IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01622

RT

DOT MERCHANT, as Administratrix of THE ESTATE OF CHARLES ERNIE HARRIS, SR. and on behalf of all WRONGFUL DEATH BENEFICIARIES of CHARLES ERNIE HARRIS, SR. **APPELLANTS**

V.

FOREST FAMILY PRACTICE CLINIC, P.A., JOHN P. LEE, M.D., and JOHN DOES 1-10 **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF SCOTT COUNTY, MISSISSIPPI

CERTIFICATE OF INTERSTED PERSONS

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

Peggy Harris
Bradley Harris
Brian Harris
Charles Harris, Jr.
Shane F. Langston
Rebecca M. Langston
Clinton L. Martin
Langston & Langston, PLLC
201 North President Street
Jackson, MS 39201- Appellants

Dr. John P. Lee
James A. Becker, Jr., Esq.
Mildred M. Morris, Esq.
Timothy L. Sensing, Esq.
Watkins & Eager, PLLC
The Emporium Building
400 East Capitol Avenue, Suite 300
Jackson, Mississippi 39205- Appellees

Hon. Marcus D. Gordon
Scott County Circuit Court Judge
Post Office Drawer 220
Decatur, Mississippi 39327

This the 12th day of January, 2011.

Shane F. Langston, Esq.
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01622

DOT MERCHANT, as Administratrix of THE ESTATE OF CHARLES ERNIE HARRIS, SR. and on behalf of all WRONGFUL DEATH BENEFICIARIES of CHARLES ERNIE HARRIS, SR. **APPELLANTS**

V. **CAUSE NO.**

FOREST FAMILY PRACTICE CLINIC, P.A., JOHN P. LEE, M.D., and JOHN DOES 1-10 **APPELLEES**

ON APPEAL FROM THE CIRCUIT COURT OF SCOTT COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT

Appellant Dot Merchant, as Administratrix of the Estate of Charles Ernie Harris, Sr., and on behalf of all Wrongful Death Beneficiaries of Charles Ernie Harris, Sr. ("the Harris Family"), files this Reply Brief of Appellant as allowed under Rule 28(c) of the Mississippi Rules of Appellate Procedure.

Appellant's Reply to "A Preliminary Matter"

At first blush, it seemed strange that appellees Dr. John Lee and the Forest Family Practice Clinic (sometimes collectively referred to as "Appellees") devoted three complete pages of their Brief of Appellees to "A Preliminary Matter," i.e., an issue that the Harris Family did not address in their Brief of Appellant and that appears to have no relevance to the appellate issues before this Supreme Court. (Brief of Appellees, pp. 8-11) It soon became apparent, however, that Appellees discussed this issue to attempt to prejudice this Supreme Court against the Harris Family by implying that Mrs. Peggy Harris, i.e., the original administratrix, is a fraud; and/or to imply that undersigned counsel in this case has a history of paranoid, unfounded claims of

judicial misconduct. The claims of judicial error and juror prejudice and misconduct in the trial court below, Appellees suggest, should be discounted for these reasons. The Harris Family, therefore, will thoroughly respond to "A Preliminary Matter."

Peggy Harris, the originally appointed administratrix of the Estate of Charles Harris, Sr., deceased, and the deceased Charles Harris, Sr., a decorated Vietnam veteran, married in 1966. During their marriage they had three sons: Charles Ernie Harris Jr.; Bradley John Harris; and Brian Anthony Harris. (R. 227-28; R.E.A., 227-28) Neither Mr. Harris nor Mrs. Harris had any other children.

In 1982 while living in Olympia, Washington Mr. and Mrs. Harris divorced. Mrs. Harris remained in Olympia and maintained full custody of her three sons. (R. 583-591) She then married a man named Paul McJunkin and she and her three sons resided with Mr. McJunkin in Olympia.

The marriage to Mr. McJunkin was short-lived. They divorced in 1985 and in 1986 Mrs. Harris reunited with Mr. Harris where they lived together for twenty (20) more years as husband and wife until Mr. Harris' death in 2006.[1] (R. 227-28) During this period of time Mr. and Mrs. Harris lived six years, from 1992 to 1996, in South Carolina, i.e., a state that recognizes common-law marriage. Id.

