

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2006-CA-01696

BOBBIE JOHNSON

APPELLANT

V.

ST. DOMINIC JACKSON MEMORIAL HOSPITAL

APPELLEE

**APPEAL FROM THE CIRCUIT COURT OF HINDS COUNTY
FIRST JUDICIAL DISTRICT**

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

**HIAWATHA NORTINGTON II
NORTINGTON LAW FIRM
P.O. BOX 1003
JACKSON, MS 39215-1003
(601) 914-0253
(601) 213-4621 (facsimile)
hnorthington@northingtonlaw.com**

COUNSEL FOR THE APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

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

Bobbie Johnson

Appellant

Hiawatha Northington II
Felecia Perkins

Attorneys for Appellant at Trial

St. Dominic Jackson Memorial Hospital

Appellees

John Wade
Sharon Bridges
Jonathan Werne
Brunini Grantham Grower & Hewes

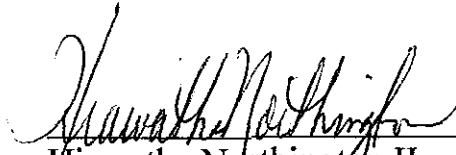
Attorneys for Appellee

Hon. Bobby B. DeLaughter

Circuit Court Judge, Hinds County, Mississippi

SO CERTIFIED, this the 20 day of March,

2007.



Hiawatha Northington II
Counsel for Appellant

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant respectfully requests oral argument, submitting that such argument would aid the Court in rendering an opinion in this matter.

STATEMENT OF ISSUES

- I. The Circuit Court of Hinds County erred in failing to grant Bobbie Johnson's Motion for Judgment Notwithstanding the Verdict, or in the alternative, for New Trial.**
- II. The Circuit Court of Hinds County erred in failing to reconvene the jury to determine its true verdict, and the proper remedy should be the granting of a new trial.**

STATEMENT OF THE CASE

Nature of the Case, Course of Proceedings, and Disposition in Court Below

This is an appeal from the Circuit Court of Hinds County, wherein the Circuit Court denied Bobbie Johnson's motion for judgment notwithstanding the verdict, or in the alternative, for new trial, after entering a judgment on a jury verdict in favor of St. Dominic.

Bobbie Johnson was treated at St. Dominic Jackson Memorial Hospital in 2003 for a laparoscopic cholecystectomy. (C.P. at 5). Immediately following this procedure, on November 3, 2003, Ms. Johnson received an intramuscular (IM) injection of phenergan in her left buttock, to alleviate nausea most likely associated with the anesthesia she received. (C.P. at 5). At the time of the injection, Ms. Johnson developed an intense burning sensation at the site of the injection, and notified the nursing staff, of the sensation, complaining that the pain was unlike any she had before. (C.P. at 5, T. at 32-33). Ms. Johnson was discharged from St. Dominic.

About three weeks later, Ms. Johnson presented to another hospital in Gulfport with a wound on her left hip, still complaining of significant pain and burning at the site of her phenergan injection. (C.P. at 5). Ms. Johnson was readmitted to St. Dominic on December 8, 2003, presenting with

chemical necrosis of the left buttock, resulting from her phenergan injection. Ms. Johnson required a surgical debridement of the wound, with excision of a 7 cm by 5 cm by 4 cm area of necrotized, or dead, tissue. (C.P. at 6). Following this, Ms. Johnson was left with a very unattractive scar and required therapy and medical treatment for her injury. (C.P. at 6).

The Complaint was filed on August 27, 2004, (C.P. at 4), alleging, *inter alia*, that St. Dominic personnel failed to properly administer the phenergan injection to Ms. Johnson, according to the orders of Ms. Johnson's physician. An answer was duly and timely filed by the Defendant St. Dominic Hospital, and discovery ensued. (C.P. at 11).

Trial was held in the matter beginning June 4, 2006, and on June 7, 2006, the jury returned a verdict in favor of the Defendant, St. Dominic Hospital. (C.P. at 73). After the verdict was received, the presiding judge received correspondence from the jury foreman indicating that he believed the jury had misread the jury instructions. (C.P. at 87-88). Ms. Johnson filed a Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial. The Court declined the Motion, and this appeal ensued. (C.P. at 163).

