2006-CA-01220 t

IN THE COURT OF APPEALS OF MISSISSIPPI

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

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record 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, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of the Mississippi Supreme Court and/or the Mississippi Court of Appeals may evaluate possible disqualification or recusal:

1. 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;

2. St. Paul Fire and Marine Insurance Company;

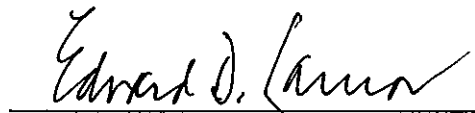
3. The Goodyear Tire & Rubber Company;

4. Joel J. Henderson, Frank J. Dantone, Edward D. Lamar and Lee B. Hazlewood of Henderson Dantone, P.A.;

5. David L. Ayers, J. Collins Wohner, Jr., and Jimmy B. Wilkins of Watkins & Eager, P.L.L.C.; and

6. Honorable Margaret Carey-McCray, Washington County Circuit Court Judge.

Respectfully submitted, this 12th day of August, 2008.



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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.

Statement of the Case

On June 14, 2002, Gaila Tate McCaskill Oliver (hereinafter "Gaila"), individually and as Executrix of the Estate of Jeffrey McCaskill and as mother and next friend of Matthew McCaskill, Josh McCaskill and Hunter McCaskill, being the wrongful death beneficiaries of Jeffrey McCaskill, filed her Complaint against The Goodyear Tire & Rubber Company (hereinafter "Goodyear") (R. 13-23) and Tim Kirby, Lawrence Ellis Bodron and K & B Tire Service, Inc.

On July 12, 2002, Gaila filed her First Amended Complaint adding the St. Paul Fire and Marine Insurance Company as a party plaintiff asserting its subrogation claim for the value of the vehicle destroyed in the accident (R. 26-38).

On July 16, 2002, Gaila filed her Second Amended Complaint substituting Ellis Willard as a party defendant in place of Lawrence Ellis Bodron (R. 45-59, R.E. 020-032).

On July 19, 2002, Goodyear answered the original Complaint denying its liability to Gaila (R. 58-66).

Goodyear answered Gaila's Second Amended Complaint on July 30, 2002 (R. 67-75, R.E. 033-041).

Ellis L. Willard and Tim Kirby answered Gaila's Second Amended Complaint on September 4, 2002 (R. 78-90).

After a period of discovery, the Court entered an Agreed Order Substituting K & B Service, Inc. for Tim Kirby and Lawrence Ellis Willard

d/b/a K & B Tire Service, Inc. on July 31, 2003 (R. 4, 189).

On or about December 22, 2003, Gaila settled with K & B Service, Inc. and the Court entered an Order dismissing it with prejudice (R.258-259).

On or about June 13, 2005, Gaila voluntarily dismissed her individual claims, but continued as Plaintiff in her representative capacity.

The trial court entered the Pre-trial Order on the morning trial began (R. 471-503, R.E. 042-074).

Following nine days of trial held in four different courtrooms in both Greenville and Greenwood from June 13-23, 2005, the attorneys met in Circuit Judge Margaret Carey-McCray's Chambers in Greenwood on the morning of June 24, 2005 for the jury instruction conference. Pertinent portions of the conference are found at Tr. 1, 68-80, 82-84; R.E. 126-152. Later that day the Court read the instructions to the jury, counsel presented closing arguments and the jury deliberated for three hours and ten minutes before they returned an interrogatory verdict on Instruction D-29-A, on which they found for Goodyear on the design and failure to warn claims (12 to 0), but were divided "Yes-5" to "No-7" on the defective manufacture claim. Without reaching a verdict on the defective manufacturing claim, the jury then answered Question (2) concerning proximate cause in the negative (Tr. 168-170; R. 453-454, R.E. 101-102, 148-150).

The jury was polled by the Court only on claims (1)(a) and (1)(c) (Tr. 168-169; R.E. 148-149). The Circuit Court, after a brief conference with counsel

dismissed the jury with the Court's appreciation for their service (Tr. 170-172; R.E. 150-152). Approximately one week later on July 1, 2005, the Circuit Court reformed the jury verdict and entered judgment in favor of Goodyear and dismissed Gaila's Complaint with prejudice (R. 408-410, R.E. 010-012).

Gaila timely filed her Motion for New Trial (R. 411-415). Some ten months later, on June 8, 2006, the Circuit Court denied her motion (R. 518, R.E. 013).

Gaila timely filed her Notice of Appeal on June 28, 2006 (R. 442, 443; R.E. 014-015).

Statement of Facts

Jeffrey McCaskill was born on January 19, 1953. On March 18, 2000, Jeffrey purchased four (4) new Goodyear Wrangler MT Load Range D 305/70R16 tires and had them installed on his Ford F-350 pick-up truck. He was traveling north during the early evening hours of Sunday, August 27, 2000, when his Ford F-350 pick-up truck tire (Goodyear Wrangler MT LRD 305/70R16) on the left front side of this truck suffered tread separation and blew out which caused his truck to leave the west side of Feather Farms Road, strike an embankment, become airborne, land in a field, then flip over several times and eject him from the vehicle into a ditch where he was later found and pronounced dead (R.E. 043-044).

After nine days of trial testimony from more than twenty (20) witnesses, fact and expert, and the admission of more than 90 exhibits, all parties finally rested.

Counsel met with the Court for the jury instruction conference on the morning of Friday, June 24, 2005. After several hours, the Court designated the instructions which would be given (R. 593-628, R.E. 081-082, 085-118, 120). One of the instructions was an interrogatory verdict form designated "D-29-A" (R. 642-643, R.E. 081-082). Additionally, as one of the Court's instructions, the Court instructed the jury that "[a]ny nine (9) or more of you may agree upon a verdict and return it in open Court as the verdict of the jury." Instruction C-1 (R. 593-594, R.E. 075-076).

After being instructed as to the law by the Court and hearing closing arguments from counsel, the jury retired, deliberated for three hours and ten minutes and during that time asked questions of the Court regarding "proximate cause" and whether they could fill in original Instruction D-29-A with their "verdict", and then advised the Court that they had reached a verdict (Tr. 167-168, R.E. 147-148).

The jury returned to the Courtroom and the foreperson presented the interrogatory verdict on which the Court had previously written "Given. Margaret Carey-McCray" and on which the Clerk had previously stamped "GIVEN" and had written "C. Webster, D.C." (Tr. 168; R. 453-454; R.E. 083-084, 148).

The interrogatory verdict indicated in answer to Question (1)(a) on defective design of "No X 12"; to Question (1)(c) on failure to warn "No X 12"; but to Question (1)(b) on defective manufacture of "Yes-5"; "No-7" (R. 453, R.E. 083). Then in answer to Question (2) concerning whether the defective condition was the proximate cause of the death of Jeffrey McCaskill, the jury answer "No X". (R. 454, R.E. 084).

Following a short colloquy with counsel outside the presence of the jury, the Court called the jury into the Courtroom, had the jury polled as to their verdict on issues (1)(a), (1)(c) and (2), conducted a short colloquy with counsel in which Gaila's counsel registered their concern about whether the verdict was intelligible and whether the jury departed from the Court's instructions, the

Court reformed the verdict, and discharged the jury (Tr. 170-172; R.E. 150-152). Then on July 1, 2005, the Court entered judgment for Goodyear (R. 408-410; R.E. 010-012).

Gaila timely filed a motion for new trial on July 11, 2005 (R. 411-418). On June 8, 2006, the Circuit Court overruled Gaila's motion (R. 518; R.E. 013).

On June 28, 2006, Gaila filed her Notice of Appeal (R. 442-443; R.E. 014-015).

Summary of the Argument

The Trial Court, faced with a defective verdict, not only failed to call the jurors' attention to their failure to reach a verdict on issue (1)(b) - defective manufacture, but also failed to re-instruct them, and to require them to continue deliberating until they had reached a proper and correct verdict on the issues presented in the Court's instructions, and, thus, failed to follow §11-7-161, Miss. Code 1972, for 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 when this Court views the trial court's ruling when it "reformed" the jury's "non-verdict" on the claim of a manufacture defect of the Goodyear tire, it will find that the trial judge 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.

As a result of the trial judge's errors of law, Gaila contends that this Court should reverse and remand this cause for a new trial on the issue of defective manufacturing of the subject tire, proximate cause, comparative fault, if any, and damages. Finally, Gaila contends that the trial court abused its discretion when it overruled Gaila's motion for a new trial.

Standard of Review

Gaila contends that the standard of review this Court should apply for Issues I and II is ***de novo*** review as she contends that each concerns an error or errors of law made by the Circuit Court in either interpreting a statute or a rule of court. As former Mississippi Supreme Court Judge James L. Robertson stated, "[T]his Court...is the ultimate expositor of the law of this state. ...[o]n matters of law, it is *our* job to get it right. That the trial judge may have come close is not good enough." ***UHS-Qualicare, Inc., et al. v. Gulf Coast Community Hospital, Inc.***, 525 So.2d 746, 754 (Miss. 1987).

As far as Issue III is concerned, Gaila contends that whether the trial judge erred when she overruled Gaila's motion for new trial is reviewed by this Court to determine whether the trial judge abused her discretion. ***Bell v. City of Bay St. Louis, Mississippi***, 467 So.2d 657 (Miss. 1985); ***Adams v. Green***, 474 So.2d 577 (Miss. 1985); ***Jesco, Inc. v. Whitehead***, 451 So.2d 706 (Miss. 1984).