When Mr. and Mrs. Harris reunited in 1986 she reclaimed the name "Harris", secured a driver's license in the name "Harris", filed joint tax returns as husband and wife, shared a joint checking account in the names "Harris", and in all respects lived as husband and wife until Mr. Harris' death in 2006. Id. As she acknowledged, however, in her deposition testimony given in the trial court below Mr. and Mrs. Harris never had a second formal marriage ceremony.

[1] Mrs. Harris insists that she and Mr. McJunkin were divorced but cannot locate a divorce decree.

When Mr. Harris died in 2006 the obvious selection as the estate representative was Mrs. Harris. Mr. and Mrs. Harris' three adult sons, Charles Harris, Jr. who works as an investigator for the Mississippi Bureau of Narcotics, Bradley John Harris who is a special agent for the Federal Immigration and Customs Enforcement, and the youngest adult son Brian Anthony Harris who works for J.P. Morgan Chase, all recognized their parents as husband and wife and all supported and desired that their mother Peggy Harris be appointed as administratrix of the estate. All of these adult children believed that their mother had divorced Mr. McJunkin and remarried their father. (R. 583-91; R.E.A. 583-91)

After her husband's death Mrs. Peggy Harris, who in good faith believed that she was the lawful wife of Charles Harris, Sr., deceased, petitioned the chancery court of Leake County, Mississippi to be appointed administratrix. All three of her and Mr. Harris' adult sons filed in the chancery court sworn Joinders adopting their mother's Petition and agreeing that she should be appointed as administratrix of their father's estate. (R. 221-26) Following such lawful appointment in May 2008 she initiated the subject wrongful death suit in her individual capacity and on behalf of all wrongful death beneficiaries.

Mrs. Harris in the subject wrongful death suit gave her deposition testimony in late 2008 where she acknowledged that she and Mr. Harris did not have a second marriage ceremony when they reunited in 1986. Soon thereafter, on December 23, 2008, Appellees in the trial court below filed a Motion to Dismiss claiming that Mrs. Harris' appointment as administratrix in Leake County was a fraud and that Judge Gordon, i.e., the circuit court trial judge, "is not required to recognize Plaintiff, acting as administratrix of Mr. Harris' estate, as a proper party to the current lawsuit." (R. 194-96; R.E.A. 194-96)

The Harris Family in January 2009 responded to the Motion to Dismiss. (R. 210-28; R.E.A. 210-28) In addition to the presentation of affidavit testimony from Mrs. Harris and her three sons showing that no one made any attempt to mislead either the chancery court or the circuit court, the Harris Family pointed out the obvious, i.e., that the Motion to Dismiss was grounded on an attempt in the Scott County Circuit court to collaterally attack a valid order of the Leake County Chancery Court.[2] Id. The Harris Family argued that if Appellees believed that Mrs. Harris – who was the duly appointed administratrix of the estate – should be removed in that capacity then the proper mechanism would have been to seek to intervene in the chancery proceeding and address the issue with Leake County Chancellor Cynthia Brewer. The circuit court had no authority to void the order of the chancery court.

What happened after this, in some material respects, is a mystery to the Harris Family. Prior to a hearing or ruling on the circuit court's Motion to Dismiss, the Leake County Chancery Court on February 10, 2009 entered a "Show Cause" order noting that, "It has come to the attention of this Court by an affidavit filed in the Circuit Court of Scott County that the Administratrix may not have been the lawful wife of the Decedent at the time of his death. . . ." (R. 417; R.E.A. 417) The "Show Cause" order commanded Mrs. Harris and her counsel, then undersigned counsel's associate Mr. Robert Greenlee, Esq., to appear on March 11, 2009 and "show cause why the Administratrix should not be removed in her fiduciary role." Id.

This "Show Cause" order was NOT received by Mr. Greenlee or anyone in undersigned counsel's office. (R. 367-98; R.E.A. 367-98) Neither Mrs. Harris nor her counsel had knowledge

[2] The actions of a duly appointed administratrix are valid and binding (and may be ratified by the successor administratrix) even if such administratrix procured the appointment through a misrepresentation. See Estate of Moreland v. Moreland, 537 So. 2d 1337 (Miss. 1989) (wrongful death claim of mother of deceased properly initiated by mother who was appointed administratrix in error upon misrepresentation that she was wrongful death beneficiary when in fact minor child was sole wrongful death beneficiary; mother of child substituted as administratrix, actions of prior administratrix ratified, and action continued.)

