TABLE OF CONTENTS

2007-CA-00280
COA
TR

TABLE OF AUTHORITIES

CASES:

OTHER CITATIONS:

REPLY ARGUMENT

THE BOARD WAS NOT ENTITLED TO JUDGMENT NOTWITHSTANDING THE VERDICT.

"In essence, judgments as a matter of law present both the trial court and appellate court with the same question - whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated." *White v. Stewman*, 932 So.2d 32 (Miss. 2006) "The trial court must view the evidence in the light most favorable to the non-moving party and look only to the sufficiency, and not the weight, of the evidence. *Prudential Insurance Co. Of America v. Stewart*, 969 So.2d 17, 21 (Miss. 2007); *Poole v. Avara*, 908 So.2d 716, 727 (Miss. 2005).

It is the legal sufficiency of the evidence, and not the weight of the evidence, that is tested in a motion for JNOV. *Johnson v. St. Dominics-Jackson Memorial Hosp.*, 967 So.2d 20, 23 (Miss. 2007); *White v. Yellow Freight System, Inc.*, 905 So.2d 506, 510 (Miss. 2004). Therefore, even if the Board had more witnesses than Martin, this does not mean that the Board automatically should win. "Credibility does not depend on the numbers of witnesses." *Turner v. State,* 748 So.2d 706, 709 (Miss. 1999); *Spiers v. State*, 94 So.2d 803 (1957). "In general, the testimony of a single witness, no matter what the issue or who the person, may legally suffice as

evidence upon which the jury may found a verdict. *White v. State*, 507 So.2d 98, 102 (Miss. 1987).

Martin clearly testified that he did not breach his contract with the Board, and Martin was not alone. Other witnesses testified to what a high quality coach Martin was, and one witness confirmed Martin's version of what happened out on the golf course, the incident that was the cause of Martin's firing. "This Court has repeatedly stated that the jury is the sole judge of the credibility of the witness. *Gathright v. State*, 380 So.2d 1276, 1278 (Miss. 1980). '[W]hen the evidence is conflicting, the jury will be the sole judge of the credibility of the witnesses and the weight and worth of their testimony.'" *Ford v. State*, ___ So.2d ___, 2008 WL 451569 (Miss. 2008). The jury made its credibility determination and decided to believe Martin and his version of what happened. The verdict of the jury "is to be given great weight, and is the best means, when fair, of settling disputed questions of fact." *White v. Stewman*, 932 So.2d 27, 33 (Miss. 2006).

The Board's version of what happened was that Gregory Martin supposedly cursed Carl Sutton, a student at Mississippi State University and former member of the golf team, and violently swung a golf bag at him, hitting him in the head. The evidence put forward by Greg Martin, which the Court must believe, painted a very different picture for the jury.

Lee Robertson, the secretary for the men's golf team, testified that Greg Martin never used profanity, that he treated his players with respect, and he tried to teach them maturity both as golfers and men. T.T. 90-91. Martin never abused his players. T.T. 92. Pat Sneed, the Mississippi State University Golf Course Superintendent, T.T. 100, said that Martin expected discipline from his players. Martin would never use profanity. T.T. 102.

Linda Buehler is the academic coordinator for the Mississippi State University College of Agricultural and Live Sciences, and was also academic advisor for the golf team. T.T. 104-05. According to Buehler, Coach Martin emphasized discipline for his students, both on and off the golf course, and greatly aided her in her job as academic advisor. T.T. 108, 113. According to Buehler, Coach Martin's team was the top performing men's team academically, all because of Martin's leadership. T.T. 109. Buehler testified that Martin never abused, cursed or mistreated his players. T.T. 109.

Matthew Mooney was a junior on the golf team at the time. T.T. 216. According to Mooney, Martin wanted the best for his players, and wanted them to grow as golfers and as men. According to Mooney, Martin was a man of good character, who expected his students to do their best and be responsible. Martin expected hard work, both at golf and academically, and was very encouraging to his

players. T.T. 227, 230-31. Part of the discipline Coach Martin insisted on was that he be treated with respect and called "Coach Martin" by his players. T.T. 230.