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, 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;

§11-7-161, Miss. Code 1972, reads as follows:

> If the verdict is not responsive to the issue submitted to the jury, the court shall call their attention thereto and send them back for further deliberation.

Rule 3.10, Uniform Rules of the Circuit and County Court Practice, reads, in pertinent part, as follows:

> Rule 3.10 Jury Deliberations and Verdict
>
> The court may direct the jury to select one of its members to preside over the deliberations and to write out and return any verdict agreed upon...
>
> . . .
>
> When the jurors have agreed upon a verdict they shall be conducted into the courtroom by the officer having them in

> charge. The court shall ask the foreman or the jury panel if an agreement has been reached on a verdict. If the foreman or the jury panel answers in the affirmative, the judge shall call upon the foreman or any member of the panel to deliver the verdict in writing to the clerk or the court. The court may then examine the verdict and correct it as to matters of form.
>
> . . .
>
> ...in a civil case if less than the required number cannot agree the court may: 1) return the jury for further deliberations or 2) declare a mistrial.
>
> . . .
>
> If a verdict is so defective that the court cannot determine from it the intent of the jury, the court shall, with proper instructions, direct the jurors to reconsider the verdict.

Only six weeks ago, this Court decided ***Lambert Community Housing Group, L.P. v. Wenzel***, ___ So.2d. __, 2008 Miss. App. LEXIS 383 (Miss. App. June 24, 2008) (ADD3), reversing and remanding that cause for new trial in order to determine what portion of fault may have been attributable to William Wenzel, individually.

This case was heard by the panel of Court of Appeals' Judges Lee, Barnes and Ishee. Judge Barnes authored the opinion of the Court. In that case, Plaintiff Lambert Community Housing Group, L.P. (hereinafter "Lambert") was awarded judgment against Wenzel & Associates, an architectural professional association, but the form of the verdict did not include a space for apportioning fault against another Defendant, William Wenzel, individually. The Circuit Judge dismissed the Complaint against Wenzel, individually, with prejudice. This Court reversed and remanded for new trial in order to determine what portion of fault may have been attributable to Wenzel,

individually.

Lambert contracted with Wenzel, P.A. to perform comprehensive architectural services in its design and construction of multiple-unit low-income housing. Wenzel, individually, was the one who principally performed the services provided according to the contract by Wenzel, P.A. and would review the progress of the work and certify the amounts to be paid to the contractor. Lambert sued William Wenzel, individually, and Wenzel, P.A. for breach of contract and negligence. Wenzel, individually, was never dismissed from the case and was listed as a named defendant throughout the proceedings, including trial.

The Circuit Court granted instruction P-100 - the form of the verdict. One paragraph dealt with a breach of contract issue and one with the alleged negligent certification of the contractor's applications for payment. The jury found no compensatory damages for breach of contract, but awarded a verdict of approximately $1,900,000.00 on Lambert's negligence claim. Instruction P-100 also required the jury to apportion fault among six different parties. However, it did not provide a space for a percentage to be attributed to the negligence of William Wenzel, individually. The jury apportioned fault one-third (1/3) to the Wenzel, P.A., one-third (1/3) to Quality Construction and one-third (1/3) to Mid-South Development.

After the verdict was returned by the jury, a hearing was held on the apportionment of compensatory damages and the fact that Wenzel,

individually, was not included individually in the form of the verdict. The trial judge noted the conflict, calling it a "quagmire" and recognized that no objection was made to Instruction P-100 before it was given to the jury. At the time of the final hearing, the Court entered judgment against Wenzel, P.A. for one-third (1/3) of the total judgment.

Six months later, after one appeal had been dismissed as no final, appealable judgment had yet been rendered, the Circuit Court entered a final judgment awarding Lambert damages against Wenzel, P.A. and dismissing with prejudice the claims against Wenzel, individually.

Lambert appealed contending that the verdict did not disclose the clear intent of the jury. This Court held the jury verdict to be ambiguous as the instructions did not ever define the term "Wenzel" and as Instruction P-100 did not request the jury to apportion liability to one of the named defendants, William Wenzel, individually, concluding that it could not, as a matter of law, find that the jury apportioned liability to the professional association based entirely on the negligence of Wenzel, individually, as it would not presume that the jury interpreted the term "Wenzel" to be mean "Wenzel, individually".

This Court found the Mississippi Supreme Court's decision in ***Adams v. Green***, 474 So.2d 577 (Miss. 1985), to be instructive. ***Adams,*** *supra.*, involved a wrongful death action against Doris Edwards, the driver of the vehicle in which the decedent was a passenger; Morris Green, the driver of the tractor-trailer rig; and D. T. R. Leasing, the owner of the tractor-trailer rig Green was

driving. The jury returned a defense verdict for Green, the truck driver, and D. T. R., the truck owner, but made no mention of the claim against Defendant Doris Edwards. When the Plaintiffs' motion for judgment not withstanding the verdict against Edwards, or, in the alternative, for a new trial was denied, they appealled, assigning two (2) errors, one concerning the form of the verdict and another contending that the trial court erred because it failed to require the jury to return a verdict either in favor of or against Edwards.

The Mississippi Supreme Court, relying on §11-7-161, Miss. Code 1972, which requires the trial judge to call the jury's attention to a non-responsive verdict and to send them back for further deliberations, together with the cases of ***Universal C.I.T. Credit Corp. v. Turner***, 56 So.2d 800 (Miss. 1952), ***Saucier v. Walker***, 203 So.2d 299 (Miss. 1967), and ***Harrison v. Smith***, 379 So.2d 517 (Miss. 1980), found that the trial judge committed reversible error when it failed to return the jury to the jury room to deliberate on the question of liability of Edwards which failure resulted in a mistrial so it reversed and remanded the case to determine the liability, if any, of Edwards.

In ***Adams***, the Supreme Court seems to rely most heavily on its decision in ***Saucer v. Walker***, *supra.*, a negligence action against five (5) defendants in which the jury brought a verdict in against only three (3) of the defendants leaving out two (2) of them. As discussed in more detailed in Issue II, even though the parties made no objection to the form of the verdict, the Supreme Court said that where the verdict was ambiguous, confusing and improper,

the responsibility and duty squarely fell upon the trial judge on its own motion to order the jury to return to the jury room to deliberate and reform their verdict.

Also, in the case of ***Harrison v. Smith***, *supra.*, the Mississippi Supreme Court re-affirmed that it was the duty of the trial judge to order the jury to return to the jury room to re-word their verdict.

Also, while in ***Lambert***, *supra.*, there was no proof adduced that the ambiguity was brought to the trial judge's attention prior to the release of the jury, the problems with the verdict in the case at bar was certainly brought to the trial judge's attention (Tr. 170-172; R.E. 150-152).

In ***Lambert***, this Court comprehensively and finally found that as throughout the instructions and the verdict form the usage of "Wenzel" was inconsistent and not specifically defined, the Circuit Court erred in dismissing the Complaint against him, reversed and remanded the case for a new trial "to determine what portion of Wenzel, P.A.'s judgment, if any, may be apportioned to William Wenzel, individually". ***Lambert***, *supra.*, at ¶25.

When the jury in the case at bar failed to follow the sequence of the Interrogatory Verdict by deliberating and answering the "proximate cause" question without nine of them having reached a verdict on the "defective manufacturing" question, the Circuit Court should have told them that they had erred, instructed them to return to the jury room, to re-consider the "defective manufacturing" claim until either nine or more of them reached a

verdict or until they were hopelessly deadlocked on that issue at which point they should return to the Courtroom for further directions.

However, Gaila's appeal is not one against the use of interrogatory verdicts. As this case makes abundantly clear, Instruction D-29-A, as completed by the jury, gives this Court more detailed information concerning what went on in the jury room than a general verdict form. Both state Mississippi and federal courts of appeal, particularly by the late Circuit Judge John R. Brown of the United States Court of Appeals for the Fifth Circuit, have long requested trial courts to employ interrogatory verdicts. ***Cf., Horne v. Georgia S. & F. R. Co.***, 421 F.2d. 975, 980, 981 (5th Cir. 1970). In the case at bar, Goodyear advocated its use. Gaila filed an interrogatory verdict form more detailed as to categories of damage sought by Jeffrey's estate and by his wrongful death beneficiaries. In the end the Court and counsel fashioned a form which addressed liability for the causes of action, proximate cause, comparative fault and damages (Tr. 68-80; R.E. 127-139). In this instance, the form worked as it shows, on its face, that nine members of the jury never reached a verdict on the issue of "manufacturing defect" and that the jury then compounded their error by deliberating on the "proximate cause" issue out of sequence. Unfortunately, the Circuit Court confirmed the jury's error by entering judgment for Goodyear based on the facially defective Interrogatory Verdict (R. 408-410; R.E. 010-012) and thus failed to protect both the process and Gaila's right to trial by jury by not requiring at least nine members of the

jury o return a verdict on the factual issues posed to them in the sequential order set out in Instruction D-29-A.

The actions of the trial judge as set out in ***Mississippi Power Company v. Jones***, 369 So.2d 1381 (Miss. 1979), show us what the trial court in the case at bar should have done. That appeal involved a person who worked for a company which was under contract with Peavey Electronics to install electrical wiring in a building owned by Peavey. Mississippi Power Company (hereinafter "MPC") installed its own large transformer on Peavey's property and sent current to all four sections of the building. The employee for the electrical contractor requested MPC to disconnect the temporary service to the fourth section of the building which was being renovated. Sometime during August 16, 1974, MPC energized the service to the fourth section of the building, and, on that afternoon, Jones, who was working on the switchbox, was injured.