that Chancery Judge Brewer had set a hearing to remove Mrs. Harris as administratrix. (R. 372; R.E.A. 372) On March 11, 2009, Chancellor Brewer conducted a hearing without the presence of Mrs. Harris or her counsel. No phone calls or any other attempts were made to contact Mrs. Harris or her counsel and ask why they were not present at the hearing as previously order in the "Show Cause" order. Instead, the hearing proceeded without Mrs. Harris or her counsel and the Chancery Judge entered an order on March 13, 2009 removing Mrs. Harris as administratrix, substituting in her place Dot Merchant, Leake County Chancery Court Clerk, and sanctioning Robert Greenlee, Esq., $100 for not appearing at the March 11th hearing. (R. 406-07)

When undersigned counsel learned of Chancellor Brewer's actions, undersigned counsel on March 24, 2009 immediately contacted Chancellor Brewers' office to explain that neither Mrs. Harris nor her counsel received notice of the "Show Cause" hearing. Oddly, and yes somewhat disturbingly, Chancellor Brewer responded that she would not entertain "ex parte" communications with counsel for the estate and that any pleadings and requests for rehearing should show a copy to counsel for the circuit court defendant Dr. John Lee. (R. 379-81; R.E.A. 379-81) This communication, at a minimum, was perplexing because Dr. Lee was not a party to the chancery court proceedings. Neither he nor his counsel had filed any pleading seeking to intervene in the chancery court proceedings. There was only one "parte" to the chancery proceedings and that was the Estate of Charles Ernie Harris, Sr., deceased. Chancellor Brewer was treating the proceedings as though Dr. Lee had intervened and the proceedings were adversary.

Following the above communication, Mr. Greenlee wrote a letter to Chancellor Brewer and, consistent with the Chancellor's directive, copied counsel for Dr. Lee. (R. 424-25) This letter was followed by a Petition for Rehearing requesting that Mrs. Harris be returned as

administratrix or, alternatively, that the adult son Charles Harris, Jr., i.e., the investigator with the Mississippi Bureau of Narcotics, or another of the adult, undisputed wrongful death beneficiaries / children be substituted in place of chancery clerk Dot Merchant who, after all, had no personal interest in the underlying wrongful death suit. (R. 409-503) The Petition for Rehearing was accompanied by voluminous exhibits. Dr. Lee, again a non-party to the chancery proceedings, filed a rambling "Response to Petition for Rehearing" claiming "an interest in the outcome of this matter . . . ." (R. 504,508)[3]

A hearing on Mrs. Harris' Petition for Rehearing was held on April 14, 2009. Dr. Lee fully participated in the hearing but never clarified what interest he had in the matter. Undersigned counsel for the Harris Family questioned Chancellor Brewer about the *ex parte* communications that she had with someone, presumably Judge Gordon, regarding this issue and her unorthodox *sua sponte* directive to notice Dr. Lee's circuit court counsel on the estate proceedings. Chancellor Brewer offered no response. (R. 529-60)

Ultimately, the chancery court refused to reinstate Mrs. Harris as administratrix, refused to substitute one of the adult children in place of Dot Merchant as estate representative, and rescinded the $100 sanction earlier levied against Mr. Greenlee relative to the "Show Cause" hearing of which the Harris Family had no notice. (R. 361-62) (A complete transcript of the hearing is included in the Supreme Court record at R. 367-98 and 529-60.)

Following the above proceedings in chancery court Dr. Lee made multiple filings and arguments in the circuit court proceedings seeking to dismiss the wrongful death complaint. In these filings and arguments Dr. Lee continually misrepresented the findings of Chancellor Brewer claiming that Chancellor Brewer had found that Mrs. Harris and her adult children had

[3] The "interest" that Dr. Lee claimed in the outcome of whether Mrs. Harris or one of her adult children would be substituted in place of Dot Merchant as administratrix was not articulated in Dr. Lee's Response.

all participated in a fraud and, consequently, the circuit court action should be dismissed. (R. 363-66; 399-404) Chancellor Brewer, of course, had made no such finding. And while Circuit Court Judge Gordon by order entered May 12, 2009[4] properly denied Dr. Lee's multiple motions to dismiss, Judge Gordon inexplicably refused to allow the three adult sons and undisputed wrongful death beneficiaries of Mr. Harris to be joined as additional party plaintiffs along with the personally disinterested administratrix Dot Merchant. (R. 22-26) The trial of this cause, therefore, proceeded not with Mr. Charles Harris, Jr., nor Mr. Bradley Harris, nor Mr. Brian Harris as the estate representative but with Dot Merchant as the sole plaintiff.

