IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2010-CA-00395

CHUCK WOOD — APPELLANT

V.

JASON CHAD COOLEY — APPELLEE

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.

1. **Chuck Wood,** Appellant, and his wife, **Mollie Wood;**
2. **Jason D. Herring, Esq.,** Attorney for Chuck Wood;
3. **Henderson M. Jones, Esq.,** Attorney for Chuck Wood;
4. **Jason Chad Cooley,** Appellee;
5. **J. Mark Shelton Esq.,** Attorney for Jason Chad Cooley; and
6. **Jana L. Dawson Esq.,** Attorney for Jason Chad Cooley.

RESPECTFULLY SUBMITTED, this the 20 day of December, 2010.

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PROCEDURAL FACTS

Jason Chad Cooley was divorced from his wife Jennifer on October 16, 2006. Following the divorce, Cooley filed his *Complaint for Alienation of Affection* in the Circuit Court of Lee County, Mississippi on November 6, 2006. Following a jury trial conducted on September 8 through September 10 in 2009, a jury verdict was returned in favor of Cooley in the amount of One Hundred Thousand Dollars ($100,000.00). Wood filed his *Motion for Judgment Notwithstanding the Verdict and Discovery Sanctions and, in the alternative, Motion for New Trial or Remittitur,* which was denied pursuant to *Order* entered on February 9, 2010. From that order, Wood appeals to this Court.

SUMMARY OF FACTS

1. Wood admitted that he was primarily responsible for the hiring of Jennifer (Cooley) Sage at his place of employment, Wilburn Oil Company; [Transcript p.18 line 18 – p.81 line 19]

2. Wood admitted that while working at Wilburn Oil Company, Jennifer reported directly to him; [Transcript p.82, lines 4-7]

3. Wood admitted that he began having sex with Jennifer, Cooley's wife in January, 2006; [Transcript p.77, lines 2-18]

4. Wood admitted that he knew Jennifer was married at the time he began having sex with her; [Transcript p.78, lines 2-4]

5. Wood admitted that this sexual relationship with Jennifer continued from January until May 8th when Wood was confronted by his wife; [Transcript p.84, lines 26-29]

6. Jennifer stated on direct examination that were it not for her relationship with Wood, she would still be married to Cooley; [Transcript p.104 line 28 – p.105 line 3]

7. Jennifer stated that Wood initiated the first computer message exchange; [Transcript p.109 lines 7-9]

8. Jennifer described the nature of these computer messages as follows:

A. He would tell me he thought I was pretty and how he always liked me, and you know, we would talk. And then, of course, as time progressed, it led into more and it became sexual advances and that sort of thing.

Q. Sexual advances by whom?

A. Him.

[Transcript p.110 lines 4 -12]

9. Jennifer testified that Wood would tell her that he loved her. When asked how frequently, Jennifer responded "Every time he talked to me." [Transcript p.110 lines 21-25]

10. Jennifer testified that prior to her sexual relationship with Wood, she and Cooley had never filed for divorce or separated due to marital difficulties; [Transcript p.113 lines 25 – p.114 line 4]

11. Jennifer testified that prior to her sexual relationship with Wood, she had never engaged in an adulterous relationship; [Transcript p.114 lines 3-5]

12. Jennifer testified that during this sexual relationship with Wood, Wood gave her gifts of a thong underwear, nightshirt, a cell phone and gifts of money; [Transcript p.115 lines 11-27]

13. Jennifer testified that the total value of gifts and money received from Wood during this period of time was approximately $3,000; [Transcript p.142 lines 23 – p.143 line 5]

14. Cooley testified as follows:

Q. When did you first begin believing that there was some serious problems in your marriage?

A. I would say about the middle of January.

Q. All right. And what did you notice? What happened? How was Jennifer acting differently or what caused you to believe there were some major problems there?

A. Just her attitude towards me.

Q. Okay. Which was what?

A. Always mad, just trying to start fights, you know, just being mean. I guess you could say just being mean to me.

Q. What about her affections toward you? Did that change any?

A. She started sleeping in the other room.

Q. When was that?

A. In January.

[Transcript p.161 lines 3-19]

15. Cooley testified that he and his wife Jennifer had never separated or filed for divorce prior to the sexual relationship between Jennifer and Wood; [Transcript 158 line 27 – p.159 line 5]

16. Cooley described for the jury the importance of his marriage:

Q. Was it important to you that your marriage stay together?

A. Yes, sir.

Q. Why?

A. Because I loved her.

Q. Even though had had these money problems, even though you had these other problems?

A. I wasn't rich. All I had was a family. Excuse me. And I lost that.

[Transcript p.162 lines 16-24]

17. Cooley testified as to some of the activities he and his wife engaged in, including the following:

A. We did everything together, you know. Went out and eat, we'd go to baseball games, and that's about it, you know. We would socialize with a few friends, and that's about it.

Q. All right.

A. Went on vacations, visit her mom and dad.

[Transcript, p.156 lines 9-14]

18. Regarding his marriage in general, Cooley testified as follows:

Q. What type of marriage – did you have a perfect marriage?

A. I wouldn't say perfect.

Q. What type of marriage did you have?

A. I thought we had a good marriage.

[Transcript p.159 lines 15-19]

19. Cooley testified as to what he lost as a result of Wood's actions:

Q. Are you asking this jury to award you a judgment based upon the actions of Chuck Wood?

A. Yes, sir.

Q. Why? Why is that important to you?

A. Basically for justice. I mean, I lost – I'm not rich. I lost everything I had when I lost my wife and family.

Q. Is this about the money?

A. Money ain't no – nothing, you know. We wasn't rich. Our family – I'd rather have my family back as money.

Q. Now, have you moved on with your life? Are you remarried? Are you seeing someone else?

A. No, sir.

Q. Have you dated since your wife divorced?

A. No sir.

[Transcript p.164 lines 3-18]

20. Cooley was asked on redirect:

Q. But if you'd been given the opportunity in January of 2006, if you'd been given the opportunity for somebody to give you $750,000 and take your family or leave your family intact, which would you have chosen?

