2006-CA-01220 RT

IN THE COURT OF APPEALS OF MISSISSIPPI

GAILA TATE MCCASKILL OLIVER	**APPELLANT**
v.	**No. 2006-CA-01220**
THE GOODYEAR TIRE & RUBBER COMPANY	**APPELLEE**

TABLE OF CONTENTS

Table of Contents (Continued)

TABLE OF AUTHORITIES

Constitution, State of Mississippi:

Statutes:

Cases - State:

Uniform Circuit and County Court Rules:

Statement of Issues

Outlined below as error are the following three issues:

I. Whether the Circuit Court erred when it failed to follow the requirements of §11-7-161, Miss. Code 1972, and/or Rule 3.10, Uniform Circuit and County Court Rules, when it failed to re-instruct and to require the jury to return to the jury room and to continue to deliberate on the section of the Interrogatory Verdict, Instruction D-29-A, a copy of which is contained in the Addendum hereto, concerning Interrogatory (1)(b), the issue of whether the subject tire was defective and unreasonably dangerous in its manufacture, as pursuant to §13-5-93, Miss. Code 1972, which is the codification of Article 3, §31, Mississippi Constitution, neither nine (9) or more members of the jury had decided that question as the vote of the jury at the time they returned and tendered the Interrogatory Verdict to the Circuit Court was "Yes"-5; "No"-7;

II. Whether the Circuit Court erred when it, pursuant to §11-7-159, reformed the jury's Interrogatory Verdict and entered judgment in favor of Defendant The Goodyear Tire & Rubber Company as nine (9) members of the Jury never reached a verdict on the issue of whether the subject tire was defective and unreasonably dangerous in its manufacture, Interrogatory (1)(b), and as the jury answered Interrogatory (2) concerning the question of proximate cause out of sequence; and

III. Whether the Circuit Court erred when it overruled Plaintiff Gaila Tate McCaskill Oliver's motion for new trial.

Summary of the Argument

As the jury's division on Interrogatory 1(b) concerning manufacturing defect ("Yes"-5; "No"-7) clearly revealed that no verdict had been reached on that particular issue, Gaila Oliver, in her representative capacity, contends that in "reforming" the jury's "non-verdict", the trial judge not only failed to abide by §11-7-159 and §11-7-161, Miss. Code 1972, and Rule 3.10 of the Uniform Circuit and County Court Rules, but also compounded that error by rendering judgment on said "non-verdict" and by overruling her motion for new trial.

As a result of the trial judge's errors of law and/or abuse of her discretion, Gaila contends that this Court should reverse and remand this cause for a new trial.

Standard of Review

Appellant Gaila Tate McCaskill Oliver (hereinafter "Gaila") contends that in its Brief Appellee The Goodyear Tire and Rubber Company (hereinafter "Goodyear") disregarded the plain error of law which the Circuit Court committed when it violated not only §11-7-161 and §11-7-159, Miss. Code 1972, but also Article 3, §31, Constitution of Mississippi, as it deprived Gaila of her right to trial by jury as it "reformed" a "non-verdict" on the issue of defective manufacturing of a Goodyear tire rendered by fewer than nine or more of the twelve member jury into "verdict" and then rendered Judgment for Goodyear based on that "non-verdict".

Clearly, as stated by former Supreme Court Judge James L. Robertson, this Court's job is to see that the law, i.e., its Constitution, statutes and Court rules are enforced correctly and must, "with respect for and deference to the trial judge, . . . get it right". ***UHS-Qualicare, Inc. et al. v. Gulf Coast Community Hospital, Inc.***, 525 So.2d 746, 754 (Miss. 1987). Therefore, as to the issues surrounding the Interrogatory Verdict, Instruction D-29-A; its completion and tendering in open court by the jury after ten trial days in five different courtrooms in two different courthouses located some sixty miles and several counties apart and after more than three hours of deliberation and coming at the hour of 9:25 p.m. on Friday, June 24, 2005; and the Circuit Court's initial lack response to and then overly pro-active reform of said

Interrogatory Verdict over Gaila's counsel's objection, and dismissal of the jury, the standard of review to be employed by this Court is *de novo.* The most basic and sacred tenet of Anglo-American law, Gaila's right to trial by jury, is what is at stake in this appeal. As to the error of the Circuit Court in overruling Gaila's motion for new trial, Gaila contends that it is clear beyond peradventure that the Circuit Court abused its discretion and that because of both errors, this Judgment should be reversed and the cause should be remanded for new trial. ***Beard v. Williams***, 172 Miss. 880, 884, 161 So.2d 750, 751 (Miss. 1935).

