SUPREME COURT OF MISSISSIPPI

C. RICHARD DOBBINS,	)	
	)	
APPELLANT	)	
	)	
VS	)	CAUSE NO. 2006-CA-02104
	)	
FREDRICK J. VANN, III,	)	
	)	
APPELLEE	)	

APPEAL FROM THE CIRCUIT COURT
OF ALCORN COUNTY, MISSISSIPPI

ORIGINAL BRIEF OF APPELLEE, FREDRICK J. VANN, III

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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 disqualifications or recusal. All persons listed by Plaintiff/Appellant.

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This the 31st day of July, 2007.

Robert G. Krohn

Robert G. Krohn

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STATEMENT OF THE CASE

A motor vehicle accident occurred about 11:00 a.m. on January 19, 2002, at an intersection in Corinth, Mississippi, involving an SUV driven in an easterly direction by Richard Dobbins (hereafter "Plaintiff") and a pickup truck driven in a northerly direction by Fredrick J. Vann, III, (hereafter "Defendant"). The front of the Plaintiff's vehicle collided generally with the driver's door of Defendant's vehicle and came to a stop very near the point of collision. The Defendant's vehicle continued to travel to his north and a little to his left and came to a stop within 15 or 20 feet (T 136-138). Plaintiff and his wife sued for damages.[1] Defendant admitted liability, the case was tried and a jury returned a verdict for the Plaintiff by a vote of eleven in favor and one against in the amount of $50,000 (T 315-318). Plaintiff has appealed on the issue of damages.

Plaintiff was using his seat belt and it worked. His air bag did not deploy (T 135). He returned to his home and then later that day drove himself to Iuka, Mississippi (approximately 20 miles away) to visit with his mother. He did not even consider going to the emergency room. The following day he called the offices of both Dr. Kerby and Dr. Frazier and made appointments with each respectively on the 28th and 29th of January. Neither office suggested he go to the emergency room (T 143, 144).

The Plaintiff complained to Dr. Kerby of neck, back, and headache pain, but did not mention the shoulder or knees. He last saw Dr. Kerby on March 5, 2002, and was released on a return-as-needed basis and further advised to see Dr. Budny, a local chiropractor, if he needed further treatment (T 144-145, 147).

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[1] Mrs. Dobbins' suit for loss of consortium was dismissed at the conclusion of all testimony and that dismissal has not been appealed.

Dr. Frazier examined and treated Plaintiff on January 29 and February 12, 2002. Plaintiff complained of left knee and right ankle pain, was injected on at least one occasion, and told to return on an as-needed basis. He did not mention any shoulder discomfort (T 146,147 and R 313-317). The next treatment was in the form of adjustments from Dr. Budny who was initially consulted on September 4, 2002. One final visit to Dr. Frazier occurred on May 9, 2003, nearly 16 months after the accident. At that time, according to Dr. Frazier's testimony and office notes, Plaintiff "had been hurting in his right shoulder for approximately two weeks" (Deposition of Dr. Frazier at R 317; Office notes at R 350).

Drs. Felix Savoie and James O'Mara are each practicing in the field of orthopedic surgery in the same clinic in Jackson, Mississippi. In their elective practices, Dr. Savoie specializes in the upper extremities and Dr. O'Mara specializes in the lower extremities.

Plaintiff first visited Dr. Savoie complaining of pain in the right shoulder on December 15, 2003, and was treated conservatively until Dr. Savoie repaired an injury to the right rotator cuff by an arthroscopic procedure on July 13, 2005, approximately three and one-half years after the alleged injury. Plaintiff has had no further pain in the right shoulder. On cross-examination, Dr. Savoie was advised of the three visits to Dr. Frazier on January 29 and February 12, 2002, and again on May 9, 2003, and further advised the first mention of shoulder pain to Dr. Frazier occurred on May 9, 2003, and the pain was of a two-week duration. Dr. Savoie culminated his testimony on this subject as follows:

> Q. Doctor, would that in any way have any bearing on your opinion as to whether this was caused by the January 29, 2002, automobile wreck?
>
> A. I think if either of these physicians have something that says where there is no check-off of shoulders problems, or -- I

> mean obviously, I can't review their notes and stuff. But if it says new shoulder pain and no previous complaints of shoulder problems until that visit you just alluded to, then you would have to say the accident had no role in it whatsoever. (R 207-209)

Dr. James O'Mara was first consulted on January 15, 2004, and has treated the Plaintiff conservatively ever since. After testifying on July 18, 2005, that the knee injury suffered in another accident in 1979 contributed significantly to the osteoarthritis he found in the left knee (R 263), and that he could not be sure of the cause he discovered in 2004 (R 263, 264), Dr. O'Mara testified at a subsequent deposition on July 5, 2006, that he thinks it is possible that the motor vehicle accident contributed to his current condition (R 290, 291).