The jury returned as the verdict:

> We, the jury, find for the Plaintiff, Robert L. Jones, and assess damages in the sum of $0.00 actual damages and $15,000.00 punitive damages against Mississippi Power Company.

The trial judge, over the objection of MPC, gave additional instructions to the jury to the effect that they could not legally award punitive damages unless they found that Jones was entitled to actual or compensatory damages. After being given these additional charges, the jury went to the jury room,

deliberated and returned the verdict:

> We, the jury, find for the Plaintiff, Robert L. Jones, and assess damages in the sum of $5,000.00 actual damages and $15,000.00 punitive damages against Mississippi Power Company.

The Supreme Court, citing §11-7-161, Miss. Code 1972, affirmed the trial court for calling the jury's attention to the legal unresponsiveness of the verdict and sending them back for further deliberations, citing ***Saucier v. Walker***, 203 So.2d 299 (Miss. 1967), holding that the first verdict was ambiguous, confusing and improper.

A year later in ***Harrison,*** *supra.*, the Mississippi Supreme Court reversed a trial judge who, when faced with a verdict in an automobile accident case which stated that:

> We, the jury, find both Plaintiff and Defendant negligent to a degree with no damages assessed with a vote of the 11 to 1,

accepted the verdict and reformed it at the bench to a judgment dismissing the plaintiff's complaint. In its decision, the Mississippi Supreme Court cited §11-7-157, Miss. Code 1972, which states that "[n]o special form of verdict is required, and where there has been substantial compliance with the requirements of the law in rendering a verdict, a judgment shall not be arrested or reversed for mere want of form therein", and ***Henson Ford, Inc. v. Crews***, 160 So.2d 81 (Miss. 1964), holding a verdict is sufficient as to form when it is an intelligent answer to the issues submitted and is expressed by the jury so

that it can be understood by the court. The trial court in ***Harrison***, *supra.*, gave a comparative negligence instruction telling the jury that if they found both parties to be at fault, then they were to reduce the plaintiff's recovery in proportion to her fault. Finding that the language of the verdict was not clear and neither was the language, "both parties were negligent to a degree", surplusage, i.e., meaningless, the Supreme Court found it "inescapable" that, as the jury by their verdict affirmatively found both appellant and appellee negligent, the jury's verdict and the comparative negligence instruction were inconsistent. In that factual situation, the Supreme Court said that the trial court should have returned the jury to its room for further deliberation on a proper verdict and that it was error for the court to enter in light of the verdict, judgment in favor of the defendant.

In ***Byrd v. McGill***, 478 So.2d 302 (Miss. 1985), the issue was whether the trial judge should have instructed the jury on the question of negligence *per se* as the proof was that the owner of a fishing boat failed to follow U. S. Coast Guard regulations. In that case, Judge Anderson, speaking for the Mississippi Supreme Court, found that the trial judge has a responsibility either to reform or correct the proffered instruction or advise counsel on the record of the perceived deficiencies therein and to afford counsel the reasonable opportunity to prepare a new, corrected instruction and where the trial judge failed to do this and the proffered instruction related to a central issue, not covered by other instructions, then the Supreme Court will reverse citing

Harper v. State, 478 So.2d 1017 (Miss. 1985).

Byrd is a corollary to the trial judge's duty when a jury comes back with a confusing or incorrect or invalid verdict, to advise the jury of its error and send it back to deliberate. Gaila contends it is also precedent to require trial courts, when the form of the interrogatory verdict does not plainly state that the jury must reach a verdict only when nine (9) or more of them have agreed on each particular issue. Clearly, the Supreme Court and this Court, as seen in ***Lambert***, *supra.*, is telling trial judges to at least re-read that instruction, in this case, the last paragraph of C-1 (R.E. 075-076), and send the jury back to deliberate and/or even go so far as to revise Instruction D-29-A to emphasize C-1 by inserting language in D-29-A about the necessity of the jury answering the questions in order and not going to the next question unless and until nine or more of them had reached a verdict on the preceding one. Technically, the jury in this case should have returned to the courtroom to announce they were deadlocked on issue (1)(b), before they considered the failure to warn issue in (1)(c).

Byrd, *supra.*, was cited in the dissent filed by Judge Chandler in ***Beckwith v. Shah***, 964 So.2d 552 (Miss. App. 2007), a case also presided over by Circuit Judge Margaret Carey-McCray. In that case, ***Beckwith v. Shah***, *supra.*, the Court of Appeals affirmed the trial court's decision to give Instruction C-7 which set out the elements of medical negligence, together with Instruction D-4 which stated the death of the patient did not mean that the

gastroenterologist had been negligent even though he perforated his patient's colon and that he could only be held liable for medical negligence when his treatment of her fell below the minimally acceptable level of care. Not only did the Plaintiffs object to those instructions as being abstract and not correctly setting forth the standard of care, but, as set out in detail by Judge Chandler, filed instructions tying abstract law to the proof.

Seven weeks after the jury in the case at bar returned its verdict, the Mississippi Supreme Court in ***Hobbs Automotive, Inc. v. Dorsey***, 914 So.2d 148 (Miss. 2005), affirmed the trial judge's reformation of "a kind of special verdict" which awarded Plaintiffs $100,000.00 for fraud, but stated that the better practice would have been for the trial court to have reviewed the form of the verdict in the presence of the attorneys, note that it didn't conform to the specific instruction given as to the form of the verdict and then direct the jury to return to the jury room, tell them that as they had already been properly instructed regarding the form of the verdict, read carefully the proper form of the verdict which had been submitted, and then have them write their verdict following the exact language of the instruction.

For the Supreme Court the question was "Can we ascertain the unquestionable intent of the jury from the verdict which they rendered?"

Gaila contends that the jury's intent could not have been discerned as it never reached a verdict on Issue 1(b), the claim of defective manufacturing.

Additionally, in his dissent in ***Hobbs***, *supra.*, Judge Dickinson provided the bench and bar with a copy of the form of the verdict and reminded his fellow judges that the trial judge did not authorize the jury or instruct the jury to return a special verdict on interrogatories, but merely gave them the general verdict form. The jury composed an interrogatory verdict tied to specific instructions, a two-page document written in longhand setting out "$0 compensation for a number of blank items; $0 compensation for illness [per] Instruction P-3; $0 compensation for medication [per] Instruction P-6, and on the second page stated "$100,000.00 for fraud, not illness, suffering, etc. [per] P-8".

When the verdict was returned, the jury was polled and their verdict was unanimous. Then the trial court ordered the verdict filed and entered of record and dismissed the jury until 9:30 a.m. the following Monday morning to consider the question of punitive damages. The Defendant's counsel requested and received leave to reserve objections to the form of the verdict until the following Monday morning. Then the Plaintiff's lawyer asked the court to reform the verdict and counsel for the Defendant asked the court to enter judgment in its favor as the jury's verdict was hopefully at odds with the instructions. The trial court, on its own motion pursuant to Rule 3.10 of the Uniform Circuit and County Court Rules, amended the form of the verdict to read "We, the jury, find for the Plaintiffs in the amount of $100,000.00".

Then the court went ahead to instruct them on punitive damages which

the jury declined to award.

For Judge Dickinson, the intent of the jury was not so clear and he opined that the Supreme Court should decline to engage in any attempt to decipher the verdict. Under Rule 3.10, UCCR, Dickinson stated the trial court was left with two (2) options: either have the jury, with proper instructions, reconsider the verdict or declare a mistrial. He suggested that the trial court should have required the jury to reform the verdict to the proper form so that its intent could be clearly discerned.

Clearly, one doesn't know what the jury in the case at bar would have decided had they been allowed, at 9:25 p.m. on a Friday night and after having been either traveling with the Sheriff to Greenwood or being instructed as to the law, hearing closing argument and then deliberating for over three hours, to recess until 9:00 a.m., Monday morning, been re-instructed concerning at least C-1 and D-29-A, and then been allowed to deliberate as they were not re-instructed and were not allowed to deliberate further. The five "yes" jurors on Issue (1)(b) may have been able to convince four others to vote in favor of Gaila or the seven "no" jurors may have been able to convince two additional members that they should vote in favor of Goodyear on that issue. Additionally, we will never know what their discussions would have been with regard to the remaining questions on D-29-A in light of their additional deliberations on the issue of manufacturing defect.

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 and against Plaintiff 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;

§11-7-59, Miss. Code 1972, states, in pertinent part, as follows:

> If the verdict is informal or defective, the court may direct it to be reformed at the bar.

The Mississippi Supreme Court case which most completely illustrates the error committed by the jury concerning their deliberations and the form of their verdict is ***Griffin v. Fletcher***, 362 So.2d 594 (Miss. 1978). In that case, the court gave a peremptory instruction for the Plaintiff. However, after deliberating, the jury returned a verdict for the Defendant. In response to the jury's confusion, the trial court entered judgment for the Plaintiff but awarded no damages. Plaintiff's Motion for New Trial on the issue of damages only or, in the alternative, for New Trial on liability and damages was over-ruled.