Argument

I. Whether the Circuit Court erred when it failed to follow the requirements of §11-7-161, Miss. Code 1972, and/or Rule 3.10, Uniform Circuit and County Court Rules, when it failed to re-instruct and to require the jury to return to the jury room and to continue to deliberate on the section of the Interrogatory Verdict, Instruction D-29-A, a copy of which is contained in the Addendum hereto, concerning Interrogatory (1)(b), the issue of whether the subject tire was defective and unreasonably dangerous in its manufacture, as pursuant to §13-5-93, Miss. Code 1972, which is the codification of Article 3, §31, Mississippi Constitution, neither nine (9) or more members of the jury had decided that question as the vote of the jury at the time they returned and tendered the Interrogatory Verdict to the Circuit Court was "Yes"-5; "No"-7.

Replying to Goodyear's Brief is like an aviator trying to get his hands around the cloud through which he is flying. Goodyear's Brief and thus its argument is much more fascinating for what it does not say than for what it does.

Goodyear neither attempts to distinguish nor comments at all upon this Court's most recent decision of ***Lambert Community Housing Group, L.P. v. Wenzel,*** 987 So.2d 468 (Miss. Ct. App. 2008), in which this Court held that as the Interrogatory Verdict failed to include all of the defendants and as the

intent of the jury was not clear as the instructions and the interrogatory form of the verdict as completed by the jury were inconsistent, the judgment had to be reversed and remanded for new trial. While in the case at bar the Circuit Court's instructions, including the Interrogatory Verdict, D-29A were consistent, once the jury recorded its members' answers to item 1(b) as "Yes"-5 and "No"-7, the Circuit Court was faced with a situation in which it had to act in order to comply with §11-7-161, Miss. Code 1972, as the Interrogatory Verdict was, in fact, a "non-verdict", the most "unresponsive" type of document for the jury to return in open court as it stated on its face that the jury had yet to reach a verdict on the issue of defective manufacture. As this Court in ***Lambert,*** *supra.*, stated at paragraph 25:

> . . . [W]e find the form of the jury's verdict and the apportionment of fault contained in instruction P-100 [the Interrogatory Verdict] to be ambiguous.
>
> . . . the circuit judge erred in not ordering the jury to return for deliberations in order to reform its verdict . . .

As General Robert E. Lee and the Army of Northern Virginia defended Petersburg against General Ulysses Grant's Army of the Potomac in the final stages of our great American conflict, Goodyear consistently "retreated to the left" in attempting to avoid a direct confrontation with the facts that the jury, through its answers written on the Interrogatory Verdict, told the Circuit Court that it was deadlocked on Question 1(b), and that the Circuit Court not only failed to re-read Instruction C-1 and send the Jury back into its cloistered

quarters for further deliberations on Question 1(b), but "reformed" a "non-verdict" into a "verdict". Clearly nine or more of them never reached a verdict on the issue of manufacturing defect. While the jury erred by not returning into open court and declaring to the Court, parties and counsel that nine or more or them could not agree and that they were deadlocked on that issue, the Court had the power and the duty to provide the jury a way to correct the jury's error or to declare a mistrial pursuant to Rule 3.10, U.C.C.C.R.

In ***Universal C. I. T. Credit Corp. et al. v. Turner***, 56 So.2d 800, 803 (Miss. 1952) (see Addendum), the jury initially returned a separate money verdict against each of three joint tortfeasors. The trial court explained to the jury that the actual amount of damages could not be divided as to each of the joint tortfeasors, but that the jury would have to arrive at one amount of damages and then determine which of the defendants they found liable, and then sent them back to deliberate. When they returned again, their verdict listed one sum of damages, but did not specify against which of the defendants judgment should have been rendered even though it mentioned each by name. The trial judge gave them additional instructions and sent them back to deliberate once again. Finally, they returned to the courtroom and presented a third verdict form which set out one sum of damages and rendered judgment for plaintiff and against all three defendants. ***Id.***, at 803.

By refusing to act as the Circuit Judge of Wayne County did in ***Universal C. I. T,*** *supra.*, the Circuit Court did not afford the jury and, more importantly, Gaila, the right to have the jury, speaking through nine or more of its members, reach a verdict on the issue of defective manufacturing.

The Interrogatory Verdict speaks loudly that the Jury, even though deadlocked on manufacturing defect, failed to follow the Court's instructions to return and report to it of the deadlock, but trudged ahead into a totally different issue. The Circuit Court's interaction with the jury as set out on page 149 of the Record Excerpts (see Addendum) tells the tale:

THE COURT: Okay. As to (B), manufacture. First of all, my understanding is we do not have 9 votes for either "yes" or "no"; is that correct?

THE JURY: Yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes.

. . .

THE COURT: Okay. I'm going to ask you to retire to the jury room just momentarily.

Well, I see one other thing on the jury (*sic*) on here. I don't think you needed to go that far, but since you did, let me ask you this question as well: As to No. 2, "Do you find that the defective and reasonably (*sic*) dangerous condition you found in question one above

is to be the proximate cause of the death of Jeffrey McCaskill?" And there is a "no." Is this your verdict? Did you vote "no" on No. 2?