Gregory Martin's qualities and high expectations of his students paid off. While he was at Mississippi State University, the men's golf program won two SEC championships. The team fielded three All-Americans, for the first time in the school's history. Martin's leadership resulted in three SEC players of the year, three academic All-Americans, 15 academic All-Conference players, and Martin was SEC Coach of the Year twice. T.T. 116.

Carl Sutton was a student who did not respond to Martin's efforts. Martin worked hard with Sutton, giving him a lot of individual sessions, and even obtaining new clubs for Sutton so that he could improve his game. T.T. 127-28. Sutton, however, would not put forth the effort. T.T. 128. Over the Christmas holidays of the 2001-02 school year, Martin told Sutton that he needed more practice and that he should compete in some tournaments. Not only did Sutton not follow these instructions, he later lied to Martin about his reasons for not doing so, saying that he had suffered an injury. T.T. 129. During the spring, Sutton skipped the first seven practices, and only started coming to practice after Martin told him that he would not qualify for the first tournament. T.T. 130-31. Sutton made no effort, was always the last to arrive at practice and the first to leave. T.T. 131. Martin told Sutton that he

needed to practice more, and instructed him to practice over the spring break. Instead, Sutton went skiing. T.T. 131. After Sutton clearly showed that he was not willing to make the effort, and had been dishonest with Martin on three different occasions, Martin finally told Sutton that he could not practice with the team or play for the rest of the year. T.T. 131, 133. Martin found out that Sutton had been meeting with pretrial recruits for the golf team, and talking disparagingly about Martin and the program. T.T. 134.

After Sutton was kicked off the team, both Martin and the compliance people reminded Sutton "numerous times" that he needed to turn in his university-owned equipment, which Sutton kept refusing to do. T.T. 134, 139. According to Lee Robertson, the NCAA had rules requiring people no longer on the team to return the university's equipment. T.T. 95.

On February 1, 2003, the golf team was practicing at a local private country club called Old Waverly. T.T. 137, 142-43. Coach Martin and Old Waverly had the understanding that only three Mississippi State University golfers would use the practice area at a time, to leave room for the club's regular members. Martin realized that Carl Sutton was in the practice area with Mississippi State University equipment and team hat on. T.T. 138. Since Martin did not want to give Old Waverly the impression that he was allowing more players in the practice area than he was

supposed to, he was only able to allow two more of his players to warm up before qualifications. Sutton, by being on the course with Mississippi State University gear and hat, was interrupting the team's practice. T.T. 138-39, 166, 174.

Martin then approached Carl Sutton. Sutton referred to Martin by his first name, intentionally showing disrespect to the coach. T.T. 139. Martin told Sutton not to disrespect him. He reminded Sutton that he had been repeatedly told to return his school-owned equipment and to return it Monday morning. Sutton claimed that he was ready to play for the team. Martin told him that he had already had his chance and had not put forth the effort. T.T. 139-40

Martin never approached Sutton closer than about 6-10 ft. T.T. 140. According to Matthew Mooney, this initial conversation was short, "maybe twenty seconds." T.T. 220. According to Craig Horrocks, who was then a senior on the golf team, T.T. 237, Martin approached Sutton to ask him to return the golf bag because Martin did not want anyone to assume that Sutton was on the team. T.T. 240-42. According Jamie Easley, a witness who was present at Old Waverly, T.T. 249, Sutton kept insisting that he was still on the team and deserved a scholarship. T.T. 250, 260-61. Martin reminded Sutton that he was no longer on the team, and that he needed to return the equipment. Sutton insisted that, "I've earned that bag." Martin told him that it was Mississippi State University property, that Sutton did not pay for the bag,

and that if Sutton kept it, it was an NCAA rule violation. T.T. 140. Sutton claimed that Martin was "ridiculous" and so Martin just walked away. T.T. 141.

One Board witness, Jamie Easley, claimed that he heard the two using profanity. T.T. 252-53. Horrocks, however, testified that Martin used no profanity. T.T. 245. In keeping with the testimony of the other witnesses, Martin testified that he did not use profanity and had never used profanity in dealing with a player. T.T. 140-42, 157.

Martin returned to the team practice. T.T. 142-43, 245. Sutton apparently walked to the car, emptied his clubs out of the university's golf bag, and returned. About 15-20 minutes after the initial conversation, Sutton angrily strode across the course up to Martin. "He came over a hundred yards at me. [Sutton] was the aggressor." T.T. 159. Martin saw Sutton approaching.

