IN THE SUPREME COURT OF MISSISSIPPI

ESTATE OF BRANDON BOLDEN, BY AND
THROUGH MARILYN BOLDEN, ADMINISTRATRIX — APPELLANT

VERSUS — CASE NO.: 2007-CA-01121

CEDRIC WILLIAMS AND
AUTOZONE MISSISSIPPI, INC. — APPELLEES

REPLY BRIEF OF THE APPELLANT

ATTORNEYS FOR APPELLANT:

GARY D. THRASH / [redacted]
JOHN N. SATCHER, II / [redacted]
SINGLETARY & THRASH-JACKSON, P.A.
POST OFFICE BOX 587
JACKSON, MS 39205-0587
(601) 948-7410

IN THE SUPREME COURT OF MISSISSIPPI

ESTATE OF BRANDON BOLDEN, BY AND THROUGH MARILYN BOLDEN, ADMINISTRATRIX — **APPELLANT**

VERSUS — **CASE NO.: 2007-CA-01121**

CEDRIC WILLIAMS AND AUTOZONE MISSISSIPPI, INC. — **APPELLEES**

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.

The Estate of Brandon Bolden, By and Through Marilyn Bolden, Administratrix, Appellant

Cedric Williams, Appellee

Autozone Mississippi, Inc., Appellee

Honorable W. Swan Yerger, Circuit Court Judge of Hinds County

John N. Satterfield

Attorney of Record for Appellant

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES

Authority **Page(s)**

Statutes

Rules

IN THE SUPREME COURT OF MISSISSIPPI

ESTATE OF BRANDON BOLDEN, BY AND THROUGH MARILYN BOLDEN, ADMINISTRATRIX — **APPELLANT**

VERSUS — **CASE NO.: 2007-CA-01121**

CEDRIC WILLIAMS AND AUTOZONE MISSISSIPPI, INC. — **APPELLEES**

BRIEF OF APPELLANT, ESTATE OF BRANDON BOLDEN, BY AND THROUGH MARILYN BOLDEN, ADMINISTRATRIX

COMES NOW THE APPELLANT, the Estate of Brandon Bolden, by and through Marilyn Bolden, Administratrix (hereinafter "Appellant" or "Bolden"), and files this its Appellant's Rebuttal Brief, and would respectfully show unto the Court the following, to-wit:

SUMMARY OF THE ARGUMENT

Bolden timely and properly designated his treating physicians as experts witnesses to testify at trial. The trial court's finding that Plaintiff's experts should be stricken as a result of discovery violations pursuant to Miss.R.Civ.P. 26(b)(4) was not well founded. Bolden properly designated his treating physicians and he was not required to provide written and signed reports, in addition to the physicians' medical records provided and opinions contained therein, as argued by Defendants. Bolden's treating physicians should have been allowed to testify at trial as to the facts known to them and opinions contained in their medical records. Defendants also had their designation of expert witnesses stricken; however, Defendants hired experts and the standard for non-treating physicians requires written and signed reports to be provided in a timely manner or pursuant to the

trial court's scheduling order. Defendants' designation of expert witnesses provided no records, no opinions, no written or signed reports. As such, the trial court was correct in striking Defendants experts; however, the trial court later relaxed its position that the Defendants' experts were stricken pursuant to Miss.R.Civ.P. 26(b)(4) and stated that the Defendants were "hamstrung" and unable to properly designate their experts because Plaintiff did not first designate his experts properly. To presume that Defendants could not timely or properly designate their expert physician witnesses after receiving the names, contact information, areas of expertise, curriculum vitaes, and medical records of Plaintiff's treating physicians is the incorrect standard. In addition, Defendants argued that Plaintiff's treating physicians failed to provide separate written and signed reports, as required by non-treating physicians (experts); however, that is not required in order for the plaintiff's treating physicians to testify to the knowledge, facts and diagnosis contained in the medical records.