Neither the Harris Family nor their undersigned counsel is paranoid. These proceedings were clouded with suspicion and unorthodox *sua sponte* and *ex parte* actions long before the unprecedented acts of prejudice, error and juror misconduct shown in the original Brief of Appellant. The Harris Family, however, on appeal chose only to focus on the blatant errors at trial. Ironically, it is the Appellees who forced these other chancery court issues to the forefront.

Appellees' Claim that Appellant Was Not Prejudiced by Opposite Counsel's Unsolicited, Outrageous Remark that "Mr. Langston is suing Dr. Clark just up the road."

Though the multiple errors in the trial below are difficult to rank in terms of prejudice, none perhaps is greater and more calculated to prejudice than the remark by opposite counsel Mildred Morris, Esq., to the jury that, ". . .Mr. Langston is suing Dr. Clark just up the road." (R. 191) Tellingly, though, Appellees devoted only two pages addressing this issue in contrast to three pages that they devoted to "A Preliminary Matter" discussed above. (Brief of Appellees, pp. 20-22)

[4] Judge Gordon also denied Dr. Lee's *ore tenus* motion for certification of issue for interlocutory appeal relating to the court's refusal to dismiss the action. Appellees did not cross-appeal relative to Judge Gordon's denial of Dr. Lee's motions to dismiss. (R. 22-26)

Frankly, nothing written in the two pages where this issue is addressed by Appellees makes any sense. Appellees explain that they were unaware that counsel for the Harris Family had sued Dr. Clark "until it was brought to the trial court's attention in correspondence by the Estate's counsel prior to trial." Id. at p. 22. There appears to be no point to this explanation.

Appellees in their Brief also made a completely unsupported and non-sensical claim that the remark was justified because the Harris Family expert under cross-examination when the remark was blurted out "appeared to [have] a bias against physicians practicing in rural communities in high volume practices." Id. Well, to state the obvious, even if this expert was so biased (and, of course, he was not) what other than blatant, unabashed jury prejudice could opposite counsel have intended by telling the jury that undersigned counsel had sued the beloved Dr. Clark, i.e., the owner and patriarch of the only medical clinic in Scott County; a respected physician who had delivered some 4,500 babies in this small community; a man who for decades had been the doctor for the local high school football team; a man who for decades has been a Sunday school teacher at a 350 member Baptist church in Scott County; and a man whose son was the only chancery judge in Scott County, etc., etc. (See Plaintiff's Motion to Change Venue and attached exhibits, including Dr. Clark's deposition, filed in Scott County Circuit Court in the cause styled Snell vs. Howard D. Clark, M.D., R. 1066-98)

Appellees in their Brief did not address the obvious: why not simply ask the expert if he had been retained by undersigned counsel on any other cases? The answer would have been, "No," and the Harris Family would have suffered no prejudice. Prejudice, however, was the goal of opposite counsel and a fair question regarding the expert's relationship with undersigned counsel would not have achieved that goal.

Moreover, Appellees in their Brief did not even attempt to address the prejudice that this remark caused and was intended to cause the Harris Family. They did not suggest how on earth a curative instruction could possibly have cured the prejudice. And, not surprisingly, they did not address the undisputed testimony of Juror Lopez that this extraneous evidence was used by Juror Lowden to change the jury's verdict. Thus, proof positive that the curative instruction was totally inadequate to undo the prejudice created by counsel opposite.

Finally, the Harris Family is confused by Appellees' suggestion that the Harris Family could have "addressed this issue in *voir dire*." (Brief of Appellees, p. 22) Disclosing to the venire that undersigned counsel had sued Dr. Clark as well as Dr. Lee would have been legal malpractice. The few persons in the venire who did not have ties to Dr. Lee, his clinic, Sheriff Lee, and/or Deputy Sheriff Rigby, likely had ties to Dr. Clark, his clinic, and/or his chancellor son. Again, Dr. Clark ran the only other medical clinic in the community. Voir dire would not only have been ill advised but it was impossible for the Harris Family to have guessed that opposite counsel was going to inform the jury that its counsel had sued Dr. Clark.