Other facts a juror may have considered in determining the credibility of the Plaintiff's case include:

1. Though he claims to have been "addled" by the wreck, he never considered going to the emergency room (T 144), he was able to make two calls to 911 and request the police and an ambulance, he got another car and drove himself to Iuka, he tried to call Defendant's father and then another call to Defendant's uncle (T 91-94).

2. Though he claims to have had no residual effects from the crushing injury to his left knee suffered in an automobile wreck in 1979 (T 82, 83 and the deposition of Dr. O'Mara at R 256), Dr. O'Mara said the previous accident contributed significantly to the osteoarthritis in the left knee (R 263). John McCarter, Plaintiff's witness, said that prior

to 2002, Plaintiff had to mount a horse from the opposite (right) side (T 175-177).

3. Though he claims to have lost at least $57,137.50 in earnings, a careful review of his income tax returns does not appear to substantiate a substantial loss of income (R 361-518) and his longtime partner left his accounting firm in September, 2002 (T 140).

4. Though he claims damages in the amount of $6,248 for boarding fees for his horses in 2002 (T 142 and R 458 at line 34b), he also had boarding fees for his horses the year before the accident in the amount of $8,479 (R 439 at line 34c).

5. Though this was almost, if not entirely, a head-on collision from Plaintiff's standpoint, his airbag did not deploy (T 138).

6. Though he claims damage to his right shoulder, there is no testimony of direct trauma to the right shoulder, and the seat belt would have passed over his left shoulder.

Plaintiff now complains he was not allowed to voir dire regarding purchasing insurance from Defendant's family members. He was allowed to ask if any of the venire had done any business with the family and elicited positive responses from Mr. Bobo, Mr. Ross and Ms. Carmen Yancey. Messrs Ross and Bobo were struck for cause and Ms. Yancey was not selected (T 58, 59, 62).

SUMMARY OF THE ARGUMENT

Plaintiff seeks reversal basically on three grounds. First, he complains of the Court's refusal to allow certain questions on voir dire concerning the insurance business of Defendant's family and the insurance business in general. Defendant responds by showing that the Court did allow questions concerning any business relationship with the Defendant or his family and even assisted to some extent in that interrogation. Further, the Plaintiff abandoned that line of questioning and he did not proffer any suggested questions to the judge. Even if this ruling should be considered error, it was harmless error, because only three jurors admitted doing business with Plaintiff's family and all were dismissed for cause

Second, he complains of the refusal to admit certain summaries of his time records into evidence. Defendant shows that admission of summaries under MRE 1006 is not mandatory but is discretionary with the court. To the contrary, the underlying documents shall be made available for examination or copying, or both, by other parties at a reasonable time and place. This was not done. Probably even more important is the fact that the Plaintiff was allowed to use the document to refresh his recollection during his testimony and all the items of damages he desired to introduce were presented to the jury by other means. There was simply no prejudice to the Plaintiff.

Third, Plaintiff asserts the verdict was against the overwhelming weight of the evidence, the subject of bias, prejudice or passion, and he should have been granted an additur of $200,000 or a new trial on the issue of damages. Defendant points out that the jury determines the facts and the credibility of all witnesses and the court should not substitute its judgment for that of the jury in these areas unless it determines that when

taken in the light most favorable to the verdict no reasonable juror could have found as the jury found. Here there are a myriad of facts affecting the credibility of Plaintiff's case and individual witnesses. The jury had the right to give such weight to this testimony as it felt reasonably appropriate. It did and eleven jurors agreed on the verdict.

ARGUMENT

1. EITHER NO ERROR OR HARMLESS ERROR RESULTED FROM LIMITING PLAINTIFF'S VOIR DIRE REGARDING INSURANCE

Plaintiff argues he was denied meaningful information on voir dire needed to determine whether to peremptorily challenge jurors and was, therefore, denied a fair trial. This is simply not so. The Court did limit certain questions as revealed in the following discourse:

> **Mr. Hinton:** Now there's already been some mention of Joe Vann (*Defendant's father*), who's sitting in the back. He and his father, who is a namesake I believe for young Mr. Fred Vann, Fred Vann and Joe operated an insurance agency, it was right on this street, for many, many, many years. I think Joe in fact is still in the insurance business. And I would like to know if any of you have been insured by one of these Vanns or one of the agencies. (Emphasis Added)
>
> **Mr. Krohn:** Your Honor, may it please the Court, I'm going to object to this line of questioning in voir dire. I think he has injected an element that shouldn't be injected into this suit.
>
> **The Court:** All right. Mr. Hinton, you may ask the members of the panel if they have done business with, any type business with the Vanns. (T35, 36)

After ascertaining there were only three jurors who had ever done any business with the Vanns, the Court even helped the Plaintiff with at least one line of permissible questions. See:

> **Q. (BY MR. HINTON):** Ladies and Gentlemen, let me change my question. Have any of you ever conducted any type of business with Mr. Joe Vann or with Mr. Fred Vann, his father?
>
> (Hands raised)
>
> **Q.** If you will, I think I only saw two hands. Is there anybody besides row one? Okay. Let me take row number one first. I'm going to start with you. You're Mr.?
>
> **A.** Bobo
>
> ***Q.*** *I'm sorry. Yes, sir, Mr. Bobo.*
>
> **MR. HINTON:** Your Honor, I'm at a loss now how I might proceed because I—
>
> **THE COURT:** Mr. Bobo, have you done business in the past with the Vann family?
>
> **JUROR BOBO:** Yes. I've had auto and home insurance.
>
> **THE COURT:** Is there anything about having done business with them that would influence you one way or the other if you were chosen as a juror in this case?
>
> **JUROR BOBO:** I don't think so. (T36, 37)

After receiving similar answers from jurors Ross and Carmen Yancey, Plaintiff abandoned this line of questions. He did not proffer any questions nor make any attempt to elaborate on the business relations. For instance, he may have properly asked: a. how long did this business relationship last; b. who did you primarily deal

with at the business; c. were you ever satisfied or dissatisfied with the service you received; d. were you satisfied with the cost of the service; e. did you believe you received personal attention from them; f. would you be embarrassed if you met any of them after returning a verdict against the Defendant; g. why did you quit doing business with them, h. were you or close members of your family ever an employee of or in a similar business, etc?

The Mississippi Supreme Court set forth a suggested line of questions on this very point in *Avery v. Collins* 171 Miss. 636, 157 So 695, 699 (Miss 1934), by writing:

> ...But the court remarked that "such an examination may usually be conducted in such a manner as not necessarily to disclose the existence of such insurance in the particular case." Reaffirming that observation of the court, we would now add as a corollary thereto that the proper means of ascertaining the qualifications of a tendered juror in respect to his insurance connections is to ask him what business he is engaged in, and, if he answer, for instance, that he is a farmer, then the further precautionary question may be put to him whether he has any other business or business connections, and, if he answer that he has not, that usually ought to end the privilege so far as inquiry into his insurance connections are concerned.
>
> There may be cases, nevertheless, wherein it will happen that there will be no reasonable method at getting at the question of the juror's qualification on the issue of his insurance connections except by interrogatories which will disclose that the defendant in the particular case is probably insured, but he trial judge should see to it that the necessity exists in the particular case... (Emphasis Added).

In the case *sub judicia*, Plaintiff did not ask questions that would have developed the information he now complains of nor did he proffer any questions outside the presence of the jury for the Court's determination. Certainly the Court did not make a determination that a necessity existed which would authorize a deviation from the

established rule of nondisclosure. To the contrary, the Court, who had the advantage of hearing all the remarks and observing the entire procedure, said:

> **THE COURT:** All right. There's an objection by the defense to the plaintiff's proposed question, Had a member of the panel been in the insurance business. That's not relevant and it's an attempt to interject insurance coverage into this case, and the Court did sustain the Defendant's objection and prohibited plaintiff's counsel from asking that particular question (T 56, 57), (Emphasis Added).

See also the language of the Judge in his order denying Plaintiff's Motion for a new trial:

> The Court would note, in its opinion, that Plaintiff's question to potential jurors as to whether or not they had insurance coverage at any agency operated by the Defendant's father or grandfather and their personal affiliation or affiliation of any close friend or relative with the insurance industry in general was nothing more than a blatant attempt to suggest to members of the jury panel that the twenty (20) year old Defendant had liability insurance coverage. Evidence of a Defendant's insurance coverage is irrelevant as to his alleged negligence and its admission may be grounds for a mistrial. M.R.E. 411. The Court did allow Plaintiff to question the jury panel generally as to whether any member of the jury panel had done any kind of business with Defendant's father or grandfather and, if so, whether that would affect their decision in this case if selected as a juror. (R559, 560), (Emphasis Added)