> "And I said, just stay here. Let him come to you. Let him bring the bag to you. So I stayed right there. Nat [another team member] backed off and I stayed right there and let him come up to me."

T.T. 142

> "And [Sutton] got to the edge of the green, which was probably twenty yards away, and he said, Greg, you can have your bag. And he walked up to me and shoved the bag at me, got up in my face, was very aggressive and started saying stuff. And I was concerned, because he was angry. And I didn't know what to do. I was thinking I was in a vulnerable position with the bag - - I was holding the bag like this (indicating) with him right here (indicating) in-between us. And so I

> was afraid he was going to cheap shot me and do something stupid, foolish."

T.T. 141-42.

Sutton was "in [Martin's] face" and was so angry that Martin was worried that Sutton was about to hit him. T.T. 158-59. "[Sutton] was angry. He was yelling. He was being aggressive." T.T. 170.

> "So, I pushed him away with my right arm only. And again, he was right up next to me so I pushed him away from here. As he backed up, he didn't fall or anything. As he backed up, the bag went up his shoulder and glanced off the side of his face."

T.T. 142

Jamie Easley, one of the Board's own disinterested witnesses, confirmed Martin's version. T.T. 249-50. He testified that Martin just pushed Sutton away from him with the bag. Martin never swung the bag trying to hit him. T.T. 159, 170-71, 264-65. Sutton then claimed that Martin was crazy and had hit him in the head, and eventually walked away. T.T. 142-43.[1]

Contrary to the Appellee's claim that the "great weight of the evidence" supported their version of the facts, only two people testified that Martin supposedly

---

[1]After the incident, Sutton admitted to others that he had not been injured in any way. T.T. 172. Paul Mott, the head athletic trainer, did an impact test on Sutton, and he was fine. T.T. 168-69, 279-80. However, after Sutton called his father about the incident, he then insisted upon seeing a doctor, and went to the hospital for some very expensive tests that were all negative. The university paid for them. T.T. 172, 279-80, 273.

hit Sutton with the bag. One of those, Craig Horrocks, was impeached by the fact that he was very close friends with Carl Sutton, visited Sutton's home in Georgia with him occasionally, and used Sutton's car. T.T. 246-47.

The jury, therefore, had to decide whether Martin had cursed at Sutton and struck him, so as to violate terms of his contract with the university. The jury decided to believe the witnesses that confirmed Martin's version of the facts. The Defendant's witnesses were not credited by the jury. This was a plain "swearing match" case, and the jury, fulfilling its function as the finder of fact and the sole judge of credibility of the witnesses, determined that Martin was telling the truth and that he did not violate his contract with the university, and that the university breached the contract by firing Martin.

In its order granting Mississippi State University's motion for judgment notwithstanding the verdict, the Court found:

> "that the jury's verdict in this case was the result of bias, prejudice, or passion. The Court bases this decision in part on the jury's question sent to the Court during their deliberations, inquiring whether or not they could find for the plaintiff but not award monetary damages. If the plaintiff had proven its case, then the damages should have been fairly straightforward. However, plaintiff's counsel argued for sympathy during the closing arguments, asking for mercy for a sinner. The great quantum of the evidence from disinterested witnesses was that Gregory Martin struck the student in question with a golf bag to the student's face. Clearly, Martin could not intentionally strike a student under the terms of his employment contract. This action was not done in self-

> defense, nor was an instruction requested at trial which would have allowed to find that he acted in self-defense. Additionally, the jury's award of $10,000, which in no way corresponds to any damages for mental anguish, stress, or lost wages that the plaintiff was seeking, is an indication of the jury's non-reliance on the evidence presented at trial."

"Order," T.T. 236-37.