The trial court erred in striking Plaintiff's Trial Exhibits 3-10 from evidence at the end of trial which had been properly admitted into evidence during Plaintiff's case in chief. Pursuant to Miss. Code Ann. § 41-9-119 testimony that medical, hospital, and/or doctor bills were incurred because of any injury shall be *prima facie* evidence that such bills incurred were necessary and reasonable. In our case, Bolden testified as to his injuries suffered, the medical treatment and rehabilitation received, and the medical expenses that were incurred from the medical providers. As in our case, the medical expenses were then properly admitted into evidence. The burden then shifts to the opposing party to rebut such damages by putting forward proper proof, in the form of medical testimony, tending to negate the necessity and reasonableness of the expenses. However, Defendants provided no such evidence or proof to the trial court and, as such, Plaintiff's medical expenses should not have been stricken from evidence. Further, the trial court erred in striking Plaintiff's

medical expenses for lack of medical testimony providing a causal connection between Plaintiff's head, back, shoulder and leg pain and the accident. Judge Yerger admitted that it was undisputed that the Plaintiff suffered injuries to his head, neck, shoulder and other injuries as a result of the collision with Defendant's windshield; however, Judge Yerger then ruled that the Defendants were handicapped in refuting the reasonable and necessity of the medical bills (See Appellant's R.E. 7, Page 15 Line 18 – Page 16 Line 6). There is no authority which supports the trial court's rationale. Defendants were in sole control of their own actions or inactions and were not restricted from properly and timely designating their "hired gun" physicians to testify as expert witnesses. The trial court's decision to exclude Plaintiff's medical expenses incurred after the day of the accident severely prejudiced the Plaintiff from recovering his real damages and eliminated the opportunity to present all of his damages to the jury. The trial court's decision, robbed the jury from their role as finders of fact, in weighing the evidence, the credibility of the witnesses, and determining whether or not the accident had caused the injuries which Bolden testified. As a result of the trial court's decision to strike Plaintiff's designation of treating physicians as expert witnesses and its decision to strike Plaintiff's medical expenses incurred after the day of the accident, Plaintiff was unfairly prejudiced and unable to obtain a fair trial. The trial court abused its discretion in both regards and the result caused harm to the Plaintiff and entitles him to have his case reversed and remanded with regards to either abuse of discretion made by the lower court.

ARGUMENT AND LAW

I. Bolden testified and submitted his medical bills into evidence pursuant to Miss. Code Ann. § 41-9-119 (1972) and the trial court admitted the medical bills into evidence as Trial Exhibits 1-10.

In our case, Bolden testified at trial as to the injuries he sustained as a result of being struck by Williams (employed by AutoZone at the time of the accident), the medical services that he received and the medical bills that were incurred as a result. The medical bills were then properly admitted into evidence as Trial Exhibits 1-10. However, the trial court then abused its discretion by removing Trial Exhibits 3-10 at the close of the case, after both parties had rested. Immediately prior to submitting the evidence to the jury to deliberate, the trial court Honorable Judge Yerger struck Plaintiff's Trial Exhibits 3-10 (which included all medical bills after the day of the accident, approximately a year's worth of treatment and rehabilitation) (Appellant's R.E. 7, Page 16 Lines 20-29 and Page 18 Lines 1-8).

This Court has previously ruled that when a party testifies as to the injuries received, his physical pain or mental suffering, and presents medical bills that he claims were incurred as a result of the accident, it becomes *prima facie* evidence that must be admitted. See Dennis v. Prisock, 221 So.2d 706, 710 (Miss. 1969); Jackson v. Brumfield, 458 So.2d 736 (Miss. 1984); Stratton v. Webb, 513 So.2d 587 (Miss. 1987); Miss. Code Ann. § 41-9-119.

In Dennis v. Prisock, 221 So.2d 706 (Miss.1969), effectively addressed this issue:

> Any witness is competent to testify who has evidentiary facts within his personal knowledge, gained through any of his senses. A nonprofessional witness may describe personal injuries. Physical pain, weakness, exhaustion and the like are matters one may testify about. [citations omitted].

The Court in Dennis stated that Mrs. Prisock could testify that she had pain in her back as a result

of the collision, that this back condition prevented her from performing her normal activities, and that the pain lasted until she was relieved by an operation. Dennis v. Prisock, 221 So.2d 706, 710, 711. She could testify that her back hurt after an accident, and that there was no additional hurt as a result of a later accident. Id. See Marley Construction Co. v. Westbrook, 234 Miss. 710, 107 So.2d 104 (1958).

A review of the record in Stratton v. Webb discloses that Webb testified that her vehicle was hit from the rear, causing her head to hit the window. She immediately began to experience severe back and leg pain which had persisted to the date of the trial. She suffered no additional injury to her legs and back as a result of subsequent accidents and has been unable to perform her duties as a wife and homemaker since the initial accident. The court in Stratton ruled that the evidence was clearly admissible.