The threshold for reversal when opposite counsel interjects bias or prejudice was articulated in Craft v. State, 226 Miss. 426, 435 (Miss. 1956):

> It is not every argument that is improper in a case of this kind that will cause a reversal of the judgment appealed from, but where the **natural and probable effect of the improper argument** of the prosecuting attorney is to create an unjust prejudice . . . and to secure a decision influenced by the prejudice so created, a new trial should be granted. 23 C.J.S. p. 1152, Criminal Law, par. 1442.
>
> We think that the natural and probable effect of the remarks made . . . was to **create in the minds of the jurors an unjust prejudice** . . .; and it cannot be said that the evidence in the case was so strong that the remarks complained of could have had no effect upon the verdict rendered.

The Harris Family without a doubt has met its burden of showing that the "natural and probable effect" of opposite counsel's remark was to create unjust prejudice. And, certainly, the jury argument by Juror Lowden standing alone shows that this remark indeed had an "effect upon the verdict rendered."

The "Wink"

In all candor, Appellees in their Brief must have assumed that neither undersigned counsel nor the Supreme Court nor its staff would refer to the actual record of the trial proceedings when considering this appeal and the arguments in the briefs. Otherwise, Appellees would not have made the misrepresentation (complete with Record citation) that "Mr. Rigby testified under oath at the same hearing on post-trial motions that he did not wink in the direction of the jury." (Brief of Appellees, p. 24, citing Vol. 13, p. 517; R.E.B., p. 517)

The Harris Family pointed out in the Brief of Appellant that Ms. Rebecca Langston's sworn post-trial testimony was uncontradicted regarding the wink; that it was not contradicted that chancery court clerk Rigby winked in the direction of Juror Lowden following favorable testimony that was offered by Dr. Lee's liability expert. (Brief of Appellant, p. 13; R. 990) Appellees, misrepresenting the actual record, responded as quoted above. The actual transcript of Mr. Rigby's only testimony on this issue is as follows:

> Q. - - did you ever wink at the jury **in an attempt to influence the jurors in this case?** (Emphasis added)
>
> A. I did not.

(R. 517; R.E.B. 517)

Mr. Rigby did not deny winking. He did not deny that the wink was directed toward Juror Lowden. He did not deny that the wink occurred immediately following favorable

testimony offered in favor of Dr. Lee. He did not contradict the post-trial testimony of Ms. Rebecca Langston who personally witnessed the wink. He simply said that the wink was not an attempt to "influence the jurors . . . ." The representation in Brief of Appellees to the contrary is wrong.

Also, Appellees in their Brief are critical of Mrs. Langston for not reporting the wink until post-trial motions. (Brief of Appellees, p. 24) While the wink may have been disconcerting under any circumstance, Mrs. Langston explained that it was only post-trial when she learned that Mr. Rigby's son was a deputy sheriff working under Dr. Lee's son and only post-trial when she learned that Juror Lowden, who appeared to be the recipient of the wink and to whom Mr. Rigby had delivered the trial exhibits, had unabashedly ignored Judge Gordon's "curative instruction" regarding Dr. Clark and had angrily interjected extraneous evidence into the jury room and changed the outcome of the verdict. (R. 514-15; R.E.B. 514-15) This post trial knowledge transformed a suspicious or unsettling event into an event that, combined with the many other prejudicial events, should be weighed by this Supreme Court when determining whether the Harris Family was allowed a fair trial.

Juror Lowden's Misconduct

Appellees devoted most of their Brief arguing that Juror Lowden's angry comments as reported by Juror Lopez did not constitute "extraneous prejudicial information" within the meaning of Miss. R. Evid. 606(b). (Brief of Appellees, pp. 25-31) In support of this argument, Appellees rely heavily on Perkins v. Dauterive, 882 So. 2d 773 (Miss. App. 2004).

Neither the Perkins case nor any other case cited by Appellees involves the type of juror misconduct exhibited by Juror Lowden. In Perkins, the alleged juror misconduct was that a juror commented during deliberations that a verdict against the defendant doctor would cause the

doctor to lose his medical license. The Perkins appellate court specifically recognized that the Mississippi Supreme Court in Blake v. Speed, 605 So. 2d 28, 37 (Miss. 1992) held that "it does not matter that information outside the record is provided by a fellow juror as opposed to some other person .... [i]f the [extraneous] information is outside the record of proceedings in open court, it is an outside influence under the rule." Perkins, 882 So. 2d at 782, *quoting* Blake, 605 So. 2d at 37. Then, the Perkins appellate court cited APAC-Miss. Inc. v. Goodman, 803 1177, 1186 (Miss. 2002)[5], which found that juror testimony of a "quotient verdict" was not "external influences" justifying reversal. The Perkins court likewise found that the juror's references to her personal experiences was not an "external influence" that warranted reversal. 882 So. 2d at 782.