By saying that "the great quantum of the evidence from disinterested witnesses was that Gregory Martin struck the student in question with a golf bag to the student's face ..." the Trial Court clearly shows that it usurped the responsibility of the jury and chose to credit the defendant's two witnesses, and chose to not believe the two witnesses that said that Martin merely pushed Sutton away from him, after Sutton exhibited a great deal of anger, got up in Martin's face, and put fear in Martin that Sutton was about to strike him. The trial court decided which witnesses it wanted to believe, and replaced its judgment for that of the jury who had already made the decision of whose testimony to credit, despite the Mississippi Supreme Court's repeated statements that the jury is the sole judge of the credibility of witnesses. *Ford v. State*, ___ So.2d. ___ 2008 WL 451569 *8 (Miss. 2008).[2]

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[2]Nor was Martin required to seek a "self-defense" jury instruction. The jury was required to determine whether or not Mississippi State University breached the contract. To do this, the jury merely had to decide whether or not Martin had done something which allowed Mississippi State University to fire him under the terms of the contract. Pushing away an extremely angry person who had gotten within inches of Martin and may have been about to strike him clearly would not be grounds for termination. This is what the jury found.

The jury's note to the judge during deliberations states: "Do we have to give compensation?" T.T. 212. This question does not imply that the jury believed that Martin had done something to merit firing under the terms of the contract, nor does it imply, as the court states, that the jury's verdict "was the result of bias, prejudice, or passion." If the jury had been spurred to bias, prejudice, or passion by plaintiff counsel's closing argument, then they obviously could have awarded a lot more money.

In closing argument, Martin's counsel, Jim Waide, asked the jury to return a verdict for $29,100.00. T.T. 369. Martin testified that what he would have made over the remaining 13 ½ months of the contract would have been about $72,400.00., T.T. 205, and what he did actually make for the 13 ½ months remaining on the contract was $67,500.00.[3] He also testified that health insurance cost him $4,300.00, the lease of a car for the rest of the contract was about $3,900.00, and that retirement paid over the 13 ½ month period would have been about $7,500.00. Martin also testified that the various costs related to the sale of his house and moving were about $16,000.00. On cross examination, Mississippi State University's attorney

[3]In this case, Martin had been making $62,400.00 a year under the contract. T.T. 146, 205. While there were 13 ½ months left on the remainder of the contract, T.T. 146, Martin properly mitigated his damages and immediately got a job making $60,000.00 a year. T.T. 149, 207-08.

challenged the appropriateness of payments for some of these amounts. T.T. 146, 210-214. The jury clearly declined to give Mr. Martin all that he asked for, perhaps sharing the defendant's skepticism over some of his damages, but there is nothing unusual or outrageous that the jury did.

The trial court decided that the jury must have acted on the basis of bias or prejudice, because plaintiff's counsel supposedly argued for sympathy during the closing arguments. Order, T.T. 236. Mississippi State University, of course, made no objection to any such statements by counsel. "If no contemporaneous objection is made, the error, if any, is waived." *Walker v. State*, 671 So.2d 581, 597 (Miss. 1995); *Alpha Gulf Coast, Inc. v. Jackson*, 801 So.2d 709, 727 (Miss. 2001); *McGilberry v. State*, 741 So.2d 894, 908 (Miss. 1999).

Attorney Brent McBride gave the first part of the plaintiff's closing argument, and then Attorney Jim Waide gave the rebuttal portion of the closing argument for the plaintiff, Mr. Waide making the comments referred to by the Court.[4] Mr. Waide's

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[4]Attorney McBride talked solely about the evidence of what a good and competent coach Greg Martin was. McBride talked solely about the evidence from the stand, the background on Sutton being dishonest and not trying, and being eventually kicked off the team but refusing to return the equipment. T.T. 347-49. Attorney McBride talked about Sutton interfering with the practice, Martin asking Sutton for the golf bag, and Sutton arguing illogically that he was still on the team. T.T. 350-51. McBride also talked about how Sutton stormed onto the green at Martin, Martin's version of what happened, and the fact that Martin had a witness that confirmed his version of the facts. T.T. 352-54.

rebuttal, in its entirety, is contained in pages 367-369 of the trial transcript. Mr. Waide said that no one was perfect. He quoted the bible on this point and stated, "All have sinned and come short of the glory of God." T.T. 367. Attorney Waide pointed out that that was why he had asked the athletic director, Templeton, on the stand if Mississippi State University really fired somebody if they made one mistake. Waide pointed out to the jury that Templeton testified that he would look at the whole situation and not base a termination on one incident. T.T. 368. This was not an appeal to prejudice. This was related directly to Instruction P-7, which was given to the jury by the Court. T.T. 194. That instruction states, in part:

> "I charge you that in order for the Defendant Board of Trustees to fire Martin within the four-year contract terms, any breach of contract by Greg Martin would have to be substantial and material.
>
> Not every breach of a contract excuses the duty of the other party to perform. Trivial or excusable acts of misconduct by an employee, such as would be expected as a part of ordinary human behavior, does not constitute a material and substantial breach of contract. Therefore, if you find that any breach of contract by Mr. Martin was not material and substantial, then I charge you that you should return a verdict in favor of the Plaintiff, Greg Martin, and assess his damages."