THE JURY: Yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes.

(R.E. 149) (Addendum).

When the Circuit Court asked that question about Interrogatory No. 2, she invaded the province of a jury which had not yet reached a verdict on Interrogatory 1(b) and not only took away the opportunity for the five persons voting "Yes" at that particular time to convince, over time, four more persons to adopt the "Yes" position, but also took away the chance for the seven persons voting "No" to cajole two more souls to their "side of the fence", in either event so that a statutorily-required verdict could be reached on that question. If the "Yeses" won, then they could begin to deliberate on Question No. 2. If the "Nos" won, then they could report back to the Court. In legislative parlance, the Circuit Court's question brought "cloture" to the jury's deliberations when it was deadlocked.

Clearly the Circuit Court failed to correct either the Jury's error or intentional violation of the Interrogatory Verdict's instructions by not sending them back for further deliberations after re-reading to them the Court's instruction on the necessity of nine or more of them agreeing in order for them to reach a verdict. The Circuit Court could have even revised the instructions

on the Interrogatory Verdict to require them to report whether they were deadlocked if nine or more of them could not agree on an answer to each Interrogatory and re-emphasized to them that they not proceed to a new question unless and until nine or more of them had reached a verdict on the preceding question.

Better still, in light of the lateness of the hour, the Circuit Court should have just had them report at 9:00 a.m. on Monday, June 27, 2005, at the Circuit Court of Washington County to receive additional instructions (C-1) and to continue deliberations.

When this Court reads "between the lines" of the trial transcript, it will see the Court's recoil when it reviewed page one of the tendered Interrogatory Verdict and will perceive how tantalizingly close Judge Carey-McCray came to sending them back for further deliberations until nine or more of them reached a verdict on Question 1(b) – defective manufacturing. Rather than taking those actions, the Circuit Court turned to page 2 of the Interrogatory Verdict, read the response to Interrogatory 2, questioned the jury as though they had reached a verdict on Question 1(b) and determined that an out-of-sequence answer to the question of proximate cause "transformed" a "non-verdict" into a "verdict" for Defendant Goodyear.

II. Whether the Circuit Court erred when it, pursuant to §11-7-159, reformed the jury's Interrogatory Verdict and entered judgment in favor of Defendant The Goodyear Tire & Rubber Company as nine (9) members of the Jury never reached a verdict on the issue of whether the subject tire was defective and unreasonably dangerous in its manufacture, Interrogatory (1)(b), and as the jury answered Interrogatory (2) concerning the question of proximate cause out of sequence.

Goodyear also wishes this Court to review selectively the statutes concerning jury verdicts as it emphasizes §11-7-157, Miss. Code 1972, yet fails to mention the requirements of §11-7-161 and §11-7-159, Miss. Code 1972.

Goodyear even appears to chastize Gaila for using the term "reform the verdict" as one of the judicial arrows the Circuit Court has in its quiver to aid a confused jury which must weigh the facts and then apply the law to them through the Court's instructions. The power of the trial court to "reform" the verdict is one clearly available under Mississippi's statutory scheme in §11-7-159, Miss. Code 1972. Goodyear contends that the Interrogatory Verdict as completed by the jury and presented to the Court was "an intelligent answer to the issues submitted" and an understandable expression of its intent. ***Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.***, 743 So.2d 954, 969 (Miss. 1999). Clearly, it facially told the Court that the jury was deadlocked on Question 1(b) by a vote of "Yes"-5 to "No"-7. The

Circuit Court erred by violating Mississippi statutory law by expansively reforming a "non-verdict" into a "verdict" for the Defendant/Appellee Goodyear. Gaila contends that "reform" under §11-7-159, Miss. Code 1972, does not include taking the issues away from a facially-deadlocked jury, particularly when it is evident to the Court and counsel that the Jury has either misunderstood or openly violated the instructions contained on the form of the Interrogatory Verdict by leaving the issue of defective manufacturing before reaching a verdict on it and taking up the issue of proximate cause, particularly as the consideration of the latter issue would cause them to consider at least one individual instruction of the Court (D-7) which was, at least, physically, separate and apart from those dealing with Goodyear's defective manufacture of the tire on left front axle of Jeffrey McCaskill's truck. The only intelligent answer the jury gave was that it was deadlocked on Question 1(b).

III. Whether the Circuit Court erred when it overruled Plaintiff Gaila Tate McCaskill Oliver's motion for new trial.

The Circuit Court jumped to conclusions, failed to appreciate the deadlock on the manufacturing defect question, and reformed a "non-verdict" into a "verdict" for Goodyear. Then the Court rendered Judgment based on the "non-verdict" which coincidently repeated the division thereby showing on its face that nine or more jurors had not reached a verdict on the issue of manufacturing defect (R.E. 10-12). Finally, the Circuit Court compounded its error of law by taking under advisement for ten (10) months Gaila's Motion for New Trial and then overruling same in a one-sentence order (R.E. 13).

