent of a defendant's verdict on her separate claim. There is, in this case, simply no principled way to distinguish between a verdict "for" the plaintiff, Linda Spencer, but assessing no monetary damage and the more traditional form of a defendant's verdict indicating that the jury found "for" the defendants. It would certainly have been preferable for the jury to have been given this option more explicitly; however, that shortcoming cannot be attributed to the jury, and it appears the jury followed the court's instructions as best it could.

## **III.**

### **The Request for an Additur**

Because we consider this to be a defendant's verdict as to Linda Spencer's claim, we begin by dismissing the notion that an additur would have been appropriate in this case. Section 11-1-55 of the Mississippi Code permits a trial court to provisionally grant an additur only in "a case in which money

damages were awarded . . . ." **Miss. Code Ann. § 11-1-55 (1972)**. There is no authority in the trial court, or in this Court, to set aside a defendant's verdict and award the plaintiff a money judgment under the guise of the additur statute.

#### IV.

#### **Linda Spencer's Entitlement to a New Trial**

The sole question before this Court, in view of our disposition of the additur request, is whether the trial court erred in denying Linda Spencer a new trial based on the contention that the jury's verdict was against the weight of the evidence. This form of relief exists independent of the provisions of section 11-1-55 dealing with additurs and new trials. *See M.R.C.P. 59; McKinzie v. Coon, 656 So. 2d 134, 137 (Miss. 1995)*.

Spencer argues that (a) because the jury found the defendants liable on her husband's claim, and (b) because her testimony concerning the impact of her husband's injuries on her was not rebutted, the jury was obligated to return some measure of loss of consortium damages. In effect, she is contending that she was entitled to a directed verdict of liability with the sole issue being the proper amount of damages. We disagree.

A claim of loss of consortium is a separate claim from the injured spouse's tort claim, though it has been said to be a derivative action, requiring as a base a finding of liability for the injury to the party's spouse. *McCoy v. Colonial Baking Co., 572 So. 2d 850, 853 (Miss. 1990)*. Therefore, it is not enough to show that responsibility for the spouse's injury has been found to lie with the defendants. A person claiming loss of consortium damages must also prove, by a preponderance of the evidence, that she incurred or experienced those difficulties that constitute the basis of such a claim. Those matters for which the uninjured spouse may be separately compensated are "limited to loss of society and companionship, conjugal rights and physical assistance of the [uninjured spouse]." *Tribble v. Gregory, 288 So. 2d 13, 17 (Miss. 1974)*.

In summing up the proof in support of her claim, Spencer recites the following in her brief:

[a]fter Mr. Spencer's injury to his arm and shoulder, Linda Spencer was required to totally take care of Mr. Spencer. She had to dress him, feed him, bathe him and take care of him totally. She had to drive him and take him to the doctor. She had to take on additional responsibilities in running the business. Because of pain he slept in a chair and could not engage in sexual relations. All of this reflects some damage suffered by Linda Spencer for which she was entitled to be compensated. (emphasis in original).

The bulk of the proof as outlined by the foregoing passage constitutes care provided by Linda Spencer to her injured husband in the form of nursing services. Assistance to an injured spouse in the nature of nursing care may not constitute an element of damages in a loss of consortium claim. This is true because the injured spouse is entitled to recover, on his own account, the value of such services, even in the case where the services were provided without cost by a family member. *Id; Charles T. McCormick, McCormick On Damages § 90 (1935)*.

The claim that Linda Spencer was required to devote additional time to the family business does not

appear to be a recoverable element of a loss of consortium claim. Any inability of James Spencer to devote his attention to the family business would constitute a diminishment of his earning capacity for which he was entitled to compensation by the general verdict returned in his favor. To allow his wife to recover additionally would be an impermissible pyramiding of damages. ***Tribble v. Gregory*, 288 So. 2d at 17.**

As to the proof that the parties could no longer engage in sexual relations because James Spencer slept in a chair due to pain, there was evidence in the record that he had, for some time prior to his fall at the store, been substantially bothered with back pains that required him to often sleep in a chair. His symptoms were of sufficient severity that he complained of depression and ultimately underwent back surgery. Linda Spencer admitted that these back problems and the attendant depression had interfered with the couple's normal relationship. There was also testimony that Linda Spencer had, during this same period, undergone surgery and that this had affected the couple's relations. Finally, there was proof that James Spencer had severely injured his wrist in another unrelated accident, and that this was the source of much of his incapacity. In those circumstances, we cannot accept the proposition that Linda Spencer's testimony as to diminished conjugal activity was un rebutted.

The burden in every case is on the plaintiff to prove her right to recovery by a preponderance of the evidence. ***Phillips v. Hull*, 516 So. 2d 488, 491 (Miss. 1987).** In this case, the jury could have concluded that the conjugal difficulties testified to by Linda Spencer were equally as likely to be due to medical difficulties not related to the fall as they were to have arisen out of the shoulder injury suffered in Mr. Spencer's fall at the Jitney Jungle. The jury is the sole judge of the credibility of any witness and it simply is not the law that every spouse who is prepared to testify that the injury to her spouse damaged the conjugal relationship of the parties is entitled to some damages. While it may be extremely difficult, if not impossible, to directly refute testimony regarding diminished sexual activity, involving as it does the most private aspect of a couple's life, it is nevertheless true that the probative value of a witness's testimony may be damaged or destroyed indirectly. By way of example, **Mississippi Rule of Evidence 616** provides that:

For the purpose of attacking the credibility of a witness, evidence of bias, prejudice, or interest of the witness for or against any party to the case is admissible.