A. My family.

[Transcript, p.177 lines 16-20]

21. Jennifer Wren, a former co-worker of Jennifer Cooley, was called to testify on behalf of Wood. On cross-examination, Wren admitted the following:

Q. Okay. Before Jennifer began thinking there was going to be some relationship with Mr. Wood, she was coming to work bragging to you about her good marriage, wasn't she?

A. Before she set her sights on Chuck [Wood], yes.

Q. Before she set her sights on Chuck or before she got hooked in when a married man was telling her how pretty she was and how much he loved her, right, before that happened?

A. I don't know that.

Q. Yeah, before that, before she began some relationship with Chuck, she would come to work and tell you how, quote, perfect – let me back up. I want to quote you exactly.

A. Yeah.

Q. Talking about her marriage, quote, *She made it out like everything was great and happy and, you know, perfect and everything,* end quote. That was your words, right?

A. That wasn't all my words, though.

Q. Would you like to – I'll be happy to let you read it, ma'am. I'm not trying to --

A. She said that at the beginning that he was all that, you know, nice and perfect and all that. And then I said when she set her eyes on Chuck, everything about Chad changed. He had a temper, bad temper, everything.

Q. Yeah. Once she got her mind set on Chuck, her story about Chad changed, right?

A. Correct.

Q. But before that, she would come to work and she would tell you what a great marriage she had.

A. Correct.

[Transcript p.214 lines 8-11]

SUMMARY OF ARGUMENT

Wood raises twelve (12) distinct issues on this appeal, all of which for the reasons to be set forth below, fail to provide any basis for reversal or remand. This appeal is nothing more than Wood's dissatisfaction with the verdict returned by the jury. Thus, Wood seeks to have this Court disregard the function of the jury, and to have this court overturn the verdict. The appellate court's ability to set aside a jury verdict is very limited, as it should be. Only in the rarest of cases should the function of the jury be usurped by a court on appeal. "It is the province of the jury to award the amount of damages, and the award will not be set aside unless it is so unreasonable in amount 'as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous.' *Hankins Lumber Co. v. Moore,* 774 So.2d 459, 467 (Miss.Ct.App.2000). *see also Maddox v. Muirhead,* 738 So.2d 742 (Miss.1999). "Awards set by a jury are not merely advisory and generally will not be "set aside unless so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." (citations omitted). *Maddox v. Muirhead, 738 So.2d 742, 742 (Miss.1999).* Not even Wood in his brief suggests that the verdict of $100,000.00 is "beyond all measure, unreasonable in amount and outrageous." Clearly, it is not. Being unable to suggest that the verdict was outrageous, Wood grasps at straws in alleging twelve (12) errors which in reality are not errors at all.

Furthermore, none of the twelve (12) alleged errors, even if found to exist, would rise to the level justifying reversal. Not every error committed by a trial court justifies reversal or remand. In instances where error does occur, but where the ultimate outcome cannot reasonably be expected to have been altered by the error, these are referred to as "harmless error" and do not provide a basis for appellate reversal. *Strange v. Strange,*

43 So.3d 1169, ¶8 (Miss.App.2010). One cannot think of an instance where there should be greater scrutiny at the appellate level than in cases involving capital punishment. Yet even in those cases, where literally life or death hangs in the balance, the Court has recognized the concept of "harmless error." In *McDonald v. State*, the Court stated:

> The United States Supreme Court has explained that "a defendant is entitled to a fair trial but not a perfect one," for there are no perfect trials. *Brown v. United States, 411 U.S. 223, 231, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973)* (quoting *Bruton [v. United States], 391 U.S. [123,] 135, 88 S.Ct. 1620 [20 L.Ed.2d 476] [(1968)*] (quoting *Lutwak v. United States, 344 U.S. 604, 619, 73 S.Ct. 481, 97 L.Ed. 593 (1953))).* . . . "[A]n otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." *[Delaware] v. Van Arsdall, 475 U.S. [673,] 681, 106 S.Ct. 1431 [89 L.Ed.2d 674] [(1986)*].

McDonald v. State, 39 So.3d 22 ¶24 (Miss.App.2010).

If an individual in a capital murder trial, where his very life is at stake, can only demand a "fair trial but not a perfect one" then surely that is true where an individual is sued for money damages. The twelve (12) alleged errors raised by Wood in his brief, even if found to be error by this Court, would only constitute "harmless error" and would not be a basis for reversal.

ARGUMENT

Pages 3 through 29 of Wood's Appellate Brief contains essentially selected facts from the record and large sections of argument of counsel during the trial. No direct response will be given with respect to these pages as they are not dispositive to any issue on appeal. Argument of counsel during the trial has no bearing whatsoever on appeal. Either an issue is preserved for appeal by proper objection or it is lost. The substance of the argument of counsel during or following the objection is irrelevant for appeal purposes.

The assertions of error raised by Chuck Wood in this appeal will now be addressed in the order in which they appear in the Appellant's Brief.

I. Chuck Wood argues that the jury's first verdict was a legally cognizable verdict and should have been adopted by the trial court:

With all due respect, Chuck Wood certainly strains credibility when he suggests the first purported jury verdict was legally cognizable. This is easily discernable in that even he suggests that the verdict needed to be altered by the trial court. In his brief, Mr. Wood writes: "The Court erred in not adopting the jury's first verdict (supra, p.25) and should have awarded Jason Cooley Zero Dollars ($0) in damages." [Appellant's Brief p.32] Yet that is not what the first purported jury verdict stated. No dollar amount was ever stated in the first purported jury verdict. [Transcript p.309 lines 21-23] Thus Mr. Wood suggests in his brief that the first purported verdict was legally cognizable yet at the same time argues that the trial court should have altered it to award "Zero Dollars ($0)" when in fact the first purported verdict included no such language. Surely this contradiction in terms by Mr. Wood, establishes on its face the first purported verdict was not legally cognizable.

The trial court gave Instruction C-15 to the jury:

> When you reach a verdict in this case, you should write it on a separate piece of paper. You need not sign it and it may be in either of the following forms:
>
> If you find for the plaintiff: We, the jury, find for the plaintiff and assess damages at blank dollars.
>
> If you find for the defendant: We, the jury, find for the defendant.