Clearly, the Circuit Court abused its discretion when it overruled Gaila's motion for new trial because it failed to take the "log out of its own eye". For ten (10) months the Circuit Court had for consideration Gaila's Motion for New Trial. It refused to correct its mistake in failing to be judiciously pro-active as it did not re-read for the jury Instruction C-1, did not re-read for the jury the procedural instructions on Instruction D-29-A, and did not dispatch the jury to continue deliberating. The Court had the best evidence before it: Instruction D-29-A which "screamed" to anyone with eyes for ears – "Yes"-5 and "No"-7, *i.e.*, "We are deadlocked on Question 1(b)."

The actions of the Circuit Judge from Wayne County in ***Universal C. I. T.,*** *supra.*, set the standard. Not once, but twice did that Circuit Judge

ask the jury to retire – until they "got it right".

Now this Court must, in former Judge Robertson's words, "get it right", whether it determines that the trial court erred as a matter of law or abused her discretion, by reversing this judgment and remanding this matter for new trial. ***UHS-Qualicare***, *supra.,* at 754.

Conclusion

In the final analysis, this Court should be led back not only to the affirmance of the actions of the Circuit Judge of Wayne County in Mississippi Supreme Court's ***Universal C. I. T.***, *supra.*, but also to its most recent decision in ***Lambert***, *supra.* and should reverse the trial court and remand this cause for a new trial.

Respectfully submitted, this 26th day of September, 2008.

Frank J. Dantone, [redacted]
Edward D. Lamar, [redacted]
Counsel for Appellant Gaila Tate McCaskill Oliver, in her representative capacity as Executrix of the Estate of Jeffrey L. McCaskill, and as mother and next friend of Matthew McCaskill, Josh McCaskill and Hunter McCaskill

HENDERSON DANTONE, P.A.
P. O. Box 778
Greenville, MS 38702-0778
Telephone: (662) 378-3400
Facsimile: (662) 378-3413

CERTIFICATE OF SERVICE

I, Edward D. Lamar, one of the attorneys for Appellant, do hereby certify that I have this 26th day of September, 2008, caused to be mailed, via U. S. first class delivery, a true and correct copy of the foregoing to:

David L. Ayers, Esq.
J. Collins Wohner, Jr., Esq.
Watkins & Eager
400 E. Capitol St., Suite 300
Jackson, MS 39201

The Honorable Margaret Carey-McCray
Circuit Court Judge
Washington County Courthouse
900 Washington Avenue, 2nd Floor
Greenville, MS 38701

Edward D. Lamar

IN THE CIRCUIT COURT OF WASHINGTON COUNTY, MISSISSIPPI

GAILA TATE McCASKILL, AS EXECUTRIX OF THE ESTATE OF JEFFREY L. McCASKILL, INDIVIDUALLY, AND AS NEXT FRIEND TO MATTHEW McCASKILL, JOSH McCASKILL, AND HUNTER McCASKILL, MINORS, AND ST. PAUL FIRE & MARINE INSURANCE CO. PLAINTIFFS

VS. CAUSE NO. CI2002-197

THE GOODYEAR TIRE & RUBBER COMPANY, TIM KIRBY AND ELLIS WILLARD, D/B/A K&B TIRE SERVICE, INC., AND TIFFANY PICKLE AND JAY PICKLE, D/B/A K&B TIRE SERVICE, INC. DEFENDANTS

JURY INSTRUCTION NO. _____

(1) Do you find from the preponderance of the evidence that the tire was defective and unreasonably dangerous in any of the following respects:

(a) Design Yes _____ No X 12

(b) Manufacture Yes 5 No 7

(c) Warnings Yes _____ No X 12

If you answered "No" to all questions above, stop and proceed no further, and advise the bailiff that you have reached your verdict. If you answered "Yes" to one or more of the questions, then proceed to the next question.

(2) Do you find that the defective and unreasonably dangerous condition you found in question (1) above to be

D-29 - A

EXHIBIT A

the proximate cause of the death of Jeffrey McCaskill?

Yes _____ No X

If you answered "No" to this question, proceed no further and notify the bailiff that you have reached your verdict. If you answered "Yes" to this question, proceed to the next question.

(3) Assign to each person or entity listed below the percentage of fault you attribute in proximately causing the death of Jeffrey McCaskill:

The Goodyear Tire &
Rubber Company _____

Jeffrey McCaskill _____

K&B Tire Service, Inc. _____

Your percentages *must* total 100 percent.

(4) Without regard to your assignment of percentage(s) of fault in section (3) above, state the total amount of damages incurred by the plaintiffs as a result of the death of Jeffrey McCaskill: $_____.