The Mississippi Supreme Court held that once the trial court determined the law of the case, in the form of the instructions, it was the duty of the jury to decide the facts based upon the law as given by the trial court and quoted from the legal encyclopedia American Jurisprudence as follows:

> "Non-conformity of the verdict to the judge's charge is ground for a new trial...regardless of the showing as to whether the instructions were right or wrong. Even if erroneous, they constitute the law governing the case, and it is the duty of the jury to follow them. Any other rule,...would lead to endless confusion..."

The Mississippi Supreme Court also quoted from Corpus Juris Secundum as follows:

> "As a general rule, a verdict will be set aside as contrary to law where, under the evidence, it is contrary to the instructions given by the court..." ***Griffin v. Fletcher,*** *supra.,* at 595.

While the jury in the case at bar did not abrogate its duty as did the one in ***Griffin v. Fletcher***, *supra.,* there was ample evidence available to the Circuit Court of jury confusion, particularly in light of the way they completed the interrogatory form of the verdict D-29-A, by failing to reach a verdict of nine (9) or more jurors with regard to Gaila's claim of manufacturing defect (R.E. 018). Then, they went ahead and submitted an ambiguous verdict when they prematurely addressed the issue of proximate cause. Under the Court's instructions, C-1 and D-29-A, the jury should not have reached the issue of failure to warn (1)(c) much less proximate cause (2) until and after nine (9) or more of them had reached a verdict on manufacturing defect (1)(b). Those errors, combined with the jury's earlier question in written form to the trial court concerning the meaning of the term "proximate cause", are certainly indicative that the jury did not understand or follow the court's instructions as to the law and was hopelessly confused (Tr. 167-169; R.E. 147-149).

The jury's responses to the interrogatory form of the verdict also clearly showed that the verdict was defective under Rule 3.10, Uniform Circuit and County Court Rules, as it is evident that the jury did not follow the Court's instructions requiring that nine (9) or more of them must agree upon each issue of the interrogatory verdict in order for it to reflect the intent of the jury.

The proper action for the Circuit Court to have taken when the jury presented its verdict would have been to re-instruct the jury concerning, at least, Instruction C-1 requiring that nine (9) or more of them must reach a verdict on each issue in order for it to be the proper verdict of the jury. Additionally, the Court should have re-read D-29-A, the form of the verdict, to the jury emphasizing to them that it was necessary to have nine (9) or more of them agree upon a verdict as to each individual sub-part of each issue in sequence.

Eighty-one years ago in ***Morris v. Robinson Bros. Motor Co.***, 110 So. 683 (Miss. 1927), the Mississippi Supreme Court affirmed the trial judge who had the jury retire to continue deliberating after they returned an unintelligible verdict and held that a jury's verdict must be "intelligent and responsive to the issue". Otherwise, it's the duty of the Circuit Court "to require the jury to retire and return a verdict responsive to the issue in the case".

Two years later in ***Ricketts v. Drew Grocery Co.***, 124 So. 495 (Miss. 1929), the jury, deciding whether a grocery store could recover from an individual on an open account, reached the following verdict:

> We, the jury, failed to agree-the vote 10 to 2 in favor of the Plaintiff for amount sued for.

With that verdict in hand, the trial judge rendered judgment in favor of the grocery store for the amount of the account together with 6% interest.

While the individual defendant appealed contending that the jury verdict indicated that the jury had failed to reach a verdict, the Supreme Court affirmed stating this verdict was clearly a statement by the jury that, while they failed to agree unanimously, by a vote of 10 to 2 they had found in favor of the Drew Grocery Company and for the amount it had prayed. While in that case, the trial judge had not given the instruction that nine or more members of the jury could agree upon a verdict as was set out in *Hemingway's Code, 1927,* §2368; Laws of 1916, Chapter 162; the Supreme Court held that not instructing them did not vitiate the verdict as nine or more of them had, in fact, agreed that the Plaintiff should recover and the verdict was in harmony with the instruction and, therefore, the trial court had the power to enter judgment.

Just as the trial court in ***Ricketts***, *supra.*, was correct in entering judgment on the 10-2 verdict, the trial court in this case was incorrect in entering judgment because the jurors' division was "Yes-5" and "No-7". As nine (9) or more jurors did not agree to a verdict on claim 1(b), the trial court should have either re-instructed the jury and allowed them to retire again to deliberate, or should have granted, *sua sponte,* a mistrial.

Requiring only nine (9) of the twelve (12) jurors to agree to a verdict reaches back at least 92 years in the jurisprudence of Mississippi. ***Ricketts,*** *supra.*

Probably the most pointed criticism of a trial judge by the Mississippi Supreme Court on the former's dealing with verdicts arose from an action filed against several tort-feasors in which the jury rendered separate $5,000.00 verdicts against three (3) different sets of defendants. The Mississippi Supreme Court reversed and remanded for a new trial on damages against two of the defendants, the owner of and the driver of a vehicle which, while traveling between 60 and 90 miles per hour, collided into an automobile parked on the shoulder of U.S. Highway 11 about five (5) miles south of Lumberton, Mississippi, injuring a passenger in the car at rest, Herbert Saucier. The Supreme Court held that the jury's verdict was legally defective as there could be no apportionment of damages among joint tort-feasors and as the form of the verdict was ambiguous, confusing, and improper because it held different defendants in judgment for separate sums of money, ***Saucier v. Walker***, 203 So.2d 299, 302, 303 (Miss. 1967).

While late Judge Stokes Robertson chided Plaintiff's counsel for failing to request that the jury be returned to the jury room to re-word their verdict and bring in a verdict in the proper form, he put the final responsibility on the trial court, stating as follows:

> "In the absence of a request from the appellant's attorney that this be done, the trial judge on his own ***motion***, should have ordered the jury to return to the jury room to reform and reword their verdict and to bring in a verdict in proper form. In fact, this Court placed this responsibility and duty squarely on the shoulders of the trial judge, when it said in ***Universal C.I.T. Credit Corp. v. Turner***, 56 So.2d 800, 803 (Miss. 1952),
>
> > "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." 56 So.2d at 803. ***Saucier, supra.,*** at 303 (Miss. 1967) (Emphasis added).

Clearly, trial judges have had to re-instruct juries for at least the last fifty-six years as, in ***Universal C.I.T. Credit Corp.,*** *supra.* the trial court sent the jury back to deliberate three (3) times before they returned a verdict which, after polling the jury, the trial judge accepted. When two (2) of the defendants appealed and contended that the trial court had "orally instructed" the jury, Judge Percy Lee, in affirming the actions of the Circuit Court, commented:

> "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." ***Universal C.I.T. Credit Corp., supra.,*** at 803.

Just as it was error for a trial judge, regardless of "the exigencies of the situation", to allow only eleven (11) jurors to deliberate and return a verdict,

and thereby exceed its constitutional authority, so did the trial court in this case err by entering judgment when the jury had not reached a verdict on Issue (1)(b), defective manufacture. ***Brame v. Garwood***, 339 So.2d 978, 979 (Miss. 1976).

If the verdict is not responsive to the issues submitted to the jury, then the trial court is to call the jurors' attention to that fact and send them back for further deliberation, ***Powell v. Thigpen***, 336 So.2d 719 (Miss. 1976). Additionally, when the verdict is ambiguous, the Court has a duty to advise the jurors of their mistakes and to send the jury back to reconsider its verdict.

Eleven years later, in ***First Bank of Southwest Mississippi v. Bidwell***, 501.So.2d 363 (Miss. 1987), the Supreme Court, speaking through Judge Dan Lee, when faced with the situation in which the jury answered a general verdict, finding actual damages of $20,000.00, but then answered an interrogatory verdict and found the amount of cash taken from the lockbox to have been $8,700.00 held that, on the record presented to them, the jury must have found that there was $20,000.00 in cash in the safety deposit box at the time when Shirley Bidwell went in there, which, of course, conflicted with their answer to the special interrogatory and that there was no way to reconcile these two verdicts for their answer to the interrogatory was not surplusage; i.e., meaningless, and as there was no way to understand what the jury intended.

As in ***Bidwell***, *supra.*, Gaila contends that it is impossible to reconcile the jury's vote on proximate cause because they never reached a verdict on the

claim of manufacturing defect and should have been re-instructed and sent back to deliberate until they reached a verdict on claim (1)(b) as it was impossible to determine what the jury's intent was.

Additionally, ***Bidwell***, *supra.*, is instructive as it holds that as these two verdicts were conflicting special verdicts, then under Rule 49(b), Miss. R. Civ. P., the trial judge should have ordered a new trial in light of the obvious confusion in the jury's response. Following former Judge Dan Lee's opinion in ***Bidwell***, *supra.*, this Court should reverse and remand for new trial on the issues of manufacturing defect, proximate cause, the apportionment of comparative fault, if any, of Goodyear, of K & B Tire Service, Inc. and of Jeffrey, and damages, if any.

In the case at bar, the trial court failed to act appropriately under the circumstances by not re-instructing the jury and requiring them to continue to deliberate until their verdict was no longer ambiguous.

Jury deliberations began at 6:15 p.m., Friday, June 24, 2005, at the end of ten trial days. Before returning a verdict at 9:25 p.m., the jury had already posed two questions to the Court during its three (3) hours of deliberations. It was evident from the record that the Circuit Court was aware that there had not been nine (9) jurors cast either "yes" or "no" votes on the claim of manufacturing defect (Tr. 170; R.E. 150). Gaila's counsel clearly contended that the jury had to reach a verdict with regard to manufacturing defect before it could knowingly progress to the interrogatory concerning the element of

proximate cause (Tr. 170-177; R.E. 150-152).