Stratton alleged that the expenses incurred after the December 3 accident should not have been admitted because of the absence of causal connection to the November 1 accident. However, Mrs. Webb testified that the expenses were incurred as a result of continuing treatment for injuries sustained on November 1. In our case, Bolden testified as to all of his medical treatment and bills incurred as a result of the December 20, 2002 accident and likewise, the trial court Honorable Swan Yerger properly admitted the medical bills into evidence as Trial Exhibits 1-10.

In Jackson v. Brumfield, 458 So.2d 736, 737 (Miss.1984), this Court stated:

> When a party takes the witness stand and exhibits bills for examination by the court and testifies that said bills were incurred as a result of the injuries complained of, they become prima facie evidence that the bills so paid or incurred were necessary and reasonable. However, the opposing party may, if desired, rebut the necessity and reasonableness of the bills by proper evidence. **The ultimate question is then for the jury to determine.** {emphasis added}

The Court in Stratton, relying on the precedent of Jackson, stated that Webb's testimony was sufficient basis for admissibility of bills. As stated in Stratton, Miss. Code Ann. § 41-9-119 (1972), **requires only "proof that the bills were incurred or paid" to sustain its admission.** {emphasis added}. Stratton v. Webb, 513 So. 587, 591.

The majority of cases cited by Appellant AutoZone, which they contend support's their position and Judge Yerger's decision to strike Bolden's damages (Exhibits 3-10), provided expert medical testimony at trial to rebut the plaintiff's testimony and the causal connection of medical bills incurred as a result of the stated accident. In the following cases cited by Defendants, Herring v. Poirrier, 797 So.2d 797 (Miss. 2000); Callahan v. Ledbetter, _____ So.2d_____, No. 2007-CA-00908-COA (Miss. Ct App. 2008); Jackson v. Swinney, 244 Miss. 117, 140 So.2d 555 (1962); Cassibry v. Schlautman, 816 So.2d 398 (Miss. Ct. App. 2001); and Walker v. Gann, 955 So.2d 920 (Miss. Ct. App. 2007), the defendants in said cases offered the testimony of a defense expert physician to rebut the reasonableness or causal connection of the disputed medical bills. AutoZone presented no expert witnesses at trial to rebut the reasonableness of the bills nor did AutoZone submit any expert testimony to the jury to persuade the jury that the testimony of Bolden was insufficient or to negate the causal connection presented by Bolden.

In our case and as conceded by AutoZone, Bolden was the proper witness to establish the medical bills he incurred and relate his injuries and pain associated thereto. See Purdon v. Locke, 807 So.2d 373 (Miss. 2002); Moody v. RPM Pizza, Inc., 659 So.2d 877 (Miss. 1995); Green v. Grant, 641 So.2d 1203 (Miss. 1994); Stratton v. Webb, 513 So.2d 587 (Miss. 1987). Further, these cases stand for the precedent that it is up to the jury to decide which disputed medical bills are related and which ones are not. AutoZone failed to rebut the medical bills admitted into evidence

by Bolden and did not present any expert medical testimony to contradict Bolden's testimony regarding his injuries and the related physical therapy he endured.

Honorable Swan Yerger became the finder of fact and took the decision making away from the jury and took it upon himself to decide which medical bills would be related to the accident and which ones would not. Honorable Yerger's decision to strike from evidence Bolden's medical bills, that had been admitted the previous day at trial, was in error and an abuse of his discretion. Judge Yerger removed from evidence medical bills that were incurred by Bolden during the month following the pedestrian / automobile accident on December 20, 2002; even removing the bills that were as recent as three (3) days following the accident, where Bolden was seen by his family physician and then referred to Dr. James Randall Ramsey of Mississippi Sports Medicine; including removal of the corresponding MRI tests that were ordered by Dr. Ramsey and performed at Mississippi Diagnostic Imaging. Bolden testified regarding his injuries and submitted the medical bills he incurred into evidence and the jury was the proper decision makers to determine what testimony they would consider the most reliable and which medical bills were reasonable and proper as related to the accident by the testimony before them.