[Transcript, p.273, lines 15-22] Furthermore, the trial court gave Instruction C-8 which states in part: "If you find in favor of the plaintiff, Jason Chad Cooley, you must then determine the amount of money which will reasonably and fairly compensate him for the value of the consortium he has lost. You should consider the following elements of damages . . ." [Transcript, p.269 lines 1-7] (underline mine) The jury was instructed that it "must" determine the amount of damages, and yet in the first purported verdict, it did not do so. It simply cannot be genuinely argued by Chuck Wood that the first purported verdict was in the form as instructed by the Court. The jury found for the plaintiff, yet did not assess a dollar amount for damages. On its very face, the first purported verdict was not in proper form. No dollar amount was included in the verdict. The verdict was not legally cognizable because it was not in the form instructed by the Court. Chuck Wood's suggestion to the contrary is specious, and erroneous.

Chuck Wood's brief declares that the jury's first verdict was legally cognizable. Yet at the same time, Mr. Wood inexplicably suggests the trial court should have altered the verdict. That begs the question; if the first verdict was sufficient and legally cognizable, why would the trial court need to do anything further? Yet that is exactly what Mr. Wood contends. He suggests that the trial court should have taken that verdict and somehow re-written or converted that verdict into a verdict awarding Cooley "Zero

Dollars ($0) in damages." In other words, Mr. Wood suggests that the trial court committed error for not somehow transmuting a verdict that did not state Chad Cooley was to receive zero dollars as damages into a verdict that does just that. Chuck Wood offers no legal basis or authority whatsoever for how a trial court is to alter a jury verdict in that manner. That theory by Mr. Wood is unfathomable and has no support in our system of jurisprudence. The jury's first verdict was not legally cognizable, as was easily discernable by the trial court. Had the jury returned a verdict of "Zero Dollars ($0) in damages" the case would in fact have been concluded at that point. However, that is not what happened. Yet despite the fact that the jury did not return such a verdict, Chuck Wood suggests that the trial court should have given the verdict of the jury that legal affect.

If in fact the first jury verdict had been legally cognizable, there would have been no need for the trial court to make any interpretation thereof. It would have been wholly sufficient on its face. Chuck Wood's own argument acknowledges that the first verdict was insufficient, in that he argues the trial court should have taken the verdict and modified it to assess damages at zero dollars. In essence, Mr. Wood suggests that the trial court should have taken the language returned by the jury (eg. "We the jury find for the plaintiff and assess damages in the amount of attorneys fees and court costs.") as "we the jury return a verdict of Zero Dollars ($0) in damages." With all due respect to Chuck Wood and his counsel, that simply is illogical, unprecedented and would have been an improper interference by the trial court and reversible error to have done so.

The only thing that is obvious on the face of the first purported jury verdict was that they found in favor of Chad Cooley and that Chuck Wood should have to pay something to Mr. Cooley as damages. Unfortunately, although clearly intending for Mr.

Wood to pay Chad Cooley something, the amount was not designated. Had the jury placed an amount in the verdict, regardless of the amount, the verdict would have been legally cognizable. Unfortunately, they did not and thus further deliberation was necessary. The trial court astutely, and correctly, instructed the jury to continue their deliberations.

> "Ladies and gentlemen of the jury, the Court and counsel have been conferring. The Court – the fault for this is attributable to the Court, not to the lawyers. The verdict you have returned into open court is more than likely not a legally recognizable verdict which the Court can accept. Accordingly, your instructions are to return to the jury room and consider your deliberations. That is now Instruction No. C-18."

[Transcript p.315, lines 10-20].

Instruction C-18 simply and articulately informed the jury that the first purported verdict was not in a legally cognizable form, and that the jury was to continue deliberations. In other words, the jury was simply instructed to deliberate further and if able, return a verdict which accurately instructed the Court as to their intent. Following this instruction, the jury did precisely what was asked of it, and after some period of time, returned a verdict in favor of Cooley in the amount of $100,000.00. It seems difficult if not impossible to reconcile the jury's final (and legally cognizable) verdict in the amount of $100,000.00 with Chuck Wood's suggestion that the intent of the first purported verdict was to award "Zero Dollars ($0)." To the contrary, the jury's final verdict suggests just the opposite.

Regardless of what the jury may have thought or intended by the first purported verdict, its form was not such so as to allow the trial court to determine that intent. Thus, the jury was allowed to continue its deliberations. Mr. Wood seems unable or unwilling to separate the final verdict from the first purported verdict. However, the two

need not be reconcilable. The simple fact is that the jury was perfectly within its province to determine the amount of damages to be awarded to Chad Cooley using the instructions given to it by the trial court. The jury was certainly not bound by anything contained within the first purported verdict, and in fact, even had the right to change its mind as it continued with its deliberations. Whatever the jury may have thought, intended or said during its deliberations is irrelevant. What is relevant is whether the jury's verdict was legally cognizable, as surely the verdict for $100,000.00 was. The jury verdict of $100,000.00 makes it abundantly clear that:

(1) the first purported verdict did not accurately disclose their intent, eg. to award $100,000.00 in damages;

(2) that the amount they intended for Wood to pay to Cooley was $100,000.00; and,

(3) Wood's suggestion that the trial court should have taken the first verdict and transmuted it into a verdict of "zero ($0) dollars" would have in resulted in the jury's intent being totally thwarted.

Chuck Wood's reliance upon Section 11-7-163 of *Mississippi Code Annotated*, in support of his allegation that the first purported verdict of the jury should have been interpreted and accepted by the trial court as an award of "Zero Dollars ($0)" is interesting. It appears Mr. Wood, in relying upon Section 11-7-163 totally ignores the immediately preceding section, Section 11-7-161 which has direct applicability to this issue. Section 11-7-161 states: "If the verdict is not responsive to the issue submitted to the jury, the court shall call their attention thereto and send them back for further deliberation." *Mississippi Code Annotated, Section 11-7-161.* That is precisely what the trial court did in this instance. No better example could be cited for a trial court

applying and following Section 11-7-161 than that which occurred in this case. There is no question that the first purported verdict was not responsive to the issue of a dollar amount of damages. The trial court offered C-18 consistent with §11-7-161. The jury did continue their deliberation and ultimately returned a verdict which was responsive to the issue of damages. This assignment of error is without merit.