The Mississippi Supreme Court has repeatedly emphasized the necessity for both sides to have a fair trial. In *Capital City Ins. Co. v. G. B. "Boots" Smith Corp., 889 So.2d 505, 510 (Miss., 2005),* the Court reversed and remanded because of the trial court's failure to bifurcate. Such failure resulted in the jury learning the defendant had liability insurance. After first reiterating the rule set forth in MRE 411, the Court quoted with approval from *Toche v. Killebrew, 734 So.2d 276, 283 (Miss. Ct. App. 1999)*:

> ...There is a long-standing principle of law in this State that gratuitously informing the jury, or even intimating to the jury, that

> any verdict returned by them will be satisfied by the defendant's liability insurance provider so interferes with the jury's ability to fairly deliberate the true issues of the case as to constitute reversible error... (Emphasis Added).

Similar results were obtained when first and third party claims were joined in the same suit. Such improper joinder disclosed liability insurance in violation of MRE 411 and required bifurcation. *Hegwood v. Williamson, 949 So.2d. 728, (Miss., 2007).*

Defendant respectfully submits the Trial Court committed no error because the Plaintiff had ample opportunity to develop adequate information for jury selection purposes without violating the letter or the spirit of MRE 411 and thereby denying Defendant a fair trial. Assuming *arguendo* there was error, then it is submitted that such error was harmless because the only three jurors identified at this stage of interrogation were all dismissed for cause and did not require the use of a peremptory challenge.

2. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING TO ADMIT SUMMARIES PREPARED BY PLAINTIFF

Plaintiff contends the court erred in refusing to admit into evidence a summary partially prepared by Plaintiff and in support of his contention cites *Wells v. State, 604 So.2d, 271 (Miss., SCT 1992)*; *Centennial Indus. Ontr. Corp. v. Kimmons Indus. Serv. Corp., 743 So.2d, 954 (Miss., 1999)*, and *American Nat'l. Ins. Co. v. Hogue, 749 So.2d 1254 (Miss., 2000)*. These cases, apparently are all the cases on this issue decided by Mississippi courts, involve appeals taken because the exhibits were admitted and the court refused to reverse on that basis. It is respectfully submitted that Rule 1006 does

not require the admission of summaries into evidence, but admissibility is based on the discretion of the court so long as it complies with the law.

MRE 1006 provides:

> The contents of voluminous writings, recordings or photographs which cannot be conveniently examined in court **may** be presented in the form of a chart, summary or calculation. The originals, or duplicates, **shall** be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court. (Emphasis Added)

In *Wells*, supra, the owner attempted to prove embezzlement by one of his employees by compiling a summary based on bank deposits, cash register tapes, and daily accounting sheets all of which were business records prepared and utilized in the "regular conduct" of business to show that his company had been the victim of embezzlement. In the instant case, the "business record" being considered was the timesheet of the Plaintiff. There is no testimony that he regularly and customarily kept his personal affairs listed on the timesheet kept by him. Further, this underlying document contained the names of clients and other privileged information and was not produced to defense counsel for review.

In *American Nat'l. Ins. Co.*, supra, plaintiff desired to introduce a compilation of police records in order to show the frequency of crime in a certain area and to provide notice to the landlord of an unsafe condition. After considerable bickering between the parties, they stipulated as to the authenticity of the summary and the summary was admitted.

Finally, in *Centennial Indus. Ontr. Corp.*, supra, the plaintiff had prepared a four-volume set of calculations determining his alleged damages. Because of the complexity of the case, the plaintiff reduced those damages to a one-page summary. The court

refused to admit the four-volume set of calculations but did admit the one-page summary of the set. The four-volume set was available for inspection and review by defense counsel. Here, the underlying time records were not proffered for examination or review by defense counsel, but all of the medical records and statements of charges were admitted. The records of Dr. Budney, for example, were admitted and clearly and set forth the dates of each visit (R 327-329).

Plaintiff has neither demonstrated nor argued any prejudice to him which may have resulted from the denial of admissibility of the summary. To the contrary, the Plaintiff used his summary to refresh his recollection, testified to all of the pertinent facts concerning the alleged damages, frequency of visits, time out of the office and ɜlat matters, and then introduced all of the medical records which detailed and substantiated times that he was out of the office for medical reasons. It is submitted that the medical records are clearly the best evidence regarding this point because the jury can also consider the causation factor of each such visit as well as determine the dates and places of such medical attention.