While the Harris Family is of the position that the law in Blake v. Speed is still the law in Mississippi, the extraneous prejudicial evidence introduced by Juror Lowden is much different than that introduced by the nurse juror in Perkins. First, the fact that undersigned counsel had sued "Dr. Clark just up the road" was not a personal experience of Juror Lowden but was a highly prejudicial piece of evidence intentionally introduced by counsel opposite to prejudice the jury. And, unlike the facts in Perkins, Juror Lowden deliberately disobeyed the instruction of the Court (despite multiple warnings by Juror Lopez and other jurors) and used this extraneous evidence to persuade his fellow jurors to change their vote. (R. 501)

Moreover, Juror Lowden's claim during jury deliberations that he was a diabetic (i.e., the same as the deceased Mr. Harris) patient of Dr. Lee (and Dr. Clark) was a violation of his oath as a juror in that he did not reveal this claim during the venire.[6] (R. 499-505; R.E.B. 499-505)

---

[5] The Supreme Court in APAC v. Goodman made no mention of Blake v. Speed and certainly did not suggest that the law in Blake was no longer good law.

[6] Appellees' self-serving post-trial affidavit from Dr. Lee claiming that a computer search at his clinic did not reveal that Juror Lowden was a patient is of no consequence. The prejudice is that he claimed to be a diabetic patient of

Unlike the facts in Perkins, this extraneous evidence was deliberately hidden from the Harris Family during the *voir dire* questioning. Had Juror Lowden disclosed this relationship then he should have been stricken for cause or, at a minimum, subject to a peremptory strike by the Harris Family.

In the case TK Stanley, Inc. v. Cason, 614 So. 2d 942, 950 (Miss.1992) the Mississippi Supreme Court applying Miss. R. Evid. 606(b) reversed and remanded a civil case for another trial after the trial court refused to order a new trial despite post trial evidence that one of the jurors had withheld information regarding his relationship to one of the parties and then during jury deliberations used this information to sway the verdict. In TK Stanley, the Court stated:

> [The] argument that another juror's testimony should not have been heard to impeach the verdict is misplaced. It is true that, in general, jurors will not be heard to impeach their own verdict. However, M.R.E. 606(b) provides for an exception. It states:
>
> ...
>
> *that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.* (emphasis added)
>
> The "extraneous prejudicial information" **includes information brought into the jury room by another juror**, so that a juror may testify about another juror's words or actions in bringing such information before the jury. Schmiz v. Illinois Cent. Gulf R. Co., 546 So.2d 693, 697 (Miss. 1989). This is in accord with Mississippi's pre-rules practice. Bickcom v. State, 286 So.2d 823, 825 (Miss. 1973). . . . Id. at 698. Accord, Crawley v. Illinois Central R.R. Co., 248 So.2d 774 (Miss. 1971).
>
> Similarly, this case must be retried as a result of [the juror's] misconduct. The evidence is overwhelming that she withheld material information during voir dire which would have resulted in her being challenged by [the appellant], then relayed that exact disqualifying information to the other members of the jury during deliberations."

TK Stanley, 614 So. 2d at 950.

---

both Dr. Lee and Dr. Clark, that he personally knew them to be good doctors, and that he inferred that a jury verdict against them could adversely impact the communities' future health care.

The improper conduct of Juror Lowden and the testimony of Juror Lopez fall squarely within the purpose and procedure of Rule 606(b) as discussed in TK Stanley.

Additionally, Appellees in their Brief argue that Juror Lowden's claim to have been a patient of both Dr. Lee and Dr. Clark and his angry references to opposite counsel's comment that undersigned counsel had sued Dr. Clark "had no affect on the outcome of the verdict." (Brief of Appellant, p. 23) Appellees support that argument by citing Juror Lopez's affidavit wherein she states that BEFORE any jury deliberations and before the introduction of extraneous evidence Juror Lowden correctly announced that he had nine votes in favor of Dr. Lee. Id.