SUMMARY OF THE ARGUMENT

Mr. Johnson is entitled to a reversal of the Circuit Court's order denying the Motion for Judgment Notwithstanding the Verdict, or in the alternative, for a new trial. The overwhelming weight of the evidence submitted to the jury dictates a finding in favor of the Plaintiff. Testimony and evidence regarding the nature of the injury to Bobbie Johnson and her subsequent treatment was uncontradicted. Moreover, the witnesses for St. Dominic were sufficiently impeached based on inconsistent testimony such that no reasonable juror could conclude that St. Dominic nursing staff complied with the applicable standard of care in treating Ms. Johnson.

Additionally, the trial court should have reconvened the jury for clarification of its verdict, as there was information to suggest that the verdict returned may not have been the verdict intended. However, the appropriate remedy for that at this stage is the granting of a new trial

For these reasons, enumerated in further detail below, the circuit court abused its discretion, and this matter should be reversed and judgment rendered in favor of Bobbie Johnson, or in the alternative, remanded for a new trial.

STANDARD OF REVIEW

In determining whether a jury verdict is against the overwhelming weight of the evidence, this Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial. Only when the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal. *Wal-Mart Stores v. Frierson*, 818 So. 2d 1135, 1143 (Miss. 2002).

ARGUMENT

I. The Circuit Court of Hinds County erred in failing to grant Bobbie Johnson's Motion for Judgment Notwithstanding the Verdict, or in the alternative, for New Trial.

When an appellant challenges a jury verdict to be against the overwhelming weight of the evidence, this Court gives great deference to the jury verdict and resolves "all conflicts in the evidence and every permissible inference from the evidence in the appellee's favor." *Walmart Stores, Inc. v. Johnson*, 807 So. 2d 382, 389 (Miss. 2001)(citing *Bobby Kitchens, Inc. v. Miss. Ins. Guar. Ass'n*, 560 So. 2d 129, 131 (Miss. 1989)).

Our trial courts have the authority to set aside a jury verdict "where, in the exercise of their sound discretion, they regard such a verdict as being contrary to the substantial weight of the evidence." *Blossman Gas Inc. v. Shelter Mut. Gen. Ins. Co.*, 920 So. 2d 422, 424 (Miss. 2006). As such, while cases where there are "conflicts of evidence presented at trial are to be resolved by the jury," *Id.* at 426; *Venton v. Beckham*, 845 So. 2d 676, 687 (Miss. 2003), it is incumbent upon the Court to review the evidence presented to determine whether indeed such conflicts of evidence exist.

The instant case, it is respectfully submitted, does not present such a simple conflict. A review of the testimony and evidence presented at the trial of this matter bears out this conclusion.

First, Johnson's nursing expert, Ann Limbach, testified that the LPN, Kattie Minor, did not use the proper technique in administering the injection to Bobbie Johnson. This testimony was broken into two components. First, Ms. Limbach concluded that Ms. Minor, who stated that she used a one-inch needle, used an improper needle to make the injection. (T. at 126). Second, Ms. Limbach concluded that Ms. Minor, who initially testified that she didn't know what z-tracking was, should have used the z-track method to administer the phenergan injection to Ms. Johnson. (T. at 130). Ms. Limbach opined that due to the nature of phenergan, the standard of care applicable to Ms. Minor would have provided treatment that would have prevented the injury to Ms. Johnson. (T. at 130).

In addition to that, Ms. Limbach testified that the appropriate size needle to administer phenergan to Ms. Johnson would have been a two-inch needle. (T. at 129). She reached this conclusion, stating that a proper examination and assessment of Ms. Johnson by Ms. Minor would have revealed that a one-inch needle was insufficient to reach the muscle, where the injection was intended to go. (T. at 129, 130). Based on Ms. Limbach's experience and training, and according to prevailing standards of nursing care, she concluded that if Ms. Minor had used the proper technique and assessed the patient and used the correct length of needle, Ms. Johnson

would not have sustained the injury. (T. at 130).

Second, the nurse who administered the phenergan injection, Kattie Minor, testified at trial, contrary to her deposition, that she used a 1.5 inch needle. (T. at 207). However, she could not point to any document in the medical record to substantiate her changed testimony. Moreover, Ms. Minor stated that during her entire tenure at St. Dominic, she had NEVER used a needle length other than 1.5 inches. (T. at 215-216). She further testified that this was the length of needle she used, despite the various bodily makeups of her patients' bodies, and despite the St. Dominic policies and procedures which required that individual assessments of patients be made prior to intramuscular injections, and despite the St. Dominic guidelines that suggested a woman of Ms. Johnson's bodily proportions would need a needle longer than one inch. (T. at 216-219). She also stated that she knew of no other medicine in which the z-track method, which she never used in 25 years of nursing, would be used except for administering iron, despite St. Dominic policy and procedure which indicated that z-tracking would be appropriate for any medication which is capable of irritating subcutaneous tissue. (T. at 222-224).