GIVEN
Circuit Clerk

Willie E. ODOM v. STATE.

No. 38364.

Supreme Court of Mississippi.

Feb. 11, 1952.

Appeal from Circuit Court, Forrest County; F. B. Collins, Judge.

Earle L. Wingo, H. W. Pittman, Hattiesburg, for appellant.

J. P. Coleman, Atty. Gen. and Joe T. Patterson, Asst. Atty. Gen., for appellee.

PER CURIAM.

Affirmed.

UNIVERSAL C. I. T. CREDIT CORP. et al. v. TURNER.

No. 38184.

Supreme Court of Mississippi.

Feb. 18, 1952.

Action by O. V. Turner against Universal C. I. T. Credit Corporation and Bennie Turner for damages for alleged conversion of automobile. The Circuit Court, Wayne County, Jesse H. Graham, J., entered judgment on verdict for plaintiff, and defendants appealed. The Supreme Court, Lee, J., held that any supposed danger to security of credit corporation disappeared when plaintiff, who was known by credit corporation to be actual buyer, tendered balance due on conditional sales contract plus collection charges, and repossession of automobile at instigation of individual defendant who was accommodation signer was improper.

Judgment affirmed.

1. Sales ⇐481

In action for damages for conversion of automobile, wherein it was alleged that individual defendant was accommodation signer of conditional sales contract with defendant credit corporation, and that automobile had wrongfully been taken from plaintiff despite tender of payments due, issues whether individual defendant was in fact accommodation signer of contract, and, if so, whether defendant credit corporation knew of such relationship and that plaintiff was actual owner, were questions for jury. Code 1942, § 70.

2. Sales ⇐479(2)

Conditional seller, when acting under insecurity clause in contract, may proceed upon such circumstances of presently apparent danger to security as would furnish probable cause for belief that security is unsafe when viewed in good faith by man of reasonable prudence, but opportunity must be given to conditional buyer, without any unreasonable delay or unwarranted costs, to remove insecurity and to have prompt redelivery to him of property upon removal, without imposition of arbitrary or unreasonable terms, or conditions.

3. Sales ⇐481

Where plaintiff who had purchased automobile from defendant credit corporation on conditional sales contract which was signed by individual defendant, with knowledge of credit corporation, as accommodation maker, tendered balance due on contract plus collection charges, any supposed danger to security disappeared and repossession of automobile by credit corporation at instigation of individual defendant was improper and rendered defendants liable for damages for conversion.

4. Trial ⇐339(3)

Where it was apparent to judge in action against several defendants for damages for conversion of automobile that first two verdicts returned by jury were not in proper form, it was proper for judge to require jury to return to jury room and reform verdict in conformity with their finding, since trial court was under duty to see that loss of time and expense of trial should not be nullified by failure of jury to put verdict in proper form.

5. Sales ⇐481

In action for damages for conversion of automobile wherein it was alleged that defendant credit corporation at instigation of one known by it to be accommodation signer of conditional sales contract had wrongfully deprived plaintiff of possession, evidence was sufficient to sustain award of $1,250 as actual damages to plaintiff.

Arthur L. Busby, Waynesboro, Earle L. Wingo, Hattiesburg, for appellants.

Welch & Welch, C. Denton Gibbes, Jr., Beard, Pack & Ratcliff, Laurel, Frank Clark, Waynesboro, for appellee.

LEE, Justice.

O. V. Turner sued Bennie Turner, Universal C. I. T. Credit Corporation, and Arthur Matthews Motors, Inc., to recover damages for the alleged conversion of his Ford automobile. There was a jury verdict for $1,250 against all of the defendants. Only Bennie Turner and Universal C. I. T. Corporation appeal.

O. V. Turner testified, in accordance with his pleadings, as follows: He and Bennie Turner were cousins and good friends. His credit was impaired on account of the fact that a car, which he owned, had been previously confiscated because of a violation of the liquor laws. For that reason, he requested Bennie to go with him to Mobile and sign, as an accommodation, the contract for a Ford automobile, which he wished to purchase. Bennie agreed and signed the papers. An old car of O. V.'s was traded in, and he paid the balance of the down payment. The deal was made on June 2, 1948. O. V. drove the car home, and had the same in his possession thereafter, using it as a taxi. He paid the taxes, and each month gave Bennie the amount of the payment to be remitted. Marital trouble then developed, and his wife left him for Bennie. Subsequently she returned, and Bennie was enraged on that account. Because of anger, he called the C. I. T. office at Mobile and gave instructions to take the car as O. V. was using it in connection with liquor. O. V. found out about Bennie's intentions and likewise called that office to inquire how much Bennie still owed. He told the office that he would mail the amount, $252.48, that day. The office advised that the company's Mr. Wilson had been instructed to get the car; but if he came for it, O. V. should show his receipts. Money orders were actually mailed to Mobile that day. The next day, Wilson came for the car. O. V. showed him his money order receipts. However $20 was demanded as a collection fee, which O. V. paid and was receipted therefor. Later, Wilson returned and took the car against O. V.'s wishes, and refunded the $20, stating as his reason that Bennie objected to the acceptance of the money.