II. Chuck Wood suggests that Instruction C-18 was error and "the second verdict is clearly defective wherein it included damages to compensate the plaintiff for attorneys fees and court costs."

As stated earlier, Instruction C-18 is a perfect example of what a trial court should do, in compliance with Section 11-7-161 of *Mississippi Code Annotated*. More importantly, in this assignment of error Chuck Wood perplexingly suggests that he is able to read the minds of the jurors when he claims the $100,000 verdict was to "compensate the plaintiff for attorneys fees and court costs." Nothing contained in the jury verdict, nor in the record, suggests this to be true. This is nothing but mere speculation on the part of Mr. Wood. Indeed a better argument can be made that the very amount of the verdict suggests to the contrary, and that the jury was seeking to provide Chad Cooley with more compensation than just for attorneys fees and court costs. However, that too is speculation. What is not speculation is that there is nothing in the record to suggest that the jury, in returning its final verdict, did not follow the instructions which had been given to it.

The trial court also gave Instruction C-10 to the jury:

If you find from a preponderance of the evidence in this case that:

(1) The defendant, Chuck Wood, persuaded, enticed, or induced Jennifer Cooley Sage, who is the former spouse of the plaintiff, Jason Chad Cooley, to abandon her marital relationship with the plaintiff, Jason Chad Cooley, in favor of him;

(2) The defendant's persuasion, enticement, or inducement caused or contributed to the abandonment, even if the defendant did not initiate the relationship with Jennifer Cooley; and

(3) The plaintiff, Jason Chad Cooley, suffered loss of affection or consortium as a direct and proximate result of the defendant's conduct. Consortium is the entitlement to society, companionship, love, affection, aid, services, support, sexual relations, and the comfort of the spouse as special rights and duties growing out of the marriage covenant; to these may be added the right to live together in the same house, to eat at the same table, and to participate together in the activities, duties and responsibilities necessary to make a home. Then your verdict shall be for the plaintiff.

[Transcript, p.270 lines 4-29]

The trial court also gave Instruction C-8 to the jury:

If you find in favor of the plaintiff, Jason Chad Cooley, you must then determine the amount of money which will reasonably and fairly compensate him for the value of the consortium he has lost. You should consider the following elements of damages as have been proved by a preponderance of the evidence in this case: (a) the loss of society, companionship, love and affection; (b) the loss of aid, services, and physical assistance provided by Jennifer Cooley; (c) the loss of sexual relations; and (d) the loss of participation together in the activities, duties, and responsibilities of making a home.

[Transcript, p.269 lines 1-14]

The trial court also gave Instruction C-6 to the jury. It stated:

Damages is a word which expresses in dollars and cents the injury or harm suffered by the plaintiff. A plaintiff does not have to prove with absolute certainly the mathematical value of his damages. If you find from a preponderance of the evidence in this case that plaintiff has sustained actual damage as proximate result of the wrongful conduct of the defendant, then the plaintiff is entitled to a verdict in the amount that will reasonably compensate the plaintiff for his loss sustained. Such damages are called compensatory or actual damages and are awarded for the purpose of making the plaintiff whole again, insofar as a money verdict can accomplish that purpose.

[Transcript, p.268 lines 4-19]

These instructions, together with the other instructions given by the trial court, clearly and properly instructed the jury with respect to the elements of the cause of action, and also, as to the elements of damages. Chuck Wood suggests in his brief that the verdict of $100,000 was "defective wherein it included damages to compensate the plaintiff for attorneys fees and court costs." Yet nothing contained in the record, and nothing cited by Mr. Wood, suggests that the jury failed to follow the instructions given by the Court in awarding $100,000.00 to Chad Cooley. Mr. Wood relies upon nothing but his interpretation of the first purported verdict. Yet that verdict, because it was not legally cognizable, is given no effect. The jury returned to the jury room to continue its deliberations at 1:52 pm and remained there until 2:28 pm. No one can state what the jurors were saying or thinking during that thirty-six (36) minute period. One can only assume that the jury fully and completely followed the court's instructions, including the instructions setting forth the appropriate elements of damages. To suggest any other intent on the part of the jury is purely speculation and should not be given any weight by this Court.

Chuck Wood argues in his brief that "[t]he Court cannot ignore the jury's intention in its first verdict in adopting the second verdict." To the contrary, that is exactly what the court should and frankly, must do. Again with all due respect, Chuck Wood's suggestion that the trial court attempt to discern or decipher the intent of the jury and then transmute a verdict rendered in one form to another form is completely at odds with the role and province of the jury. There is a reason why the jury goes into a room without the presence of the attorneys, the parties or the court staff. They are given the privacy needed to discuss frankly and confidentially, and to ultimately agree upon a

verdict. That is precisely what the jury did for those thirty-six (36) minutes. No one knows what was said in that room, and certainly no one knows what was going through the minds of the jurors as they were in that room. Yet on appeal Mr. Wood suggests to this Court that he knows and that the trial court should have known, and should have set aside the verdict based upon what he believed the jury was thinking. With great respect, that suggestion is simply preposterous. The trial court offered C-18 and allowed the jury to continue its deliberation, after which a legally cognizable verdict was rendered. The trial court has no ability, much less a duty, to try to determine and give import to how the jury arrived at its decision. Ignoring the first purported verdict is exactly what the trial court was required to do. This assignment of error is clearly without error.

III. Chuck Wood contends the jury acted on emotion, whim and caprice in awarding a second $100,000 verdict after only awarding the plaintiff his attorneys fees and court costs in the first verdict.