Appellees, disingenuously at best, failed to remind this Court that following this initial vote Juror Lopez and another juror convinced the balance of the jury (over the protest of Lowden and another juror) to review the evidence and deliberate. Then, another vote was taken and at least two of the nine jurors who at first voted for Dr. Lee changed their vote in favor of the Harris Family. (R. 499-505; R.E.B. 499-505) After the extraneous evidence was introduced by Juror Lowden, another vote was taken with nine (9) jurors in favor of Dr. Lee, two (2) in favor of the Harris Family and one (1) undecided. Id. Specifically, Juror Christopher Patrick whose vote was necessary for a defense verdict acknowledged that it was Lowden's argument regarding the lawsuit against Dr. Clark that convinced him to change his vote in favor of Dr. Lee and the Clinic. (R. 498-511; 953-54)

Appellees further argue that this Supreme Court should reject Juror Lopez's testimony because she "contradicted" herself when she claimed to have heard chancery clerk Rigby, the Sheriff and others talking about the case in the hall in the presence of Juror Lowden and another juror. Mrs. Lopez did not contradict her testimony. She simply said that she believed the law enforcement officer to have been the Sherriff "because he had a hat and looked different from the

others [law enforcement]" and that she heard the names "Dr. Lee" and "Harris family" being spoken. (R. 508) That testimony is clarification and does not contradict her testimony on cross-examination where she said that she did not hear "jurors" discussing the case before retiring to the jury room. (R. 502; R.E.B. 502) (Emphasis added)

Change of Venue

In support of their argument that the trial court did not err in refusing the Harris Family's motion to change venue Appellees rely primarily on the 1922 decision Bond v. State, 91 So. 461, 128 Miss. 792 (1922) and an appellate court decision Adams v. State, 944 So. 2d 86 (Miss. App. 2006). Both decisions are clearly distinguishable.

Bond involved a 1922 prosecution of a criminal defendant charged with murdering two people, one of whom was a "relative" of some undisclosed consanguinity to the sheriff. Contrary to the case *sub judice*, there was no evidence that the non-party victim was a close relative to the sheriff and certainly no evidence that the victim was the sheriff's father. Further, in stark contrast to the case *sub judice*, "'the overwhelming weight of the testimony showed that this defendant could get a fair and impartial trial in Green county . . .'" 128 Miss. at 802.

In the more recent Adams appellate court decision the sibling of the victim in this criminal trial was a deputy circuit clerk, a relationship not nearly as close and prejudicial when compared to Dr. Lee's relationship to Sheriff Lee and the official duties imposed on Sheriff Lee and his deputies. Further, unlike Adams, the impossible venue in the instant case is not just because of Dr. Lee's father/son relationship to the Sheriff but is compounded by the fact that almost half of the venire or their close family members were patients of Dr. Lee and his clinic. (R. 990-91)[7]

[7] Appellees in their brief claim that there is no record that the venire consisted of 52 persons; and, therefore, the Harris Family's claim that 40% of the venire were patients of Appellees should be rejected. (Brief of Appellees, p.

Cumulative Effect of Errors and Prejudice

The trial court's refusal to strike for cause venire who were patients of the Appellees, its refusal even to strike for cause a potential juror on the first panel who not only was a patient but who was taking her son the week of trial for a doctor visit with defendant Dr. Lee, its refusal to strike for cause venire with close relationships with the Sheriff, its denial of the motion to transfer venue, the prejudicial Dr. Clark remark intentionally interjected by counsel opposite, the relationship of the Sheriff to the defendant Dr. Lee and the Deputy Sheriff Rigby to the circuit clerk Rigby, the "wink" incident, the juror misconduct by Juror Lowden, etc., each standing alone justifies reversal. The cumulative effect of these errors and prejudices, however, is overwhelming:

> None of these errors, when considered separately and apart from the others, is sufficient to justify reversal of the case. However, when they are considered as a whole, it is our view that they resulted in the appellant being denied a fair trial." Russell v. State, 185 Miss. 464, 189 So. 90 (1939); Nelson v. State, 129 Miss. 288, 92 So. 66 (1922).

Forrest v. State, 335 So. 2d 900, 903 (Miss. 1976).