O. V. went to the Matthews Motor Corporation, where the car was stored, and tried to pay the amount due. His offer was refused. He next went to the C. I. T. office in Laurel, tendered the amount due, but it was also refused.

Bob Cranford, a white friend, testified that O. V. had possession of the car all of the time, and that he had never seen Bennie in possession or driving the same. He went with O. V. to the Matthews Motor Company and to the C. I. T. office in Laurel, and was present when the balance of the debt was tendered. Arthur Matthews of the motor company said he knew that O. V. could not purchase a car, and that Bennie was acting as his purchasing agent. Mr. Clay, the agent of the C. I. T. in the Laurel office, said that he knew that O. V. was paying for the car that was bought in Bennie's name, and the reason therefor. Neither Matthews nor Clay would accept the money.

The purchase price of the car, according to the conditional sale contract, was $2,614.52. Matthews bought the car from Bennie for $850. He paid to C. I. T. the amount due, and the balance of the purchase price to Bennie. He subsequently sold the car for $1,295, but the purchaser became dissatisfied, and he took it back. Later, he sold it in New Orleans for $875.

Bennie Turner's evidence was in direct conflict with O. V.'s as to the purchase of the car. He did not make the contract as an accommodation. On the contrary, he placed the car in O. V.'s possession to be operated as a taxi, with O. V. to receive 60%, and he 40%, of the profits. He paid the difference on the purchase price himself, and drove the car to Waynesboro. O. V. made no payment on the car. The charge of intimacy with O. V.'s wife was a myth. He called the Mobile office to pick up the car so that he could get his money out of it. Since he did not send the Post Office Money Orders to Mobile, and his name had been used for that purpose, he

requested that they be returned. He admitted, on cross examination, that he had put at least three other cars in O. V.'s hands; that O. V. had full possession of the car in controversy; and that at no time did he demand that O. V. deliver it to him.

The C. I. T.'s proof was to the effect that O. V. was not known in the original purchase of the car, and that he was not mentioned in the conditional sale contract. Bennie made all of the payments. When he requested that the car be picked up on account of unlawful use, a payment was already four days past due. It took the car on that account and also to prevent endangering its security. It received the money orders, but Bennie informed it that he had not sent the payments. It was admitted that O. V. tendered the money to its agent, but Clay denied that he told Cranford that the company was aware that O. V. really owned the car. In other words, it disclaimed any knowledge of the alleged course of dealing between O. V. and Bennie, and took the car because the deferred payments were in arrears, to prevent endangering its security, and because Bennie, the owner, so far as it knew, made the request.

Since there is no appeal by Arthur Matthews Motor Company, it is not necessary to go into that feature of the case.

[1] The issue thus presented was (1) whether or not Bennie Turner was in fact simply an accommodation signer of the contract; and (2) if he was such signer only, whether or not the C. I. T. knew of such relationship, and knew that O. V. Turner was the actual owner.

The first proposition was in sharp dispute between O. V. and Bennie, and was for the jury.

The positive statement of Cranford, on the one hand, that C. I. T.'s agent Clay, admitted that the company knew that O. V. was paying for the car that Bennie had bought in his name for O. V., and the denial thereof by Clay, together with its other evidence, on the other hand, made an issue for the jury as to the knowledge of C. I. T.

Hence the motions for directed verdicts as to both Bennie Turner and Universal C. I. T. Credit Corporation were properly overruled.

The jury found a verdict for O. V. By such verdict, the jury decided that Bennie was an accommodation signer of the contract. Sec. 70, Code of 1942. The verdict also determined that C. I. T. knew that Bennie was such a signer and that the C. I. T. knew that O. V. was the actual owner.

If the note was past due, C. I. T., of course, had the right to take the car. But, when the full amount of the outstanding balance, together with the collection charge, was tendered, the company should have accepted the money and released the car. It was entitled only to collect its debt.

[2, 3] Our rule, as regards the insecurity clause in this conditional sale contract, is found in Commercial Credit Co. v. Cain, 190 Miss. 866, 1 So.2d 776, 777, and is as follows: "the mortgagee may proceed upon such circumstances of presently apparent danger as would furnish probable cause for the belief that the security is unsafe when viewed in good faith by a man of reasonable prudence; * * *". That case also points out the duty of the mortgagee, after taking possession as follows: "when possession is recovered by the mortgagee, he must still deal with it as security and with reference to the equitable rights of the mortgagor; and this rule applies with equal force when the property has been taken under the insecurity clause. When the mortgagee acts under that clause, he must give to the mortgagor without any unreasonable delay or unwarranted costs the opportunity to remove the insecurity or danger to the security and to have prompt redelivery to him of the property when this has been done; and in respect to this the mortgagee must impose no arbitrary or unreasonable terms, or conditions, but only such as ought to satisfy a reasonably fair and prudent person."