Third, St. Dominic's expert witness, Suzy Temple, a nurse, testified that phenergan is an admittedly irritating drug that can cause tissue necrosis

if injected into subcutaneous tissue. (T. at 289). She also assumed that Ms. Minor used a 1.5 inch needle, although there was no documentary evidence produced to support that conclusion. (T. at 292). She testified that she would not consider it significant for a patient to complain about pain at a phenergan injection site, and even if the patient stated it was a pain unlike any she had ever had, it still would not warrant charting. (T. at 295). She further testified that in her years of teaching, she had never run across a document or text that indicated phenergan should be z-tracked. (T. at 298). However, she admitted that one of the textbooks she used and on which she relied clearly stated that for intramuscular administration of medicines irritating to subcutaneous tissue, z-tracking should be used, and that it could be routinely used for all intramuscular injections. (T. at 299-300). She further admitted that injection of phenergan into Ms. Johnson's subcutaneous tissue was not what the ordering physician, Dr. Martin, intended. (T. at 304).

There was no evidence presented to rebut the proof that Ms. Johnson suffered necrosis of her tissue as a result of the phenergan injection, nor was there any evidence to contradict the reasonableness or necessity of the medical treatment Ms. Johnson received relative to the injury she suffered due to the injection.

St. Dominic nurses Kattie Minor and Jo Granderson both testified that they made individual assessments of patients to determine appropriate treatment. However, in the same breath, each concluded that no matter the assessment of an individual patient, a 1.5 inch needle was always appropriate. This position is clearly contrary to St. Dominic's policies and procedures which were placed in evidence at trial and explicitly provided for different length needles depending on the physical attributes of the individual patients. Even during the physical demonstrations of how a phenergan injection like Ms. Johnson's allegedly should have been done, cross-examination established that the supposed individual assessment made by the nurse was not done by Ms. Minor during her normal practice.

The jury is the ultimate arbiter of the weight of the evidence and the credibility of the witnesses. *Breaux v. Grand Casinos of Miss., Inc.*, 854 So. 2d 1093, 1098 (Miss. App. 2003) (citing *Jackson v. Griffin*, 390 So. 2d 287, 289 (Miss. 1980)). In order to have found for St. Dominic, the jury, according to the instructions, would have had to find that either the nurse used the proper needle length, or that the z-track technique was not necessary to administer the phenergan injection. As to the needle length, Ms. Minor could not contradict her deposition conclusion that the needle used was a one inch needle, because she did not make a notation in the

record of the size of the needle used. (T. at 291-292).

It is submitted to the Court that it is highly unlikely that St. Dominic would have policies and procedures allowing for the use of varying needle sizes for intramuscular administration, or for the use of the z-track injection. The jury's conclusion ignores common sense principles. "Verdicts are to be founded upon probabilities according to common knowledge, common experience, and common sense, and not upon possibilities; and a verdict cannot convert a possibility or any number of possibilities into a probability." *Elsworth v. Glindmeyer*, 234 So. 2d 312, 319 (Miss. 1970).

It is enough if the event found was so improbable, according to the ordinary operation of physical forces, or was so overwhelmingly disproved by credible witnesses, as to compel the conviction that the jury either failed to weigh the credible evidence carefully, or drew unwarranted inferences or yielded to partisan bias.

Id.

Findings of fact must be set aside when they are clearly or manifestly against all reasonable probability, and in this case, the facts are just so. Even assuming the factual dispute regarding the size of the needle used to give Ms. Johnson's injection was resolved in favor of St. Dominic, meaning the needle was a 1.5 inch needle, the hospital is still not freed from the fallacy of its argument that the 1.5 inch needle is ALWAYS appropriate, despite its

own internal policies which dictate that it is not. Additionally, the presumption does not explain St. Dominic's expert's position that the z-track technique should not be used to administer phenergan, even though the textbook from which she teaches teaches nurses otherwise.

The position of St. Dominic as a whole is substantially impeached by the undisputed facts, the testimony of the witnesses, both for Ms. Johnson and St. Dominic, and by documentary evidence. It is because these circumstances exist, then, that this Court should make the rare decision to override the great deference usually afforded to a jury's considered verdict, and reverse and remand this matter for a new trial.

II. The Circuit Court of Hinds County erred in failing to reconvene the jury to determine its true verdict, and the proper remedy should be the granting of a new trial.