The Circuit Court, after inquiring of the jury as to their verdict with regard to the failure to warn issue, stated:

> "I'm going to ask you to retire to the Jury Room just momentarily." (Tr. 169; R.E. 149).

Just at that point, the Circuit Court turned over the verdict form D-29-A to page 2 and saw that an "X" had been placed in the "No" box concerning the proximate cause issue. Then the Circuit Court polled the jury as to whether that was the verdict of all twelve to which the jurors responded, "Yes" (Tr. 169-170; R.E. 149-150).

Even though the Trial Court was aware that the jury had not reached a verdict on the issue of manufacturing defect, it compounded its error by reforming the interrogatory verdict rather than re-instructing the jury and requiring the jury to return to the jury room to continue their deliberations in order to correct the defective verdict (Tr. 172; R.E. 152).

One will never know what the verdict of nine or more of the jurors would have been on the "defective manufacturing" issue as the Court took that issue away from the jury's consideration without requiring them to go through, in sequence, the "refiner's fire" of continued deliberations on the issues of defective manufacturing, proximate cause, comparative fault and damages.

Using Reginald Ross' screenplay, Henry Fonda and an ensemble cast acting under Sidney Lumet's direction of the 1957 motion picture "Twelve

Angry Men", powerfully portrayed a particular jury's deliberations and how one juror might influence others within the sacred confines of the jury room. Gaila was not accorded the full protection of the jury deliberation process because the Circuit Court did not require nine of the jurors to reach a verdict on the issue of defective manufacturing.

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

Gaila was entitled to a new trial, in the interest of justice, as:

(1) the jury never reached a verdict with regard to the issue of manufacturing defect;

(2) the jury's verdict was unresponsive to the law and to the issues submitted to it through the interrogatory verdict or at least ambiguous and conflicting, specifically indicating, on the face of the verdict form, Instruction D-29-A (R. 414-415; R.E. 018-019; Addendum ADD1), that they had not reached a verdict with regard to the issue of manufacturing defect;

(3) the form of the verdict submitted by the jury to the Trial Court showed, on its face, that the jury was still embroiled in conflict over the issue of manufacturing defect, thus requiring the Trial Court to recess until 9:00 a.m. the following Monday morning or at least to re-instruct the jury on Instruction C-1, requiring that nine (9) or more of them had to agree in order for a verdict to be returnable on each issue and to return the jury to the jury room to continue deliberating or, in the alternative, to order a mistrial; and

(4) the Circuit Court, by failing to require nine members of the jury to reach a verdict of the cause of action of defective manufacture, forfeited Gaila's right to trial by jury on that claim under Mississippi's products' liability statute, §11-1-63 *et seq.*

Clearly, under ***Brame,*** *supra.*, the trial judge should have granted Gaila's motion for new trial as she had "exceeded [her] constitutional authority" by reforming a non-verdict ("Yes-5", "No-7") into a judgment for Goodyear.

Alternatively, under ***Bidwell,*** *supra.*, as the "non-verdict" was hopelessly conflicting, the trial court should have chosen the proper course under Rule 49(b), Miss. R. Civ. P., and ordered a mistrial.

While some may contend that the Mississippi Supreme Court's decision in ***Gill v. W. C. Fore Trucking, Inc.,*** 511 So.2d 496 (Miss. 1987)**,** teaches the bench and bar only about the appropriate standard of review in new trial situations, a closer review of the underlying facts and the trial court's rulings illustrates that the Circuit Judge in the case at bar should have responded to the jury's version of D-29-A. In ***Gill,*** a woman was driving down the highway in fog and came upon a vehicle driven by a Mrs. Smith which had previously been in an accident. While attempting to avoid Mrs. Smith's car, Gill ran into the ditch and suffered injuries. She sued both the parties involved in the first accident, Mrs. Smith and W. C. Fore Trucking, Inc., and contended that both of them were liable for not only causing the collision between their vehicles, but also for failing to warn oncoming traffic, including her, after the first collision took place.

The jury returned a verdict in favor of the Plaintiff and against the trucking company for $5,000.00 and a separate verdict against Mrs. Smith in the amount of $45,000.00. Then the trial court excused the jury. With none of

the three parties objecting, the trial court entered judgment in favor of the Plaintiff for $5,000.00 against the trucking company and $45,000.00 against Mrs. Smith and gave each party the option of accepting the judgment or having a new trial on all the issues. The trucking company wanted the new trial. Plaintiff's counsel moved the court to reform the judgment of the first trial and enter judgment jointly and severally in the amount of $50,000.00 against both defendants or for new trial on the damages only. The Court denied both of the Plaintiff's motions.

In the second trial, the jury found for the trucking company. The Plaintiff moved for judgment notwithstanding the verdict or, in the alternative, a new trial. The trial court reinstated the verdict from the first trial and assessed $5,000.00 in damages to the trucking company.

The Plaintiff appealed to the Mississippi Supreme Court from the Court's earlier refusal to reform the verdict from the first trial and its denial of the motion to limit the second trial to the issue of damages. The trucking company cross-appealed the trial court's reinstatement of the $5,000.00 judgment. As Mrs. Smith settled with the Plaintiff during the interim, she was not involved in the appeal.

In ***Gill***, the Supreme Court held that the trial judge's decision on which remedy to follow, whether to reform the verdict or set the matter for new trial, was a matter for the trial court's discretion and held that an appellate court would be reluctant to rule that the trial judge must reform the verdict to the

exclusion of a new trial as that was a remedy well within the trial judge's competence so that both his decision to order a new trial and whether or not to limit the issues would be reviewable only for abuse of discretion. ***Gill,*** *supra.*, at 498.

In light of ***Gill***, trial courts have several remedies that they can use when the verdict is confusing or does not follow the law. They can either re-instruct and have the jury continue to deliberate or, if there is an error of law, reform the verdict or order a new trial and they can limit the new trial to particular sub-issues. However, in our case the trial court chose to use none of those remedies which left the parties and counsel with a legally incorrect "verdict" because the jury neither reached one on the issue of manufacturing defect nor followed the directions of the interrogatory verdict. The trial court, rather than recessing until the following Monday, re-instructing the jury and requiring them to deliberate anew, or ordering a mistrial, incorporated the error of the jury into its judgment (R. 408-410; R.E. 010-012).

In the case at bar, the Circuit Court Judge erred as a matter of law when, after it was brought to her attention that the jury never reached a verdict with regard to the issue of manufacturing defect, the Court failed to advise the jury that they could not return a verdict as to each question or sub-issue unless nine (9) or more of them agreed, failed to re-instruct them that they should not have answered Question (2) or any additional questions until they had reached a verdict with regard to the claim of manufacturing defect (1)(b),

failed to send them back for additional deliberations and then abused her discretion when she overruled Gaila's motion for new trial.

CONCLUSION

In the final analysis this Court should be led back not only to the Mississippi Supreme Court's 1984 decisions of ***Universal C.I.T.***, *supra.*, and ***Saucier***, *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 on Gaila's claim that Goodyear manufactured defectively the tire on the left front wheel of Jeffrey's truck so that its tread separated; whether the tread separation proximately caused his injuries and death; whether Jeffrey or Kirby were comparatively negligent; and, what, if any, damages were suffered by his estate and his three sons.

Respectfully submitted, this 12th day of August, 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

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CERTIFICATE OF SERVICE

I, Edward D. Lamar, one of the attorneys for Appellant, do hereby certify that I have this 12th day of August, 2008, caused to be mailed, via overnight 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

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

093453

ADD1

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

600454

Source: Legal > / . . . / > MS State Cases, Combined
Terms: name(lambert and wenzel) (Edit Search | Suggest Terms for My Search)

*2008 Miss. App. LEXIS 383, **

LAMBERT COMMUNITY HOUSING GROUP, L.P., APPELLANT v. WILLIAM **WENZEL,** APPELLEE

NO. 2006-CA-02127-COA

COURT OF APPEALS OF MISSISSIPPI

2008 Miss. App. LEXIS 383

June 24, 2008, Decided

PRIOR HISTORY: [*1]
COURT FROM WHICH APPEALED: QUITMAN COUNTY CIRCUIT COURT. DATE OF JUDGMENT: 12/4/2006. TRIAL JUDGE: HON. ALBERT B. SMITH, III. TRIAL COURT DISPOSITION: JURY VERDICT IN FAVOR OF LAMBERT COMMUNITY HOUSING GROUP; CLAIMS AGAINST WILLIAM WENZEL DISMISSED WITH PREJUDICE.

DISPOSITION: REVERSED AND REMANDED.

CASE SUMMARY

PROCEDURAL POSTURE: The Quitman County Circuit Court, Mississippi, awarded judgment in favor of plaintiff housing group against defendant architectural firm. The verdict form did not include a space for apportioning fault against another named defendant, the architect individually. The group appealed.

OVERVIEW: The group argued that the circuit court erred in failing to enter a judgment against the architect individually. The appellate court noted that the jury's findings as to negligence were unclear as the jury neither was instructed as to the definition of the term "Wentzel" nor as to the apportioning of liability to the architect. The architect did not sign the certifications of payment solely in his individual capacity and not on behalf of the architectural firm. The appellate court could not find that the jury apportioned liability to the firm based entirely on the negligence of the architect. The proper course of action was to reverse and remand for a new trial in order to determine what portion of the firm's judgment, if any, was attributable to the architect individually. The group was not entitled to a directed verdict or judgment notwithstanding the verdict against the architect, individually, based on Miss. Code Ann. § 79-10-67(1) (Rev. 2001). The appellate court could not determine that the entire liability was attributable to the professional errors of the architect.