When O. V. tendered the amount necessary to extinguish the debt before, at the time of, and subsequent to, repossession of the car, any supposed insecurity disappeared. If the company had taken the money,

it would have been impossible for it to lose.

Full consideration has been given to the assignment of error as regards alleged erroneous instructions given for the plaintiff. Suffice it all to say, when the instructions, both for the plaintiff and the defendants, are considered together, they constitute a fair announcement of the law applicable to the particular issues submitted to the jury.

Both appellants complain vigorously at the action of the trial judge in the reception of the verdict. This challenge arises out of these circumstances: On the first return, the verdict was as follows: "We, the jury, find for the plaintiff O. V. Turner, and assess each one as follows: Bennie Turner, $750.00, C. I. T. Corporation, $250.00, Matthews Motors Corporation, $250.00." It was obvious to the trial judge that the verdict was not in proper form. Miss. Central Railroad Co. v. Roberts, 173 Miss. 487, 160 So. 604. He therefore inquired as to their meaning. Peremptory instructions that no punitive damages could be awarded against either C. I. T. or Matthews Motors Corporation had been granted; and the judge asked if any part of the verdict against Bennie Turner was punitive damages. The response of a juror indicated that it was not. Thereupon, the judge explained that the amount of the actual damages could not be divided; that it should be against the three in such amount as they should find; and if they wished to award punitive damages against Bennie Turner, it should be so indicated in addition to the joint sum. The jury was sent back to their room to reform their verdict, and presently returned. The judge, after reading the verdict, asked, "Do you mean that he is to get $1,250.00 out of all the defendants?" A juror replied, "That's right; we don't care how it is divided." The judge then said, "But you find $1,250.00 against all the defendants?" And a juror replied, "Yes sir." The judge then told them to go back and put it down whether they meant two of them or all of them. The jury retired and presently brought in a verdict as follows: "We, the jury, find for the plaintiff O. V. Turner $1,250.00, defendants Bennie Turner, C. I. T. Corporation and Matthews Motor Company." Thereupon, the judge told them that they were just writing names, and they were not saying what they were doing, and whether they were finding against all of the defendants. Again the jury went back to their room, and finally came in with the following verdict: "We, the jury, find for the plaintiff O. V. Turner against Bennie Turner, C. I. T. Corporation, Matthews Motor Company in the sum of $1,250.00". The jury was polled on this verdict, and it was accepted.

It is contended that the trial judge, in effect, instructed the jury orally.

[4] We do not think so. The jury, in the first instance found that the plaintiff was entitled to recover, but improperly assessed it against the several defendants in different amounts. In the second instance, the amount was written in such a way as to make the finding unintelligible. In the last instance, they transposed the amount of the verdict so as to make it intelligible and in conformity with their finding. The trial court was under the duty to see that loss of time and the expense of the trial should not be nullified by the failure of the jury to put their verdict in proper form. The question here is similar to the points raised in Southland Broadcasting Co. v. Tracy, 210 Miss. 836, 50 So.2d 572; Meridian City Lines v. Baker, 206 Miss. 58, 39 So.2d 541, 8 A.L.R. 2d 854; Miss. Central R. R. Co. v. Roberts, supra.

The verdict did not reflect that the jury assessed any punitive damages at all.

[5] The proof was ample to sustain a verdict for the amount awarded as actual damages.

We find no reversible error in the case; and it follows that the judgment of the lower court ought to be, and is, affirmed.

Affirmed.

ROBERDS, P. J., and HALL, KYLE and ETHRIDGE, JJ., concur.

room to begin deliberating on your verdict.

I'm going to ask Ms. Price and Ms. Collins if you will approach the bench. The rest of you are excused.

Court is in recess until the jury returns.

(THE JURY RETIRED TO DELIBERATE AT APPROXIMATELY 6:15 P.M.)

In Chambers

THE COURT: I have a note from the jury: "What exactly does proximate cause mean?" And I'm inclined to refer them to the instruction.

MR. DANTONE: Yeah.

MR. AYERS: That's fine.

THE COURT: I just said: "Please refer to instruction D-7." And I put a notation that they are not to destroy this note. "Please save this note for the record."

MR. DANTONE: I believe that will take care of it

(EXHIBIT C-1 WAS MARKED FOR IDENTIFICATION AND RETURNED TO THE JURY AND DELIBERATIONS CONTINUED.)

Back in Chambers

THE COURT: We have another question. "Do we write our answer on the original file?"