A Reverse Hypothetical

The Harris Family challenges Appellees to put the shoe on the other foot. Suppose that no one on the jury knew who Dr. John Lee was but knew that plaintiff Charles Ernie Harris, Jr.'s son (i.e., Charles Ernie Harris, III) was the Sheriff of Scott County. Suppose that plaintiff Mr. Harris, Jr., for more than forty (40) years had been a prominent lawyer in Scott County; and that 40% of the venire or twenty (20) potential jurors considered him and his firm to be their attorney; but that Judge Gordon, relative to 15 or these 20 jurors, denied Dr. Lee's request that they be stricken for cause. Suppose further that one of the potential jurors, Ms. Bonnie Gordon,

---

18) Appellees are wrong. The record before this Supreme Court includes an uncontested sworn affidavit establishing that the venire from which the jury was drawn totaled fifty-two (52) qualified jurors. (R. 990-91)

on the first panel disclosed during the Monday morning *voir dire* that not only had Mr. Harris, Jr. represented she and her family for years but that her minor son had a current legal problem and that she would be taking her son to visit Mr. Harris, Jr. on Friday of this same week to seek legal counsel; but that Judge Gordon denied Dr. Lee's request that Ms. Gordon be stricken for cause. Suppose that plaintiff Mr. Harris, Jr.'s son, the Sheriff, unbeknownst to Dr. Lee employed as a deputy sheriff the son of Circuit Court Clerk Joe Rigby who attended every moment of the trial and who had constant interaction with jurors relative to his official capacity as the circuit clerk. Suppose that the deputies under the employment of Mr. Harris, Jr.'s son, the Sheriff, throughout the trial had constant interaction with the jurors relative to their official capacities as Scott County law enforcement officers. Suppose that in full view of the jury one of these deputies approached Mr. Harris, Jr. and greeted her warmly with a hand shake while ignoring Dr. Lee. Suppose that Circuit Clerk Rigby during open court winked at Juror Lowden following expert testimony favorable to Mr. Harris, Jr. and his siblings. And, perhaps most disturbingly, suppose that Shane Langston, Esq., while examining Dr. Lee's expert blurted out that Mildred Morris, Esq., counsel for Dr. Lee, was suing prominent Scott County doctor Howard Clark, M.D., "just up the road" who in all likelihood was known, loved, and respected by all members of the jury; who in all likelihood was the Sunday school teacher for one or more members of the jury; whose son was the sole chancery judge in Scott County before whom one or more jurors in all likelihood would appear before; and who in all likelihood was the primary care physician for multiple members of the jury including Juror Lowden. Finally, suppose that Juror Lowden in blatant violation of his oath and the instructions given to him by Judge Gordon successfully argued that the jurors who were siding with Mrs. Harris (following a review of the evidence) should change their vote because of Ms. Morris' lawsuit against the beloved Dr. Clark.

Now, with the shoe on the other foot in the face of an adverse verdict does one suppose that Dr. Lee would recognize and accept that he did not receive a fair trial? Of course he would.

Whether a party be a plaintiff, defendant, doctor, lawyer, etc., the trial court below and this Supreme Court must protect our citizens' fundamental right to a fair trial and impartial jury. The trial court, respectfully, failed in this regard. The Harris Family asks that this Court correct the wrongs and allow the family a fair trial with an impartial jury.

Conclusion

For these reasons, the Harris Family respectfully requests that this Court find that the trial court committed prejudicial, reversible error when denying the Harris Family's motion for new trial, denying its requests for a mistrial, denying change of venue, denying jury strikes for cause, and refusing to set aside the Final Judgment. The Harris Family further requests that this Supreme Court remand this cause for a new trial with instructions that the Harris Family be granted a change of venue.

DOT MERCHANT, as Administratrix of THE ESTATE OF CHARLES ERNIE HARRIS, SR. and on behalf of all WRONGFUL DEATH BENEFICIARIES of CHARLES ERNIE HARRIS, SR.

By: _____

Shane F. Langston (MSB #[redacted])
Counsel for Appellants

Counsel for Appellants:

Shane F. Langston, (MSB[redacted]
Langston & Langston, PLLC
201 North President Street
Jackson, Mississippi 39201
Telephone: (601) 969-1356
Facsimile: (601) 968-3866

Certificate of Service

I do hereby certify that a true and correct copy of the foregoing Brief of Appellant has been delivered via United States Mail to the following counsels of record at their usual business address:

James A. Becker, Jr., Esq.
Mildred M. Morris, Esq.
Timothy L. Sensing, Esq.
Watkins & Eager, PLLC
The Emporium Building
400 East Capitol Avenue, Suite 300
Jackson, Mississippi 39205

Hon. Marcus D. Gordon
Scott County Circuit Court Judge
Post Office Drawer 220
Decatur, Mississippi 39327

This the 12th day of January, 2011.

SHANE F. LANGSTON