Instruction P-7, T.T. 194.

At no time did Attorney Waide ask the jury to ignore the instructions, apply a higher law, or to give in to sympathy. Waide reminded the jury of the testimony about what a quality coach Martin was, the disrespect shown by Carl Sutton. He

reminded the jury about how Sutton even argued about whether or not the coach could kick him off the team, and about the fact that Sutton had skipped practice by lying about being hurt. T.T. 369. Waide said, "He wasn't perfect, but he complied to his contract. He did all he could do to comply with his contract." He asked the jury to find that Martin did not assault Sutton and that Martin had complied with his contract. T.T. 369.

The use of a biblical reference in closing arguments is acceptable, and counsel are afforded broad latitude. *Berry v. State*, 882 So.2d 157, 165 (Miss. 2004); *Scott v. State*, 878 So.2d 933, 973 (Miss. 2004); *Carr v. State*, 655 So.2d 824, 853 (Miss. 1995). Plaintiff counsel's statements are particularly unobjectionable in light of the fact that they went directly to one of the jury instructions given by the Court. *Dycus v. State*, 875 So.2d 140 (Miss. 2004), discussed the broad latitude allowed in closing arguments in the context of religious imagery. The Court pointed out that it is perfectly legitimate to use the bible to illustrate a point to the jury. *Dycus v. State*, at 171-72. The Court did point out things which an attorney cannot do. "He cannot, however, state facts which are not in evidence, and which the Court does not judicially know, in aid of his evidence. Neither can he appeal to the prejudices of men by injecting prejudices not contained in some source of the evidence." *Dycus v. State*, at 172 (quoting *Nelms & Blum Co. v. Fink*, 131 So. 817, 820 (Miss. 1930)).

Attorney Waide did neither of those things.

CONCLUSION

The trial court usurped the authority of the jury, which is to be the sole judge of the credibility of the witnesses. Nothing about the jury's verdict indicates that there was "bias, prejudice, or passion." The trial court granted its motion for judgment notwithstanding the verdict, substituting its opinion as to the credibility of the various witnesses. There was far from a "great quantum of the evidence from disinterested witnesses" that support the defendant's case. Two people swore that Martin did not hit Sutton. Two people, at least one of whom was impeached by his close friendship with Sutton, stated that Martin did hit Sutton. Looking only to the sufficiency of the evidence, and taking all of the testimony in the light most favorable to the non-moving party, the jury verdict is clearly based upon "evidence of such quality that reasonable and fair-minded jurors in the exercise of fair and impartial judgment might reach different conclusions." *Prudential Ins. Co. Of America v. Stewart*, 969 So.2d 17, 21 (Miss. 2007).

Therefore, for the above-stated reasons, the Plaintiff-Appellant Gregory S. Martin prays that this Court will reverse the Circuit Court of Oktibbeha County's grant of judgment notwithstanding the verdict and reinstate the jury verdict in this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Luther C. Fisher, IV, attorney for Plaintiff/Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following, as well as a 3.5 WP disk:

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Honorable Lee Howard
c/o Ms. Dorothy Langford
Oktibbeha County Court Administrator
P.O. Box 1387
Columbus, MS 39703

THIS the 28th day of February, 2008.

LUTHER C. FISHER, IV

MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2007-CA-00280

GREGORY S. MARTIN

APPELLANT

VERSUS

MISSISSIPPI STATE INSTITUTIONS OF HIGHER LEARNING

APPELLEE

CERTIFICATE OF COMPLIANCE

Pursuant to Miss. R. Civ. P. 32, the undersigned certifies this brief complies with the type-volume limitations of Rule 32.

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This, the 28th day of February, 2008.

BY: _____

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