Defendant does not believe the trial court committed any error in refusing the summary into evidence. In the event this court determines that to be error, then it is submitted the denial was harmless error because Plaintiff was not prejudiced in any manner and all relevant evidence regarding damages was properly before the jury in other exhibits and testimony.

3. THERE WAS NO ERROR IN REFUSING PLAINTIFF A NEW TRIAL ON THE ISSUE OF DAMAGES OR IN NOT ORDERING AN ADDITUR

4. THE DAMAGES AWARDED, $50,000, WERE NOT INADEQUATE AND DID NOT EVINCE BIAS, PREJUDICE OR PASSION

5. THE JURY VERDICT IS NOT CONTRARY TO THE OVERWHELMING WEIGHT OF EVIDENCE

These three arguments for reversal are collectively argued by the Plaintiff, are governed by the same underlying considerations and will be collectively answered. Defendant avers that the determinative considerations are:

1. What is the standard of review to be used by this court (or the trial court) when considering substituting its judgment for that of the jury on the issue of damages?
2. Was there credible evidence on which a reasonable person could have returned a verdict of $50,000?

First, what are the standards? It is elementary that a jury determines the facts and that the jury determines the credibility of the witnesses. See *Kennedy v. Little, 191 Miss. 73, 2 So.2d 163,164 (Miss., 1941)* which addressed this point by saying:

> ...for one of the most fundamental and elementary rules of judicial procedure is that the credibility of witnesses in a case tried to a jury is for its determination....

The Miss. Supreme Court succinctly set forth the standard of review in *Miss. Power & Light Co. v. Cook, 832 So 2d. 474, 477 (Miss., 2002)* by writing:

> Once the jury has returned a verdict in a civil case, **we are not at liberty** to direct that judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a

> whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found (Emphasis Added).

and statutory authority is found in Miss Code Ann. 11-15-55, 1972 as amended:

> The supreme court or any other court of record in a case in which money damages were awarded may overrule a motion for a new trial or affirm on direct or cross appeal, upon condition of an additur or remittitur, **if the court finds** that the damages are excessive or inadequate for the reason that the jury or trier of the facts was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence.... (Emphasis Added)

Second, could a reasonable, hypothetical juror have returned this verdict? To avoid prolixity, Defendant will not reiterate in detail the facts appearing on pages 1-4 of this brief. Attention is invited to these areas:

1. Severity of impact: Plaintiff's vehicle stopped immediately, Defendant's traveled 15 or 20 feet before stopping and Plaintiff's airbag did not deploy.
2. Plaintiff's conduct shortly after the accident: Plaintiff made several phone calls, returned to his home, drove himself to Iuka, MS and never even considered obtaining medical treatment until the following day when he made two appointments nine and ten days after the accident.
3. Plaintiff's course of health treatment for injuries alleged to have been caused by the subject accident: He was examined and treated by Dr. Kerby, a neurologist, and Dr. Frazier, an orthopedic surgeon, a total of four times from the date of the accident through March 5, 2002, at which time

Dr. Kerby instructed Plaintiff to go to Dr. Budny, a local chiropractor, if he needed further treatment. He first saw Dr. Budny for adjustments on September 4, 2002. He then saw Dr. Frazier on May 9, 2003 (nearly 16 months post-accident) complaining of right shoulder pain of two weeks duration. He saw Drs. Savoie and O'Mara respectively on December 15, 2003, and January 15, 2004. Dr. Savoie performed an arthroscopic procedure on Plaintiff's right shoulder on July 13, 2005.

4. Discrepancies between what he claimed in lost earnings and what his income tax returns revealed: Also, note he claims damages for boarding expenses for his horses when he actually had more boarding expenses the year before the accident.

Clearly, a reasonable juror could have assigned such weight and credibility to these facts to arrive at the decision made by eleven jurors. Even if reasonable minds could come to a different result, this verdict does not shock the conscience, there is ample proof to support the jury's decision and there is no proof or suggestion that its verdict was influenced by bias, prejudice or passion.

CONCLUSION

This case should be affirmed because:

Plaintiff had every reasonable opportunity, and did, voir dire the jury to determine what prejudice, if any, existed. All jurors identified as having done business with Defendant's family were dismissed for cause.

1. All alleged damages were submitted to the jury by testimony, documentary evidence, or both, and the jury had the opportunity and the obligation to give all such evidence the weight and credibility it thought appropriate.
2. This verdict does not shock the conscience, is supported by the evidence and is not the product of bias, prejudice or passion.

Respectfully submitted,

By: Robert G. Krohn

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CERTIFICATE OF SERVICE

I, Robert G. Krohn, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the Appellee's Brief to the following:

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