OUTCOME: The judgment was reversed and remanded for a new trial.

CORE TERMS: housing, individually, jury instructions, architect, fault, ambiguity, certification, apportionment, site, jury verdict, involvement, apportionment of fault, architectural firm, individual capacity, ambiguous, final judgment, new trial, space, matter of law, doctrine of ejusdem generis, jury to return, professional services, directed verdict, apportioning, juror, verdict form, contract documents, general contractor, preponderance, compensatory

LEXISNEXIS® HEADNOTES Hide

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN1 When an instrument contains nothing to indicate it was signed in a representative capacity, parole evidence cannot be introduced to indicate the intent of the signer. Thus, if there is nothing in the document to indicate an individual is acting in a representative capacity, that person is individually liable. More Like This Headnote

Civil Procedure > Trials > Jury Trials > Verdicts > Inconsistent Verdicts

HN2 Miss. Code Ann. § 11-7-161 (Rev. 2004) provides that if the verdict is not responsive to the issue submitted to the jury, the court shall call their attention thereto and send them back for further deliberation. More Like This Headnote

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

HN3 The ejusdem generis rule, in the construction of laws, wills, and other instruments, states that general words, when followed by more specific words, will not be construed to the widest extent, but will refer only to those persons or things specifically mentioned. In other words, specific provisions control over general provisions. This rule only applies when the instrument is ambiguous. More Like This Headnote

Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence

HN4 The appellate court will consider the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence. If the facts are so overwhelmingly in favor of the appellant that a reasonable juror could not have arrived at a contrary verdict, the appellate court must reverse and render. On the other hand, if substantial evidence exists in support of the verdict,

that is, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, then the appellate court must affirm. More Like This Headnote

Torts > Malpractice & Professional Liability > Professional Services

HN5 Miss. Code Ann. § 79-10-67(1) (Rev. 2001) states, in part, that each individual who renders professional services as an employee of a domestic professional corporation is liable for a negligent or wrongful act or omission in which he personally participates to the same extent as if he rendered the services as a sole practitioner. More Like This Headnote

COUNSEL: FOR APPELLANT: ADAM STONE.

FOR APPELLEE: W. O. LUCKETT, JR., ROBERT M. TYNER, JR.

JUDGES: BEFORE LEE, P.J., BARNES AND ISHEE, JJ. KING, C.J., LEE AND MYERS, P.JJ., IRVING, CHANDLER, GRIFFIS, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR.

OPINION BY: BARNES

OPINION

NATURE OF THE CASE: CIVIL - TORTS-OTHER THAN PERSONAL INJURY & PROPERTY DAMAGE

BARNES, J., FOR THE COURT:

P1. After a jury trial in the Quitman County Circuit Court, the plaintiff, Lambert Community Housing Group, L.P. (Lambert Housing), was awarded a judgment against defendant Wenzel and Associates, P.A. (Wenzel P.A.). However, the verdict form did not include a space for apportioning fault against another named defendant, architect William Wenzel, individually (William Wenzel). Accordingly, Lambert Housing appeals the final judgment of the Quitman County Circuit Court, which adjudged that Lambert Housing could recover from Wenzel P.A. its portion of the judgment, but dismissed **[*2]** with prejudice all claims against William Wenzel, individually. Finding error with the circuit court's judgment, we reverse and remand for a new trial in order to determine what portion of fault, if any, may be attributable to William Wenzel, individually.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

P2. In 1994, Lambert Housing was formed to build a multi-unit low-income housing development in Lambert, Mississippi. [1] Wenzel P.A. contracted to perform "comprehensive architectural services" for the project, including periodic visits to the project site to determine if the work was being performed in accordance with the contract documents. William Wenzel, as president of Wenzel P.A., executed the American Institute of Architects' (AIA) form contract on the firm's behalf. The pleadings establish that William Wenzel, a registered professional architect, was assigned by Wenzel P.A. to render professional services to the project and was the one who "principally" performed the "comprehensive professional services" for the project on behalf of Wenzel P.A.

FOOTNOTES

1 Initially, Lambert Housing was owned by two partners, Mid-South Development, Inc. (Mid-South), and WNC and Associates (WNC). WNC was to finance **[*3]** the project, and Mid-South was responsible for its development. However, at some point, Mid-South ceased being a partner; thus, WNC became the sole owner of Lambert Housing.

P3. The contract provided that the "Architect," Wenzel P.A., would visit the site at intervals to become familiar with the progress and quality of the work and to determine generally whether the work was being completed in accordance with the contract documents. Based on these observations, the Architect would review and certify the amounts due to the general contractor, Quality Construction, Inc. [2] The certification constituted a representation to the owner that the work "ha[d] progressed to the point indicated and that, to the best of the Architect's knowledge, information and belief, [the] quality of the [w]ork [w]as in accordance with the [c]ontract [d]ocuments." William Wenzel testified that under the contract, he had the authority to revoke prior payment applications that he had approved for improperly performed work. He testified that from 1995 through 1996, he made approximately twelve scheduled field visits to the site. John Lad, an employee with his architectural firm, had accompanied him on two occasions. **[*4]** Raymond Barker, Wenzel P.A.'s engineer, also made several visits to the site. The testimony conflicted as to whether William Wenzel "quit" the project or was locked off the job site in May to October 1996. However, by April 1, 1996, William Wenzel had certified payment of $ 1,573,353 of the $ 2,115,715 contract sum. He testified that the project was 80% complete, and 74.34% of the payments had been certified for payment, leaving a retainage of 5.66%. Thereafter, in August 1997, Lambert Housing sued several defendants, including Wenzel P.A. and William Wenzel, individually. [3] Lambert Housing claimed that William Wenzel and Wenzel P.A. breached their duties by failing to identify and advise it of defective and non-conforming work of the general contractor and other named defendants involved in the project. Lambert Housing also claimed that William Wenzel and Wenzel P.A. made several negligent or fraudulent misrepresentations about the completion and quality of the project. Lambert Housing claimed to have suffered damages in the amount of $ 2,019,350.

FOOTNOTES

2 Quality Construction, Inc. entered into a contract in 1994 as a general contractor to Lambert Housing, furnishing all labor and materials, **[*5]** but left the project in 1996.

3 Other named defendants, including Quality Construction, Inc., and various subcontractors, were sued for breach of

contract.

P4. According to the record, William Wenzel was never dismissed from the case and was listed as a named defendant throughout the proceedings. In March 2006, a jury trial was held in the Quitman County Circuit Court. Throughout the portion of the transcribed proceedings that was provided to us, [4] William Wenzel testified as to his level of involvement in the project; he admitted that he was the "sole judge" as to whether or not payment applications would be certified for payment. Derrick Neal testified about the business background of the venture and William Wenzel's level of involvement. After testimony concluded, jury instructions were compiled. The circuit court granted jury instruction P-100, the form of the verdict, which enumerated various claims against the defendants. The jury instruction began as follows:

> 1. If you find that Wenzel breached *its* contract with the Owner the form of your verdict shall be. . . .
>
> 2. If you find that Wenzel negligently certified application for payment by representing that the project had achieved **[*6]** certain designated level of completion in accordance with the contract documents which, in fact, it had not, or that the project was being completed in a professional, workmanlike and orderly manner which, in fact, it had not then the form of your verdict shall be. . . .

(Emphasis added.) The jury found no compensatory damages for the breach of contract claim but awarded a verdict in favor of Lambert Housing for the negligence claim, awarding $ 1,949,932.85 in compensatory damages.

FOOTNOTES

4 Lambert Housing chose not to designate the entire transcript of the multi-day trial to this Court. Instead, we were only provided testimony from two witnesses, Derrick Neal, former president of Mid-South, and William Wenzel. Additionally, we received a partial transcription of the jury-instruction conference. The hearing dated May 23, 2006, regarding the issue on appeal, was transcribed in its entirety.

P5. Instruction P-100 continued, stating that if the jury found by a preponderance of the evidence that there was more than one actor in the case responsible for the alleged damages, they were to apportion fault accordingly. An apportionment form was contained in the instruction, stating: "[s]hould you find **[*7]** by a preponderance of the evidence that Lambert Community Housing Group, L.P. was injured due to negligence you should apportion the award among the following actors by percentage of their respective fault, if any. . . ." The actors were listed as follows:

> 1. Wenzel and Associates, P.A.
>
> 2. Quality Construction, Inc.
>
> 3. Ellis Adams
>
> 4. Sammy Thompson
>
> 5. Air Electric, Inc.
>
> 6. Mid-South Development, Inc.

The verdict form did not provide a space for apportioning fault to William Wenzel, individually. The jury apportioned fault to: Wenzel and Associates, P.A., 33.3%; Quality Construction, Inc., 33.4%; and Mid-South Development, Inc. 33.3%.