The jury was properly instructed as to the elements of damages which could be awarded to the plaintiff. The jury was instructed to apply those instructions to the facts which it found by a preponderance of the evidence. An itemization of just some of the facts presented to the jury are set forth above. [Supra pp. 1-7] Mr. Wood in his brief states: "Mr. Cooley's sole claim for damage was the mere fact that the Defendant had engaged in a sexual relationship with his ex-wife." [Appellant's Brief, p.37] That statement is simply incorrect, and quiet indicative of Wood's attitude throughout the trial with regard to his adulterous relationship. First, it was not a sexual relationship with his EX-WIFE that upset Chad Cooley, but a sexual relationship with his WIFE. The distinction may have been lost on Mr. Wood, but it was not lost upon Mr. Cooley, nor apparently lost on the jury. Second, it was not a "mere fact" to Chad Cooley, but a devastating, life-changing, future-altering fact of an adulterous relationship between

Jennifer and her then-boss. Third, and more to the point, Chad Cooley's claim for damages was based upon all of the facts presented at trial, including the seventeen (17) points which are itemized on pages 1 through 7 above.

At the risk of being repetitive, once again a jury's determination of damages cannot be set aside or altered lightly. "It is the province of the jury to award the amount of damages, and the award will not be set aside unless it is so unreasonable in amount 'as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous.' *Hankins Lumber Co. v. Moore,* 774 So.2d 459, 467 (Miss.Ct.App.2000). *see also Maddox v. Muirhead,* 738 So.2d 742 (Miss.1999). "Awards set by a jury are not merely advisory and generally will not be "set aside unless so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." (citations omitted). *Maddox v. Muirhead, 738 So.2d 742, 742 (Miss.1999).* It simply cannot be stated that $100,000.00 is "so unreasonable as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." This assignment of error is clearly without merit.

IV. Chuck Wood contends that the fact that Chad Cooley sued his wife for divorce upon the grounds of Habitual Cruel and Inhumane Treatment should bar a later claim for Alienation of Affection

Mr. Wood offers no legal authority for this novel theory, nor any rational basis to adopt such a position. First, Chad Cooley testified that he signed his counter-claim for divorce on the basis of Habitual Cruel and Inhumane Treatment before he became aware that his wife was engaged in a sexual relationship with Mr. Wood. [Transcript p.170 24-28] Second, the allegations of Habitual Cruel and Inhumane Treatments in the divorce action might very well be relevant to the issue of damages, but would certainly not act as

a bar to a subsequent complaint for alienation of affection. As the transcript depicts, much ado was made on cross-examination concerning the allegations raised in the divorce trial. [Transcript p.167 line 18 – p.171 line 26] The jury heard this evidence, and despite it, rendered a verdict in favor of Mr. Cooley for $100,000.00. Chuck Wood's novel position in this regard is clearly without merit.

V. Chuck Wood contends that Chad Cooley should not be able to benefit from his failure to disclose the identity of Michael Langley

VI. Chuck Wood contends that Chad Cooley should be sanctioned for his discovery violation

VII. Chuck Wood contends that Michael Langley was an indispensable party and accordingly, he should be granted a new trial

These three assignments of error will be addressed together. First, it is important to get the facts concerning Mr. Langley correct. It is uncontroverted that Chuck Wood and Jennifer Cooley began their sexual relationship at least no later than January 2006. Testimony from a co-worker, Jennifer Wren, indicated that the flirting between the two began "a couple of months before Christmas" of 2005. [Transcript p.213, lines 2-24] There was no evidence offered by anyone that Mr. Langley began his relationship with Jennifer until after April 2006, which would have been:

(1) close to six months after the flirting began between the married Chuck Wood and the married Jennifer Cooley;

(2) more than three (3) months after Mr. Wood began his sexual relationship with Jennifer Cooley;

(3) more than a month after Chad Cooley separated from his wife;

(4) more than a month after Jennifer filed for divorce; and,

(5) certainly well after the tort of alienation of affection had been committed by Chuck Wood.

Cooley was entitled to bring his action against Mr. Wood in January 2006 (had he known of the affair at the time.) Chuck Wood's assertions in his brief that somehow Mr. Cooley is barred from seeking damages for alienation of affection against Mr. Wood is simply without any legal support or basis. Chuck Wood was guilty of the tort of alienation of affections long before Mr. Langley ever "came into the picture."

Second, what Chuck Wood suggests in his brief is this obvious, blatant discovery violation is in fact not so. Indeed it is questionable whether or not there was any duty whatsoever to disclose the identity of Mr. Langley but clearly if so, it was of such nature as to be borderline responsive and therefore not some intentional discovery violation as is asserted. The interrogatory in question asks to "please list each and every person who may have discoverable information pertaining to this cause of action stating their full name, address, telephone number, occupation, where and by whom employed, present whereabouts, and a brief description of their knowledge of the facts involved in the case." As stated earlier, the tort of alienation of affection occurred sometime in January 2006. Mr. Cooley elected to pursue a claim against Mr. Wood for that tort. Whatever damage was caused by Mr. Wood to Chad Cooley was caused during that period of time.

Jennifer's actions with respect to Mr. Langley or anyone else after Chuck Wood's actions caused the separation of Chad Cooley and his wife, and after divorce proceedings were initiated, would in reality be of nominal, if any, relevance to Mr. Cooley's action. In considering damages suffered by Cooley, the jury looked to the impact upon his marriage at the time of Wood's tortious actions. Wood makes much

ado about nothing with respect to this allegation. Without any proof that Mr. Langley had some inappropriate contact with Jennifer prior to her sexual relationship with Chuck Wood, it is simply not relevant.

As stated earlier, the proof presented to the jury concerning the marital relationship between Chuck Wood and Jennifer was that prior to January 2006, the following was true:

(1) Jennifer commented to co-workers about having a wonderful, "perfect" marriage;

(2) Jennifer and Cooley had never separated or filed for divorce;

(3) That they had an imperfect marriage; and

(4) And according to Jennifer and Chad Cooley, the two would still be married if it were not for the actions of Chuck Wood.

For these reasons, it simply cannot be stated that Chad Cooley committed some sinister, intentional discovery violation for not disclosing to neither his legal counsel nor to Chuck Wood the name of Michael Langley as having "discoverable knowledge" of the tort complained of against Mr. Wood. It is conceded by the writer of this brief that had the identity of Mr. Langley and his sexual involvement with Jennifer been made known, his name would have been disclosed out of an abundance of caution. However, notwithstanding that, it cannot be said and has not been shown that Chad Cooley committed some intentional discovery violation.