MR. AYERS: The original --

THE COURT: Probably on the original form of the verdict. I'm going to tell them "Yes."

And I told them again to save the note for the record.

(EXHIBIT C-2 WAS MARKED FOR IDENTIFICATION AND RETURNED TO THE JURY AND DELIBERATIONS CONTINUED.)

Back in the Courtroom

THE COURT: I understand the jury has a verdict. You may bring the jury.

(THE JURY RETURNED WITH THEIR VERDICT AT APPROXIMATELY 9:25 P.M.)

THE COURT: Ladies and gentlemen of the jury, have you reached a verdict?

(THE JURY RESPONDS AFFIRMATIVELY).

THE COURT: Will you please hand it to me.

(THE COURT REVIEWS THE VERDICT.)

THE COURT: I'm not sure I understand this. Is the number the number of you who agreed on a particular vote?

UNIDENTIFIED JUROR: Yes.

THE COURT: Okay. All right. So I think I -- for the first question, "Do you find from the preponderance of the evidence that the tire was defective and unreasonably dangerous in any of the following respects: As to (A), design."

At "no" there is an "X" and "12." I'm going to poll you so that I'm sure that I understand it, and each of you have to respond that this is your -- I'm going to ask you if this is your verdict, and you respond "yes" if it is; "no" if it is not, okay?

Is this your verdict?

THE JURY: Yes --

THE COURT: Is that how you voted?

THE JURY: Yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes.

THE COURT: Okay. As to (B), manufacture.

First of all, my understanding is that we do not have 9 votes for either "yes" or "no"; is that correct?

THE JURY: Yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes.

THE COURT: As to warnings there is at "no" an "X" and a "12." That means that all of you agree to that, that's how I'm reading that, but I'm going to ask you again: Is this your verdict?

THE JURY: Yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes, yes.

THE COURT: Okay. I'm going to ask you to retire to the jury room just momentarily.

Well, I see one other thing on the jury on here. I don't think you needed to go that far, but since you did, let me ask you this question as well: As to No. 2, "Do you find that the defective and reasonably dangerous condition you found in question one above is to be the proximate cause of the death of Jeffrey McCaskill?" And there is a "no." Is this your verdict? Did you vote "no" on No. 2?

THE JURY: Yes, yes, yes, yes, yes, yes,

yes, yes, yes, yes, yes, yes.

THE COURT: Okay. Return to the jury room just momentarily.

(THE JURY RETURNS TO THE JURY ROOM.)

THE COURT: On the manufacturing claim, I did not poll them specifically about the vote because my instructions said to them not to let me know how they are divided numerically if they don't reach a verdict, if at least nine of them vote. On that claim what is written on the form is, yes, five votes; and, no, seven votes. What I did poll them on is the fact that they were unable to reach a verdict or have nine people agree to that.

Would either counsel like anything further from the Court before this is filed of record and the jury is discharged?

MR. LAMAR: Your Honor, I don't think -- according to that form, I don't think we get to the proximate cause question until we have satisfactory answers to the first. So I think they need to deliberate, and if they cannot -- you know, if they cannot reach -- if nine of them cannot reach a verdict with regard to manufacturing, then I think we've got some serious problems. Because you don't get to question two unless --

MR. DANTONE: You got to go through one before you can get to two.

MR. AYERS: Well, but what -- it seems to me what they did is they took it literally, and

since there was some "yes" answers on manufacture, they kept working, but they agreed that -- even the five who voted that there was a manufacturing defect voted that it was not the proximate cause. So that's a final judgment.

THE COURT: All twelve of them agreed that it was not proximate cause.

MR. AYERS: I mean, you could have -- Your Honor, you could have -- in fact, I've had it in U.S. District Court in Greenville where the verdict was unanimous that there was a defect but it was not the proximate cause, and so that's -- that being a prerequisite to liability, that's a final judgment, when you add the five to the seven.

THE COURT: I believe so. Now, if you want me to -- again, I didn't poll them on the number for manufacture, but if you would like for me to poll them on that, I can bring that back before I discharge them and do that, but I thought by asking them whether or not nine of them were able to agree --

MR. DANTONE: Your Honor, may I see the verdict?

THE COURT: Sure. All of you can.

(PAUSE IN PROCEEDINGS.)

MR. AYERS: In other words, nine or more have agreed that there is no proximate cause, so that's a verdict.

MR. LAMAR: But they haven't reached that

point yet.

THE COURT: I think what happened is the five who answered "yes" went on and they all did -- since they had a "yes" and a "no" for manufacture. But, again, if you would like for me to poll them on manufacture before I discharge them, I'd be glad to do that.

MR. DANTONE: I don't think so, Your Honor.

THE COURT: Okay. Well, the verdict is filed of record, the jury is discharged, and court is adjourned.

(TRIAL CONCLUDED.)