P6. On May 23, 2006, a hearing was held regarding the jury's apportionment of compensatory damages and the fact that William Wenzel was not included in his individual capacity. The circuit judge noted the conflict created by the use of the term "Wenzel" on the first page of jury instruction P-100 and Wenzel P.A. on the second page of the instruction in the apportionment form and deemed the result a "quagmire." The court further noted that no objection was made to the jury instruction at issue or the form of the apportionment. By affidavit, **[*8]** defense attorney Robert Tyner explained that the parties had worked together to draft a form of the verdict jury instruction, which was prepared at trial by the legal assistant of the plaintiff's attorney. When Tyner asked about including Neal on the form, plaintiff's counsel advised him that since they were not listing any other individuals in the form of the verdict, including William Wenzel, individually, Neal should not be listed either. [5] The Wenzel defendants therefore argued that Lambert Housing had made a "conscious and deliberate decision not to put Wenzel individually on there." Adam Stone, one of the attorneys for Lambert Housing, represented at the hearing (and later confirmed by affidavit) that the parties agreed not to list the individuals separately from the corporate entities in order to avoid confusing the jury. Stone stated that there was never an agreement to release any individuals from the case; he contended that at all times it was understood that the liability of William Wenzel was joint and several with Wenzel P.A.'s liability. Subsequently, the parties submitted letter briefs on contract interpretations as requested by the circuit court. In June 2006, the court **[*9]** entered a "final" judgment against Wenzel P.A. for 33.3% of the total judgment, or $ 643,477.84. [6]

FOOTNOTES

5 We note, however, that William Wenzel was the only defendant associated with a corporation or business which was

individually named in the action; neither Neal nor Mid-South were named as defendants in the action.

6 Subsequently, in August 2006, Wenzel P.A. notified the circuit court that the firm had filed for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code.

P7. Aggrieved by the June 2006 decision of the circuit court, which did not state whether damages were recoverable against William Wenzel, individually, Lambert Housing appealed to the Mississippi Supreme Court. William Wenzel filed a motion to dismiss Lambert Housing's appeal. In November 2006, the supreme court dismissed Lambert Housing's appeal and William Wenzel's motion to dismiss because the June 2006 order of the circuit court did not resolve all claims against all parties; specifically, the judgment did not resolve claims against William Wenzel, individually. Thereafter, Lambert Housing filed a motion for final judgment, requesting the circuit court resolve all claims against all parties and adjudge **[*10]** William Wenzel jointly and severally liable for the $ 643,477.84 judgment against Wenzel P.A. In the alternative, Lambert Housing noted it had previously moved for a directed verdict or a judgment notwithstanding the verdict, arguing that William Wenzel was jointly and severally liable with Wenzel P.A. On December 4, 2006, the circuit court entered a final judgment on the jury verdict, awarding damages against Wenzel P.A. and dismissing with prejudice "[a]ll claims against all other parties, including all claims against William H. Wenzel, individually." Lambert Housing appeals this judgment, raising one issue: whether the circuit court erred in its refusal to enter a judgment against William Wenzel, individually. 7

FOOTNOTES

7 William Wenzel notes in his brief to this Court that Wenzel P.A., having filed for protection under the bankruptcy code, could not perfect an appeal without posting bond and moving to lift the automatic stay; thus, he represents that "economics" prevented Wenzel P.A. from appealing the judgment against the firm.

ANALYSIS

P8. Lambert Housing makes several arguments in support of its contention that the circuit court erred in failing to enter a judgment against William Wenzel, **[*11]** individually. Lambert Housing contends that we should render a decision whereby William Wenzel is individually liable for the entire portion of fault attributed to Wenzel P.A. William Wenzel, in response, argues that he is not responsible for any portion of the fault attributed by the jury to Wenzel P.A., and we should affirm his dismissal with prejudice. We find that neither result is appropriate under the circumstances of this case.

1. "Clear Intent" of the Jury.

P9. Lambert Housing contends that the circuit court's decision is contrary to the jury verdict, as "the jury clearly found that William Wenzel acted negligently." Conversely, William Wenzel argues that "the jury's decision was clear and unambiguous" that the liability of "Wenzel" refers only to Wenzel P.A. Specifically, Lambert Housing argues that it is clear from the jury's finding on the P-100 form of the verdict that William Wenzel was individually negligent, as the instruction on the various claims mentions merely "Wenzel" without any corporate designation. Lambert Housing further argues that the apportionment of liability to Wenzel P.A. was based entirely on the negligence of William Wenzel, individually, since the **[*12]** evidence presented at trial shows William Wenzel's direct actions were the basis for the jury's finding of liability. Lambert Housing points to the admission of William Wenzel that he was the "sole judge" of payment certification and the fact that he signed the certifications in his individual, rather than corporate, capacity. William Wenzel counters that the term "Wenzel" in the form of the verdict is "only linked" to Wenzel P.A. in the apportionment of fault, and the jury was never asked to consider the individual liability of William Wenzel. He points to the use of the word "its" instead of "his" in the contract portion of P-100 as indicative that the term "Wenzel" referred to the corporate entity only. We reject these contentions and find, as the circuit court did, ambiguity in the jury's verdict of negligence.

P10. Lambert Housing cites in support of its argument *Hobbs Automotive, Inc. v. Dorsey*, 914 So. 2d 148 (Miss. 2005), wherein the Mississippi Supreme Court affirmed reformation of the verdict by the trial judge where the jury verdict merely stated the plaintiffs were entitled to "$ 100,000 for fraud." *Id.* at 152 (PP15-16). However, *Hobbs* is distinguishable from this case. **[*13]** In *Hobbs*, the intent of the jury to find liability against the defendant was clear as there was only one defendant. Here, the jury's findings as to negligence were unclear as the jury neither was instructed as to the definition of the term "Wenzel" nor as to the apportioning of liability to one of the named defendants, William Wenzel.

P11. Lambert Housing formulates its argument, in part, based on contract law, questioning whether or not William Wenzel was acting in a representative or individual capacity when he signed the payment certification, with the answer to that question being determinative of whether or not he was individually subject to the jury's award of damages. Lambert Housing cites the rule that HN1 when an instrument contains nothing to indicate it was signed in a representative capacity, parole evidence cannot be introduced to indicate the intent of the signer. *See Turner v. Terry*, 799 So. 2d 25, 34 (P30) (Miss. 2001) (citing 12 Am. Jur. 2d, *Bills and Notes*, § 503 (1997)). Thus, if there is nothing in the document to indicate an individual is acting in a representative capacity, that person is individually liable. Lambert Housing contends William Wenzel did not sign the **[*14]** application payments in a representative capacity. We disagree.

P12. In analyzing the record, we find that certifications of payment were made on AIA form document G702. On the top of the form, in each instance, beside the term "Architect" was written "Wenzel & Associates, P.A. Architects" with the firm's address stated. Then, the first line of the signature block contained the word "Architect" and the next line had "By:" and a space for a signature. While only one of the forms had "Wenzel & Associates, P.A. Architects" rewritten at the bottom after the term "Architect," we find that the term "Architect" was already defined at the top of the form. Therefore, it was unnecessary to rewrite Wenzel & Associates, P.A. at the bottom of the form above the signature. Therefore, we are not persuaded by Lambert Housing's argument that William Wenzel signed these forms solely in his individual capacity and not on behalf of the architectural firm.

P13. As to Lambert Housing's argument that the jury based Wenzel P.A.'s liability entirely on William Wenzel's negligence, we find instances in the portions of the trial transcript that were provided which show the involvement of other members of his architectural **[*15]** firm, who inspected the project or otherwise monitored its progress. William Wenzel testified that in the course of his twelve scheduled visits to the site, an employee from his firm, Lad, accompanied him on two occasions; additionally, the record reflects that the firm engineer, Barker, made several visits to the site. It is not apparent from the record the level of involvement these individuals had with the project. While William Wenzel admitted that he was the "sole judge" regarding certification of payments, the record does not reflect whether, or to what extent, he may have relied upon the information supplied to him by Lad or Barker in making those determinations. We cannot, on the record before us, find as a matter of law that the jury apportioned liability to Wenzel P.A. based entirely on the negligence of William Wenzel.

P14. To the extent that Lambert Housing contends, based on its analogy to contract law, that the absence of a corporate designation after the term "Wenzel" in P-100 "clearly" references William Wenzel, we reject that contention. The term "Wenzel" was never defined for the jury, and we cannot presume that the jury interpreted the term to mean William Wenzel, **[*16]** individually. We similarly reject William Wenzel's contention that "Wenzel" refers to Wenzel P.A. based on the use of the word "its" rather than "his" in the contract portion of P-100. We note that the general jury instruction on negligence, P-35, referred to "Wenzel" as "his." [8]

FOOTNOTES

[8] Instruction P-35 provided: "that if [the jury] find[s] from a preponderance of the credible evidence that the damage that is complained of by plaintiff Lambert was caused by or resulted from the neglect of Wenzel to exercise ordinary skill and diligence in the performance of *his* contract and/or professional duties, then it is [the jury's] sworn duty as jurors to return [a] verdict in favor of Lambert." (Emphasis added.)

P15. We find, as the circuit court did, that use of the term "Wenzel" in the form of the verdict is in conflict with the use of "Wenzel and Associates, P.A." in the apportionment of fault. Accordingly, we reject the arguments of both parties that the issue is "clear."

2. Ambiguity of the Jury Verdict.

P16. Lambert Housing argues that the circuit court erred in not resolving the jury verdict's ambiguity. Lambert Housing contends that the circuit court could have resolved that ambiguity by requiring **[*17]** the jury to return an unambiguous verdict or applying the doctrine of *ejusdem generis*. Lambert Housing relies upon HN2 Mississippi Code Annotated section 11-7-161 (Rev. 2004), which provides that "[i]f the verdict is not responsive to the issue submitted to the jury, the court shall call their attention thereto and send them back for further deliberation."