If the interrogatory had specifically asked for the names of each individual known to have had a sexual relationship with Jennifer since the date of the marriage, certainly Chad Cooley would have had a duty to disclose Mr. Langley's identify. However, the duty to have disclosed Mr. Langley as having "discoverable knowledge"

given the facts as known to Chad Cooley at the time is much more questionable.

Thirdly, the failure to disclose Mr. Langley to counsel for Chuck Wood was harmless at best. Mr. Wood's counsel at trial, and in the Appellant's Brief, suggests a great miscarriage of justice occurred given the lack of knowledge of Langley. Such is not the case. There is nothing in the record to suggest the testimony of Jennifer Cooley and Christi Stephens was inaccurate. Both place the beginning of the relationship between Jennifer and Mr. Langley as being sometime after the filing for divorce, and certainly well after the sexual relationship between Jennifer and Chuck Wood began in January 2006. Extrapolating her testimony, Stephens places the time period of the relationship around April 2006. [Transcript p.197 lines 14-28; p.199 lines 9-13]

Jennifer's testimony was that she did not begin seeing Mr. Langley until after she and Chuck Wood had ended the relationship. [Transcript p.139 lines 25-29] Mr. Wood testified that his wife confronted him with the adultery on May 8, 2006 and that he ended the relationship with Jennifer sometime after that. [Transcript p.85, lines 16-28] At any rate, the proof established that Mr. Langley became involved with Jennifer either in April or May 2006. There is no reason to believe Mr. Langley would have suggested an earlier date for this relationship. The jury heard the proof of Mr. Langley's relationship with Jennifer (which began well after Mr. Wood's involvement with her) and ultimately rendered a verdict in favor of Chad Cooley.

Although Mr. Wood, during his testimony at trial and in his arguments in the Appellant's Brief, appears oblivious that it was <u>his</u> actions, and not Langley's, that caused the breakup of Cooley's marriage, the proof suggests the opposite. The jury verdict certainly establishes that the jury believed it was Mr. Wood's actions, and not Mr. Langley's, which caused the alienation of Jennifer's affections toward her husband.

Jennifer's testimony on cross-examination should enlighten Mr. Wood:

Q. Yes, ma'am. How is it that you can tell these ladies and gentlemen of the jury when Mr. Mark Shelton asked you right off the bat, the very first question, he comes right out, *Would you still be married to Chad Cooley if it wasn't for Chuck Wood,* and you said *Yes, sir?*

A. I would.

Q. How is it you can say that when you were dating, seeing, having sex with yet another man, Michael Langley, prior to your divorce terminating in October of 2006? Tell them how you can say that?

A. Because that has nothing to do with – Michael and I would never have dated if Chad and I weren't getting a divorce. I mean, that has nothing to do with it.

[Transcript p.140 lines 4-16] That is the credible proof presented to the jury.

Fourth, despite there being no proof that Mr. Langley caused or contributed to the breakup of the Cooleys' marriage, the trial court still allowed a jury instruction of apportionment. Though Chuck Wood claims to have suffered great prejudice, he was still allowed to get the instruction wherein the jury could have attributed fault to Mr. Langley. Instruction C-11 was given to the jury and allowed the jury to assign fault between and among Mr. Langley and Mr. Wood, if it saw fit. [Transcript p.271 line 5 – p. 272 line 6] What Mr. Wood is really upset about is that the jury agreed with Jennifer, that Mr. Langley had nothing to do with the breakup of her marriage, and assigned all of the fault to Mr. Wood.

With all great respect to counsel for Wood, the assertion that Mr. Langley was an indispensible party pursuant to *Rule 19(a)(1)-(2)* is simply unfathomable. Without a scintilla of proof that Mr. Langley had any contact with Jennifer prior to the inappropriate flirting by Chuck Wood, that led to inappropriate sex, that led to separation, that led to the filing of divorce papers, it is simply fantasy to suggest that he is an indispensible party to Chad Cooley's claim against Mr. Wood. There is simply no

basis in law or fact for that assertion. Chad Cooley had the absolute right to seek relief against the person whom he believes caused the alienation of affection with his wife. Even if the facts had proven Mr. Langley was involved with his wife prior to the separation, Chad Cooley would still have the right to elect to sue the one person whom he believed to have caused the breakup. In other words, there is nothing contained within *Rule 19* or any other rule of law that would have prevented Chad Cooley from electing his intended target for his alienation claim. It is conceded that if the proof had shown both Mr. Langley and Mr. Wood were involved with Jennifer beginning prior to Christmas 2006 and beginning a sexual relationship in January 2006, Chad Cooley would have taken a greater risk that the jury would be harder to persuade that one or the other caused the breakup. However that doesn't prevent Cooley from taking that risk.

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For the reasons set forth herein above, these three assertions of error are without merit.

VIII. The trial court was correct in granting Plaintiff's Motion in Limine

Chuck Wood complains that the trial court refused to allow the introduction of evidence regarding various facts which occurred after Chad Cooley's divorce became final. Some of the facts sought to be proven by Mr. Wood included litigation wherein Chad Cooley obtained custody of the minor child born during his marriage to Jennifer, and other post-divorce actions of Jennifer. However, this issue is procedurally barred because Mr. Wood failed to make sufficient offers of proof to allow this Court to determine precisely what evidence which would have been introduced, nor weight the probative value of same. Notwithstanding the procedural bar, this assertion of error is

without merit. With all due respect to Mr. Wood, this assertion of error shows little understanding of the tort of alienation of affections. Chuck Wood's assertion that he should have been able to introduce this post-divorce evidence is completely contrary to the holdings of the Supreme Court of this State. In *Fitch v. Valentine*, the Mississippi Supreme Court upheld the trial court's entry of a motion in limine precluding the introduction of evidence regarding pre-marital conduct of the parties and a child born after the divorce of the parties, specifically stating that "the key time frame for the tort of alienation of affections is that of the marriage." *Fitch v. Valentine,* 959 so. 2d 1012, 1022 (Miss. 2007). Surely it cannot genuinely be argued that the negative actions of offending spouse (Jennifer) who is not a party to the lawsuit and which occurred after the divorce would be as probative as negative actions of the Defendant to the lawsuit such as that which was sought to be introduced in *Fitch.*