In addition, the Mississippi Supreme Court as well as the U.S. Court of Appeals for the Fifth Circuit has found that expert or medical testimony is not required to establish a causal connection with the injuries alleged and the accident that caused said injuries. See Bates v. Merchants Company, 249 Miss. 174, 161 So.2d 652 (Miss. 1964); Hamburger v. State Farm Mut. Auto. Ins. Co., 361 F.3d 875, 57 Fed.R.Serv.3d 1087, 63 Fed.R.Evid.Serv. 1108 (5th Cir. 2004). Where an injured person has testified as to their injuries and pain it is up to the jury to determine the credibility of the witnesses and the causal connection between the injuries alleged, the accident, and the medical

bills incurred. In Hamburger, the trial court concluded that expert testimony was not required because "the jury should be entitled to decide causation with or without medical testimony in areas of common experience." Hamburger, 361 F.3d 875, 885 quoting Fidelity & Guaranty Ins. Underwriters, Inc. v. La Rochelle, 587 S.W.2d 493, 494 (Tex. App. Dallas 1979, writ dism'd).

Furthermore, looking at Honorable Swan Yerger's own opinion (Appellant's R.E. 7, Page 13 Lines 3-8) the trial court admits that AutoZone failed to rebut Bolden's damages (medical bills) by failing to refute his medical expenses incurred. However, Judge Yerger took his decision one step further and took the decision making power away from the jury when he stated:

> In the opinion of the Court, **the only plausible medical treatment based on the circumstances as far as the reasonableness and necessity is the one on the day of the accident** when the undisputed evidence is that, of course, the plaintiff came in contact with the windshield of defendant's vehicle and broke the windshield, complained of shoulder injuries after that, some other injuries, but that seemed to be the primary one, a cut on the head and some other things, some neck complaint.
>
> But beyond that, the day of the accident, there are a lot of unknowns. And again, the defendants are handicapped in refuting the reasonable and necessity of these medical bills because of the turn of events regarding the medical experts.
>
> The Court believes that under all the facts and circumstances **it would be unfairly prejudicial to the defendants to be responsible for any medical treatment and/or hospital treatment following the day of the accident**...
>
> They (AutoZone) had no medical expert. They were hamstrung.
>
> See Appellant's R.E. 7, Page 15 Lines 18-29, Page 16 Lines 1-6 and Lines 20-25, and Page 18 Lines 1-8.

Judge Yeger took the role of the jury upon himself and determined which medical bills he would relate to the accident and what damages, if any, Bolden could recover. It was an abuse of discretion for Judge Yerger to determine that the "only plausible medical treatment" was received on the day of the accident. That assertion is clearly erroneous. Bolden saw his treating physicians

in consecutive days, weeks and months following the accident. Bolden, a pedestrian, was struck by a vehicle moving approximately 30-35 mph and landed approximately fifty feet from the point of impact. It is not plausible to think that the only medical attention required would be the day of the accident. Bolden asserts that it is more plausible and more probable to think that follow-up visits and further medical testing and/or rehabilitation would be required in a vehicle/pedestrian accident than just the day of the accident. Judge Yerger's decision to strike all medical evidence beyond the day of the accident boggles the mind; and, to then state that his rationale for such was "it would be unfairly prejudicial to the defendants to be responsible for any medical treatment and/or hospital treatment following the day of the accident" boggles the mind even further (See Appellant's R.E. 7, Page 16 Lines 21-25) see also Page 18 Lines 1-8).

II. Bolden's treating physicians were timely and properly designated as experts and this issue for appeal was preserved through plaintiff's Designation of Experts Witnesses, Supplemental Designation of Expert Witnesses, and plaintiff's Response to AutoZone's Motion to Strike Expert Witnesses.

The courts in Mississippi treat the designation of treating physicians separate and apart from the designation of hired expert witnesses. In the case of Robbins v. Ryan's Family Steak Houses East, Inc., 223 F.R.D. 448 (S.D. Miss. 2004) the Court noted that Rule 26.1(A) of the Uniform Local Rules of the Northern and Southern Districts of Mississippi and the corresponding Advisory Committee Notes "treat disclosure procedures and expert designation procedures of **treating physician** experts differently as compared to expert witnesses in general." {emphasis added} According to the Court in Robbins, when designating a treating physician as an expert witness it is not mandatory that the designation be accompanied by a separate written report including the opinions to which the expert (treating physician) will testify. Id. at 453. The Court in Robbins went

on to say that "the different treatment applies to treating physicians, not to non-treating physicans, sometimes referenced as "hired gun" physicians, who are retained to offer expert opinions for a calling party." Id. The Court in Robbins added that when a treating physician is designated as an expert witness, without a written and signed report, the treating physician will be limited at trial to testify only to those opinions expressed in the office records. Id. As in our case, Bolden's presentation of his medical injuries and diagnosis were severely prejudiced and his substantial right to present the testimony of his treating physicians was affected.