P17. Lambert Housing further cites *Adams v. Green*, 474 So. 2d 577 (Miss. 1985) for the proposition that despite the appellant's failure to request the jury be returned to reword their ambiguous verdict, "the responsibility and duty" is placed "squarely on the shoulders of the trial judge to, on [his or her] own motion, order the jury to return to the jury room to reform and reword their verdict." *Id.* at 581. In our case, there is no indication that the ambiguity was brought to the circuit judge's attention prior to his releasing the jury. William Wenzel has not tried to distinguish *Adams,* and we find it analogous to the instant case. While it is disingenuous for Lambert Housing to blame the circuit court for not correcting the ambiguity the parties engrafted into jury instruction P-100, we must follow supreme court precedent that the **[*18]** ultimate burden is on the circuit court to resolve the ambiguity.

P18. As the jury had already been released at the time the ambiguity was noted, Lambert Housing contends that the circuit court should have applied the doctrine of *ejusdem generis* to resolve any ambiguity in its favor. [9] Lambert Housing argues that the jury's finding that "Wenzel" "negligently certified applications for payment" is a detailed finding of fault as the only evidence was that William Wenzel was the sole individual responsible for the certifications and should control over the non-specific apportionment form which "simply provided a space for the jury to apportion percentages" and "was to be used in conjunction with any of the jury instructions."

FOOTNOTES

[9] HN3 The *ejusdem generis* rule, in the construction of laws, wills, and other instruments, states that general words, when followed by more specific words, will not be construed to the widest extent, but will refer only to those persons or things specifically mentioned. Black's Law Dictionary, 517 (6th ed. 1990). In other words, specific provisions control over general provisions. *See Yazoo Properties v. Katz & Besthoff Number 284, Inc.*, 644 So. 2d 429, 432 (Miss. 1994). **[*19]** This rule only applies when the instrument is ambiguous. *Id.*

P19. Lambert Housing has cited no authority wherein the doctrine of *ejusdem generis* has been used in such a manner, and we agree with William Wenzel's contention that it is incongruent to apply the doctrine to construe the jury verdict and apportionment of fault in this case. [10] However, we reject William Wenzel's argument that because Lambert Housing did not object, and in fact prepared the apportionment form which failed to list his name individually, that Lambert Housing cannot raise the error on appeal, and it is "too late" to correct any error.

FOOTNOTES

[10] We, therefore, do not address whether we would adopt Lambert Housing's contention that the finding of liability against "Wenzel" is more specific than the apportionment of fault against Wenzel P.A.

P20. We find *Adams* instructive. In *Adams*, the jury returned a verdict in favor of two defendants, but remained silent as to the third defendant. *Adams*, 474 So. 2d at 581. The appellant never instructed the jury to find against the defendant individually. *Id.* at 580. The supreme court held that the trial court erred in failing to require the jury to render a verdict against a named defendant, **[*20]** in her individual capacity, where the evidence submitted at trial supported her liability. The supreme court remanded the case as to the third defendant to determine liability, if any. *Id.* at 581.

P21. As stated previously, the instruction paired with the verdict form is in conflict and thus ambiguous. Throughout the pleadings filed with the circuit court, the usage of "Wenzel" by Lambert Housing and the defendants varies in meaning. [11] This inconsistency carries over to the drafting of the jury instructions as well. Throughout the jury instructions the term "Wenzel" is used, but the term is rarely specifically defined by either parties' instructions. [12] We cannot determine from the record whether the term "Wenzel" used in the jury instruction refers to William Wenzel, individually, or Wenzel P.A. For this reason, we find the circuit court erred in dismissing William Wenzel from the cause without requiring the jury to determine if he would be assessed any portion of fault individually. Therefore, the proper course of action, as indicated in *Adams*, is to reverse and remand for a new trial in order to determine what portion of Wenzel P.A.'s judgment, if any, is attributable to William **[*21]** Wenzel, individually.

FOOTNOTES

[11] For example, Wenzel P.A.'s and William Wenzel's pleadings usually use the term "Wenzel" to refer to both defendants; in Lambert Housing's and WNC's pleadings "Wenzel" refers to William Wenzel, individually, only.

[12] For example, the following granted jury instructions refer merely to "Wenzel" without defining the term: P-5, P-9, P-35, DW-11, DW-12, DW-17, DW-18. Jury instruction DW-7 does define "Wenzel" as Wenzel, P.A. Additionally, while the jury instruction on negligence P-35 refers to Wenzel's performance as "his," the form of the verdict (P-100) refers to Wenzel's breach of contract as "its."

3. Motion for Directed Verdict or JNOV.

P22. Finally, Lambert Housing contends it is entitled to a directed verdict or JNOV against William Wenzel, individually, based on the Mississippi Professional Corporation Act ("MPCA"), codified at Mississippi Code Annotated sections 79-10-1 to -117. Our standard of review is the same for both motions:

> HN4 "This Court will consider the evidence in the light most favorable to the appellee, giving the appellee the benefit of all favorable inferences that may be reasonably drawn from the evidence." If the facts are so overwhelmingly in **[*22]** favor of the appellant that a reasonable juror could not have arrived at a contrary verdict, this Court must reverse and render. On the other hand, if substantial evidence exists in support of the verdict, that is, "evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions," then this Court must affirm.

Harrah's Vicksburg Corp. v. Pennebaker, 812 So. 2d 163, 170 (P28) (Miss. 2001) (internal citations omitted).

P23. Lambert Housing contends that William Wenzel is entirely responsible for Wenzel P.A.'s liability pursuant to Mississippi Code Annotated section 79-10-67(1) (Rev. 2001). HN5 This code section states, in pertinent part, that "[e]ach individual who renders professional services as an employee of a domestic . . . professional corporation is liable for a negligent or wrongful act or omission in which he personally participates to the same extent as if he rendered the services as a sole practitioner." *Id.*

P24. As stated previously, we find that the portions of the record provided to us indicate the involvement of other members of the Wenzel P.A. architectural firm in the project. While William **[*23]** Wenzel admitted that he was the "sole judge" regarding certification of payments, the record does not reflect whether or to what extent he may have relied upon information supplied to him by Lad or Barker in making that determination. Lambert Housing cites as its only authority, other than the MPCA, *Carl J. Battaglia, M.D., P.A. v. Alexander*, 177 S.W.3d 893, 903 (Tex. 2005) for the proposition that the jury should only be asked whether the professional was negligent and "the consequences to the professional associations follow as a matter of law." William Wenzel responds, and we agree, that the reverse of *Battaglia* is not necessarily true despite Lambert Housing's assertion. To hold otherwise, could impose a disproportionate share of liability to an employee of a professional association if that employee only was responsible for a small share of the alleged negligence involved. In this case, we cannot, as a matter of law, determine that the entire liability is attributable to the professional errors of William Wenzel. Moreover, in order to reverse and render the circuit court's decision on sufficiency of the evidence, this Court would need to review the entire transcript of the trial **[*24]** proceedings, which has not been provided.

CONCLUSION

P25. We find the form of the jury's verdict and apportionment of fault contained in instruction P-100 ambiguous. Even though neither party objected to its form, the circuit judge erred in not ordering the jury to return for deliberations in order to reform its verdict and to determine the individual liability of William Wenzel as there was evidence submitted at trial supporting some liability on his part. For this reason, we find the circuit court erred in dismissing William Wenzel from the case with prejudice. In accordance with *Adams*, we reverse and remand for a new trial in order to determine what portion, if any, of Wenzel P.A.'s liability may be apportioned to William Wenzel, individually.

P26. **THE JUDGMENT OF THE CIRCUIT COURT OF QUITMAN COUNTY IS REVERSED AND REMANDED FOR A NEW**

TRIAL IN ACCORDANCE WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.

KING, C.J., LEE AND MYERS, P.JJ., IRVING, CHANDLER, GRIFFIS, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR.

IN THE COURT OF APPEALS OF MISSISSIPPI

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

AMENDED CERTIFICATE OF SERVICE OF BRIEF ON APPEAL

I, Edward D. Lamar, one of the attorneys for Appellant Gaila Tate McCaskill Oliver, do hereby certify that true and correct copies of Appellant's Brief on Appeal were dispatched for delivery via Federal Express on Tuesday, August 12, 2008, and, upon information and belief, as verified via Federal Express's internet tracking information, were delivered on Wednesday, August 13, 2008, to the office of those persons listed below at the time noted:

David L. Ayers, Esq. — 8:39 A.M.
J. Collins Wohner, Jr., Esq.
Watkins & Eager
400 E. Capitol St., Suite 300
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The Honorable Margaret Carey-McCray — 8:36 A.M.
Circuit Court Judge
Washington County Courthouse
900 Washington Avenue, 2nd Floor
Greenville, MS 38701

This 14th day of August, 2008.

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CERTIFICATE OF SERVICE

I, Edward D. Lamar, one of the attorneys for Appellant Gaila Tate McCaskill Oliver, do hereby certify that I have this 14th day of August, 2008, caused to be mailed, via first class mail, postage prepaid, a true and correct copy of the foregoing Amended Certificate of Service of Brief on Appeal to:

David L. Ayers, Esq.
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The Honorable Judge Margaret Carey-McCray
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