It matters not, with respect to the alienation claim, what type of behavior Jennifer engaged in after her sexual relation with Chuck Wood, which ultimately caused the breakup of her marriage to Chad Cooley. The fact that she may have "gone downhill" in her lifestyle is simply not relevant. No one can possibly say that Jennifer's post-divorce behavior would ever have surfaced had it not been for the interference by Chuck Wood. In fact, it is more likely that such behavior would not have occurred had her marriage not been destroyed. Regardless, it is pure speculation either way. The tort committed by Chuck Wood occurred prior to the filing of the divorce by Jennifer, and in any event clearly had ended once the divorce became final. The evidence concerning the modification of custody, which Mr. Wood wanted to introduce, had no purpose but to paint Jennifer as a horrible person. However, the type of person Jennifer was after the divorce has no relevance to the claim for alienation of affections, nor of damages. The

type of person Jennifer was prior to the divorce clearly was relevant, and the Court allowed great latitude to Wood in introducing this proof. The jury heard Chuck Wood's attempt to paint Jennifer in a "bad light" prior to her divorce from her husband, and despite this proof, still awarded Chad Cooley $100,000.00. This assertion of error is without merit.

IX. The trial court made no error in refusing to grant a mistrial based upon statements of Plaintiff's counsel during closing argument

Of all of Wood's assertions of error during the trial, this one is the hardest to comprehend. The trial court granted Chad Cooley's motion in limine precluding evidence of the circumstances of the modification of custody of the child born during the marriage of Chad Cooley and Jennifer. [Transcript p.59 lines 4-16] Following the grant of the motion, counsel for Wood sought clarification as follows:

> MR. HERRING: Just for clarification and on the record, it's my understanding, and this obviously comes from our discussions in chambers, Mr. Shelton and Ms. Dawson would have no objection as to us asking a witness or any witnesses where the minor child born to the parties is now residing, or at least that is my understanding, and that would be part and parcel of the ruling as well?
>
> MR. SHELTON: No objection to that, Your Honor.
>
> THE COURT: That is part of the ruling.

[Transcript p.59 line 20 – p.60 line 2]

With the trial court's ruling, including the clarification sought and obtained by counsel for Chuck Wood, Mr. Cooley's attorney asked the following questions of Jennifer on direct examination:

> Q. All right. You have two children, I believe. What are your children's names and ages?

A. My son is Peter and he's 10, and then Sarah is fixing to be six.

Q. All right. And with whom do your two children live?

A. My son is with me, and Sarah lives with her daddy.

[Transcript p. 105, lines 12-19] No objection was made to this line of questioning, nor would an objection have been appropriate because this line of questioning was clearly within the parameters of the trial court's ruling pursuant to the clarification sought by Mr. Wood's own legal counsel. Furthermore, Mr. Wood's attorney asked the following questions of Jennifer on cross-examination:

Q. Now, you have a child named Sarah; is that correct?

A. I do.

Q. And how old is she?

A. She's five.

Q. And that was the child born to you and Chad, correct?

A. Yes.

Q. And who does she live with?

A. I'm sorry?

Q. Who does she live with?

A. Her daddy.

[Transcript p.134 lines 12-23]

The comments by Chad Cooley's counsel during closing arguments to which Chuck Wood now complains of are as follows:

> Mr. Cooley, in fact, is not this mean, violent person that they would have you believe that he is. All of the proof showed Mr. Cooley has custody of three of children. The proof is - -

[Transcript p.276, lines 10-13] These comments were an accurate recitation of the proof established during the trial, proof which was elicited in part by Mr. Wood's own legal counsel. The proof of where this child born to the marriage was living was proper pursuant to the trial court's ruling (after clarification by Mr. Wood's own legal counsel.)

"In general, parties may comment upon any facts introduced into evidence, and may draw whatever deductions and inferences that seem proper from the facts." *Thomas v. State, 14 So.3d 812, 815 (¶22) (Miss.App.2009)* citing *Bell v. State, 725 So.2d 836, 851 (¶ 40) (Miss.1998).* Mr. Wood's own counsel sought clarification to the trial court's ruling on the motion in limine allowing evidence of where the child born to Mr. Cooley and Jennifer was living. The evidence was introduced without objection, and in part by Mr. Wood's own counsel. Counsel for either side could comment upon "any facts introduced into evidence" and further could seeking to "draw whatever deductions or inferences that seem proper from the facts." *Id.* It is quiet incomprehensible for Mr. Wood's own legal counsel to ask a question of a witness (eg. where does that child reside) and then to complain when counsel for the opposing party makes reference to that very fact in closing argument. This assertion of error is clearly without merit.

X. Instruction C-5 was a correct statement of the law:

XI. Instructions C-7 and C-9 were correct statements of the law:

These assertions of error will be addressed together. The scope of review on appeal concerning instructions to the jury is limited, as the trial court is given great discretion in this regard. "[T]he trial court has considerable discretion in instructing the jury." *Fitch v. Valentine, 959 So.2d 1012, 1023 (Miss.2007)* (citing *Southland Enter. v. Newton County*, 838 So.2d 286, 289 (Miss.2003).

> Further, the court must view the instruction in light of all the other instructions which were given to determine whether the jury was properly instructed. *Munford, Inc. v. Fleming, 597 So.2d 1282, 1286 (Miss.1992).* If other instructions granted adequately instruct the jury, a party may not complain of a refused instruction on appeal. *Purina Mills, Inc. v. Moak, 575 So.2d 993, 996 (Miss.1990).* Lastly, the trial court has considerable discretion in instructing the jury. *Splain v. Hines, 609 So.2d 1234, 1239 (Miss.1992).*

Southland Enterprises, Inc. v. Newton County, 838 So.2d 286, 289 (Miss.2003).