The trial judge deviated from the standard of allowing treating physicians to testify as to the information contained in the their medical records and his decision to not allow the treating physicians to testify at trial was in violation of Bolden's substantial rights. The trial court committed plain error and deviated from Mississippi law which severely prejudiced the outcome of the trial for Bolden. See University of Mississippi Medical Center v. Peacock, 972 So.2d 619 (Miss. App. 2006) citing Cox v. State, 793 So.2d 591, 597 (Miss. 2001).

The plain error rule is found in Miss. Rules of Evid. 103(d). Looking at the Comments to Rule of Evidence 103(d) it states:

> Subsection (d), regarding plain error, is a restatement of that doctrine as it existed in pre-rule practice. It reflects a policy to administer the law fairly and justly. If the party persuades the court of the substantial injustice that would occur if the rule were not invoked, the court may invoke the rule. See Edwards v. Sears, Roebuck & Co., 512 F.2d 276 (5th Cir. 1975). The plain error may be applied in either criminal or civil cases. See House v. State, 445 So.2d 815 (Miss. 1984).

The trial court's error in not allowing the treating physicians to testify amounts to plain error and is inconsistent with the precedent in Mississippi. See Robbins v. Ryan's Family Steak Houses East, Inc., 223 F.R.D. 448 (S.D. Miss. 2004); and Mitchell v. City of Gulfport, _____ F.Supp.2d _____, 2005 WL 3116071 (S.D. Miss. 2005). In Mitchell the court found that the trial court was

incorrect in striking plaintiff's treating physicians. Mitchell v. City of Gulport, 2005 WL 3116071 *2. The Court determined that the requirements to submit a signed and written report with expert designations do not apply to treating physicians. Id. However, the treating physicians designated as such, could then only testify at trial limited in scope to the opinions contained in their written reports or in the physicians' office records. See Hamburger v. State Farm Mutual Auto. Ins. Co., 361 F.3d 875, 882 & n.4 (5th Cir. 2004). In our case, the trial court committed reversible error when striking Bolden's treating physicians who had been timely designated with attached medical records and not allowing them to testify as to the information contained in their records. Judge Yerger should have allowed the treating physicians to testify at trial and properly limit their testimony to the facts and information contained in their records. It is for this reason that the trial court committed error which substantially harmed the rights of Bolden to a fair and just trial. This Court must take notice that Bolden's rights have been substantially harmed and an injustice would occur if the lower court was not overruled on the issues presented.

WHEREFORE, PREMISES CONSIDERED, the Estate of Brandon Bolden, by and through Marilyn Bolden, Administratrix prays that the decision of the Hinds County Circuit Court be reversed and remanded for a new trial.

RESPECTFULLY SUBMITTED, this the 15th day of October, 2008.

THE ESTATE OF BRANDON BOLDEN,
BY AND THROUGH MARILYN BOLDEN,
ADMINISTRATRIX, APPELLANT

BY: SINGLETARY & THRASH, P.A.
Its Attorneys

BY: John N. Satcher II
GARY D. THRASH / M[redacted]
JOHN N. SATCHER, II / [redacted]

CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this day mailed, postage prepaid, through the U.S. Mail, a true and correct copy of the above and foregoing Appellant's Reply Brief to:

Keith D. Obert, Esq.
Obert Law Group, P.A.
P.O. Box 2081
Madison, Mississippi 39130-2081

Honorable W. Swan Yerger
Circuit Court of Hinds County
P.O. Box 327
Jackson, MS 39205

So certified, this the 15th day of October, 2008.

John N. Satcher II

GARY D. THRASH
JOHN N. SATCHER, II

GARY D. THRASH / [redacted]
JOHN N. SATCHER, II [redacted]
SINGLETARY & THRASH, P.A.
P.O. BOX 587
JACKSON, MISSISSIPPI 39205
(601) 948-7410