It is submitted that the jury's verdict does not represent the true verdict of the jurors in this case, and was the result of error as defined by this Court in *Martin v. State*, 732 So. 2d 847 (Miss. 1998). In *Martin*, the Court examined the circumstances in which the jury's verdict may be investigated to determine whether it was the actual verdict voted and agreed upon. The Court examined a Fifth Circuit decision, *United States v. Dotson*, 817 F. 2d 1127 (5th Cir. 1987), modified on reh'g, 821 F. 2d 1034 (5th Cir. 1987), where the Court of Appeals found that the district court should have sent a

jury back for further deliberations, or should have ordered a new trial, where three jurors, after the jury was discharged, confirmed that contrary to the guilty verdict read in court, the jurors had actually voted to acquit on a charge. *Id.* at 1129.

In *Martin*, the Court was presented with a scenario where the jury returned a guilty verdict, and after a motion for new trial was denied, counsel for the defendant was approached by jurors who read about the sentence and informed the attorney that the verdict should have been something else. The attorney then obtained affidavits from the jurors stating that a mistake had been made, and asked the trial court to set aside the judgment, which the trial court then denied. *Martin*, 732 So. 2d at 848. The *Martin* Court determined that a logical extension of the rule normally prohibiting juror testimony regarding the “validity” of a verdict or its thought processes in reaching the verdict, would be to allow evidence establishing that a jury’s verdict was not the verdict actually voted and agreed upon. *Id.* at 854. The Supreme Court ruled that the matter should be remanded to the trial court for a hearing to determine the true verdict of the jury, and only for resolution of that point. *Id.*

In this case, the trial court received contact in the form of an e-mail from the jury foreman post-trial, suggesting that the jury somehow

misinterpreted the court's instructions. (C.P. at 87). The trial court, in forwarding the letter to the undersigned counsel and counsel for St. Dominic, noted that a misunderstanding of the jury concerning the law and evidence is not an extraneous source of improper influence upon which evidence may be obtained from a juror or through which a jury's verdict may be impeached. However, Ms. Johnson submits to the court that this correspondence squarely suggests that the jury's intended verdict may not have been what was actually indicated in court. In the Motion for Judgment Notwithstanding the Verdict or in the alternative, for New Trial, Ms. Johnson requested that the court reconvene the jury for the specific purposes of determining of whom each juror intended his or her verdict to be intended. However, practically speaking, at this point, Ms. Johnson submits to the court that such an endeavor would not be feasible, and the only remedy would be to order a new trial. Accordingly, Ms. Johnson alternatively requests that the Court grant her a new trial on the merits.

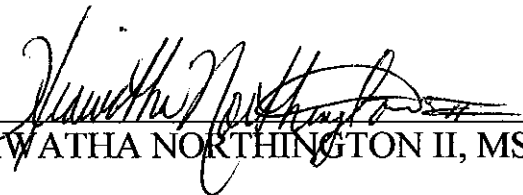

CONCLUSION

Clearly, the best interests of justice were not served by the entry of judgment in favor of St. Dominic Hospital and by the denial of Bobbie Johnson's Motion for Judgment Notwithstanding the Verdict, or in the alternative, for New Trial. The circuit court abused its discretion in failing

to grant Bobbie Johnson's post-trial motion, an error which should be corrected by this Court, and it is respectfully submitted that the Court should hereby REVERSE AND RENDER judgment in favor of Bobbie Johnson, or in the alternative, REMAND this matter to the Circuit Court of Hinds County for a new trial on the merits.

RESPECTFULLY SUBMITTED,

BOBBIE JOHNSON

BY: 
HIAWATHA NORTHINGTON II, MSB # 

ATTORNEY FOR THE APPELLANT

OF COUNSEL:

**NORTHINGTON LAW FIRM
P.O. BOX 1003
JACKSON, MS 39215-1003
(601) 914-0253
(601) 213-4621 (facsimile)
hnorthington@northingtonlaw.com**


CERTIFICATE OF SERVICE

I, Hiawatha Northington II, hereby certify that I have this day caused to be mailed by United States mail, postage pre-paid, a true and correct copy of the above and foregoing instrument to the following:

John Wade
Sharon Bridges
Jonathan Werne
Brunini Grantham Grower & Hewes, PLLC
P.O. Box 119
Jackson, MS 39205-0119

Hon. Bobby B. DeLaughter
Circuit Court of Hinds County
P.O. Box 327
Jackson, MS 39205

SO CERTIFIED this 20 day of March, 2007.



HIAWATHA NORTHINGTON II