The Mississippi Supreme Court, in the case of ***Alldread v. Bailey***, was confronted with a situation similar to that with which we now deal. ***Alldread v. Bailey*, 626 So. 2d 99 (Miss. 1993).** The defendant's liability for the physical injury was resolved by the jury against the defendant; however, the jury declined to award any loss of consortium damages to the uninjured spouse. ***Id.* at 101.** The court said that the "real issue" to be faced was "whether that verdict [in favor of the injured spouse] forces the jury to find in favor of [the uninjured spouse] on the issue of loss of consortium." ***Id.*** The supreme court acknowledged a split of authority on the question in other jurisdictions, but went on to conclude that:

even in states where there is authority supporting appellant's argument, the courts have held that not every verdict against the non-injured spouse claiming a loss of consortium is inconsistent as a matter of law with a verdict in favor of the injured spouse.

***Id.* at 102.** The court affirmed a verdict awarding no loss of consortium damages even though the

only real contradictory evidence to the plaintiff's assertions came from the cross-examination of the married couple. *Id.* at 103.

"This Court must assume that the jury drew every permissible inference from the evidence offered in favor of the appellee[s]." *Id.* There was, in this case, evidence that both the plaintiff and her husband suffered health-related problems that were not connected to the husband's injury. There was evidence that these problems were of sufficient severity to adversely impact the couple's relationship. Viewing these facts in the light consistent with the verdict, we find that the jury could have reasonably concluded that Linda Spencer failed to prove any compensable damages by a preponderance of the evidence. We do not find the verdicts in this case to be inconsistent, nor do we find the verdict against Linda Spencer to be against the weight of the evidence. There is, therefore, no basis to interfere with the decision of the jury in this case.

**THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., THOMAS, P.J., COLEMAN, HERRING, HINKEBEIN, AND SOUTHWICK, JJ., CONCUR. DIAZ, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY KING AND PAYNE, JJ.**

DIAZ, J., DISSENTING:

I respectfully dissent. After reviewing the record, it is clear that Mrs. Spencer not only lost the companionship, comfort, and society of her husband, but she also lost the services that her husband provided. Once the jury had determined that Jitney Jungle and Walker & Sons were liable to Mr. Spencer for his damages, then in order for Mrs. Spencer to be awarded damages, she had to prove loss of consortium damages. The loss of consortium claim seeks to protect certain interests of the non-injured spouse.

She is entitled to society, companionship, love, affection, aid, services, support, sexual relations, and the comfort of her husband as special rights and duties growing out of the marriage covenant. To these may be added the right to live together in the same house, to eat at the same table, and to participate together in the activities, duties and responsibilities necessary to make a home.

*Tribble v. Gregory*, 288 So. 2d 13, 16 (Miss. 1974). Consortium consists of more than only intangible emotional elements. It also encompasses services performed by the husband for the wife which have some type of monetary value. *Id.* at 17.

Mrs. Spencer's testimony is uncontradicted. Neither Jitney Jungle nor Walker & Sons have offered anything to refute Mrs. Spencer's testimony. Where the liability is admitted, and the testimony as to the element in question is uncontradicted, the court has, in the past, awarded an additure or a new trial on the issue of damages. *Moody v. RPM Pizza, Inc.*, 659 So. 2d 877, 883 (Miss. 1995). Mrs. Spencer testified to numerous activities in which she and her husband could no longer participate

and in many extra duties that she had to assume for her husband, all uncontradicted by appellees.

Not only did Mrs. Spencer have to take on extra responsibility at their family business, but she had to hire strangers to help her run it. Mrs. and Mr. Spencer were also unable to enjoy certain recreational activities which they used to participate in together. They did not spend time with their friends or go to the children's ball games and work in the concession stand anymore. There was also no affection displayed by Mr. Spencer towards Mrs. Spencer or the children, and there was a drastic decline in the Spencers' sexual relations. Mr. and Mrs. Spencer could not even sleep in the bed together because of the pain Mr. Spencer felt when he lay down. Mrs. Spencer had to completely take care of Mr. Spencer--from dressing him in the morning to feeding and bathing him at night.

Although Mr. Spencer may have been sufficiently compensated for his damages, Mrs. Spencer incurred separate damages due to her husband's injury which were essentially ignored by the jury. The verdict given Mrs. Spencer was against the overwhelming weight of the evidence, and she should be compensated by the appellees. For these reasons, I believe that a new trial should be held to determine the amount of damages to be awarded to Mrs. Spencer.

**KING AND PAYNE, JJ., JOIN THIS SEPARATE OPINION.**