> "When we review a claim of a trial court error in granting or denying jury instructions, we are required to read and consider all of the jury instructions together as a whole." *Richardson v. Norfolk S. Ry. Co.*, 923 So.2d 1002, 1010 (Miss.2006) (citing *Burr v. Miss. Baptist Med. Ctr.*, 909 So.2d 721, 726 (Miss.2005)). "No instruction should be taken out of context or read alone in isolation." *Richardson* at 1010.

Pierce v. Cook, 992 So.2d 612, 626 (Miss.2008).

Chuck Wood complains that Instruction C-5 was given in error by the trial court. Essentially, Mr. Wood complains that "C-5 should not have been allowed whereas it may have confused the jury as to the three elements of alienation of affection." [Appellant's Brief, p.46] Instruction C-5 states as follows:

> The Court instructs the jury that the plaintiff, Jason Chad Cooley, was entitled to be protected in his marital relationship without interference from the defendant, Chuck Wood.
>
> The interest protected is personal to the husband and arises out of the marriage relation, (sic) and includes the society, companionship, love, affect, aid, services, support, sexual relations, and the comfort of his wife as special rights growing out of the marriage covenant."

[Transcript 267 line 21 – p.268 line 3] This instruction is virtually identical to an instruction passed upon by the Mississippi Supreme Court in 2008. In *Pierce v. Cook,* the following instruction was given:

> Jury Instruction No. 6: The Court instructs the jury that the Plaintiff was entitled to be protected in his marital relationship without interference from Defendant.
>
> The interest protected is personal to the Husband and arises out of the marriage relation, and includes the society, companionship, love, affection, aid, services, support, sexual relations and the comfort of his wife as special rights and duties growing out of the marriage covenant.

Pierce v. Cook, 992 So.2d 612, 627 (Miss.2008). The Supreme Court in *Pierce*, finding no error in the jury instruction, stated, "[i]n sum, the jury instructions in today's case, when read as a whole, clearly and properly informed the jury of the law which the jury was to consider in arriving at the appropriate verdict in this case." *Id.* Instruction C-5 was an accurate statement of the law, and clearly when "read as a whole" along with the other instructions, was an appropriate instruction.

Mr. Wood also complains that Instruction C-7 and C-9 were given in error. Both sides to this appeal rely heavily upon the same case, *Fitch v. Valentine*, in arguing the correctness, or incorrectness, of these instructions. *Fitch v. Valentine, 959 So.2d 1012, 1023 (Miss.2007).* The instruction given by the trial court in C-7 closely follows the instruction (Instruction P-5) which was passed upon and affirmed by the Court in *Fitch. Id. at 1022.* Likewise Instruction C-9 accurately and appropriately instructs the jury as to the elements for the tort of alienation of affection.

Chuck Wood's assertion of error with respect to C-7 and C-9 in essence boils down to the lack of certain language found within the *Fitch* opinion, primarily language that Mr. Wood's actions included "persuasion, enticement or inducement." Yet despite Mr. Wood's heavy reliance upon *Fitch*, the Court there affirmed an instruction that totally and completely lacked any reference to "persuasion, enticement or inducement."

In *Fitch*, the trial court offered C-5 to the jury, which stated:

> [i]n order for your verdict to be for [Valentine] and against [Fitch], you must find the following:
>
> 1. That the conduct of [Fitch] was wrongful;
> 2. A loss of affection or consortium was suffered by [Valentine]; and
> 3. That this wrongful conduct caused the loss of affection or consortium.
>
> If you determine the above statements to be true, yo[u] must return a verdict for [Valentine] and award him damages in accordance with the Court's instructions.
>
> If [Valentine] fails to prove any one or more of these elements by a preponderance of the evidence, then your verdict must be for [Fitch].

Fitch v. Valentine, 959 So.2d at 1022. Nowhere within that instruction do we find the language which Chuck Wood now argues is essential and without which constitutes error. Yet the Supreme Court in *Fitch* found:

> This Court first finds this argument to be procedurally barred as Fitch failed to object after Instruction P-5 was rephrased and therefore failed to properly preserve for appeal his Instruction D-8 argument. Procedural bar notwithstanding, this Court concludes that the circuit court properly exercised its discretion in finding Instruction D-8 "repetitive" of Instruction P-5. Therefore, this issue is without merit.

Fitch v. Valentine, 959 So.2d at 1023 *(emphasis mine).* The Court made no comment that Instruction P-5 was inappropriate or lacked necessary language of "persuasion, enticement or inducement."

The trial court granted Mr. Wood's request to offer Instruction C-10. Taking all of the instructions together, read as a whole, the jury was correctly instructed as to the necessary elements for the tort of alienation of affection. As such, this assertion of error is without merit.

CONCLUSION

The jury heard the evidence presented during the trial and ultimately concluded that Chuck Wood committed the tort of alienation of affections, and that he is liable unto Chad Cooley in the amount of $100,000.00. Try as he might, Chuck Wood in his brief presented no justification for this Court to disturb the jury verdict. Therefore, this Court should refuse to nullify the verdict of the jury, and should affirm the trial court, leaving undisturbed the jury verdict in the amount of $100,000.00.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2010-CA-00395

CHUCK WOOD **APPELLANT**

V.

JASON CHAD COOLEY **APPELLEE**

CERTIFICATE OF MAILING

This is to certify that I, J. Mark Shelton, attorney for Appellee, have this day mailed by United States Mail, postage prepaid, the ORIGINAL and three (3) copies of the *Brief of Appellee, Jason Chad Cooley* to Kathy Gillis, Clerk, Supreme Court of Mississippi at the address of said Court, Post Office Box 249, Jackson, Mississippi 39205-0249.

THIS the 20 day of December, 2010.

J. MARK SHELTON, MSB[redacted]

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
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CHUCK WOOD **APPELLANT**

V.

JASON CHAD COOLEY **APPELLEE**

CERTIFICATE OF SERVICE

I, J. Mark Shelton, do hereby certify that I have this day forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee, Jason Chad Cooley* to the following:

Honorable James L. Roberts, Jr.
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THIS the 20 day of December, 2010.

J. MARK SHELTON, MS [redacted]