IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TOMMY E. JOHNSON — APPELLANT

VS. — CAUSE NO. 2010-CA-00735

MARTY G. CUMBERLAND — APPELLEE

ORAL ARGUMENT NOT REQUESTED

APPEAL FROM THE CIRCUIT COURT OF NESHOBA COUNTY, MISSISSIPPI
CAUSE NO. 08-CV-0020-NS-G
HONORABLE MARCUS D. GORDON, CIRCUIT COURT JUDGE, PRESIDING

BRIEF OF APPELLEE

Douglas J. Graham
MSB #[redacted]
Settlemires & Graham, PLLC
410 East Beacon Street
Philadelphia, MS 39350
Telephone No. (601) 656-9597
Attorney for Appellee,
Marty G. Cumberland

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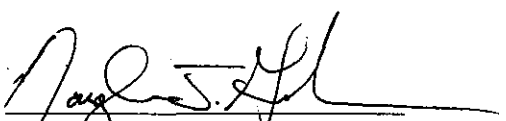
CERTIFICATE OF INTERESTED PERSONS

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

1. Tommy E. Johnson - Appellant
2. Marvin E. Wiggins, Jr. - Attorney for Appellant
3. D. Joseph Kilgore - Attorney at Trial
4. Robert L. Thomas - Attorney for Appellant
5. Marty G. Cumberland - Appellee
6. Douglas J. Graham - Attorney for Appellee

Respectfully submitted, this the 16th day of September, 2011.

BY: 

Douglas J. Graham
Attorney for Appellee

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6. WHETHER THE VERDICTS OF THE JURY ON NOVEMBER 3, 2009, AND NOVEMBER 5, 2009, WERE THE RESULT OF THE EVIDENCE BEFORE THEM.

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II.

STATEMENT OF THE CASE

In the Circuit Court of Neshoba County, Mississippi, in Cause Number 08-CV-0020-NS-G thereof, with Honorable Marcus D. Gordon, Circuit Judge, presiding, the jury found for the Defendant Marty Cumberland as to Tommy Johnson's complaint on November 3, 2009. (R 108) On November 5, 2009 the jury found in favor of Marty Cumberland against Tommy Johnson on his counter-complaint and awarded damages in the amount of ten thousand dollars ($10,000.00). (R106-107) Tommy Johnson has appealed the decision, and seeks to have the decision overruled and the case remanded for a new trial.

1. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

On January 31, 2008, Mr. Johnson filed a Complaint against Marty claiming Marty without provocation attacked him and caused him damages for medical expenses, lost income and punitive damages. (R 12-14)

On March 4, 2008, Marty filed his answer to the Complaint denying all of the claims alleged by Mr. Johnson. (R 17-20) On April 22, 2008, Marty filed a Counter-Complaint claiming alienation of affections of his former wife Diane Cumberland. Marty claimed as damages loss of consortium, emotional distress, other damages and punitive damages. (R 21-26) On May 27, 2008,

Mr. Johnson filed his answer to the Complaint alleging multiple defenses and denying all allegations contained in said Complaint. (R 27-30)

From May 27, 2008 until October 26, 2009, the parties conducted discovery proceedings and during this time Douglas J. Graham was substituted as counsel for Marty Cumberland. (R 31-75) The cause was set for trial during the November 2009 term of court, by Order entered on June 29, 2009. (R 60)

The trial began on November 2, 2009, and continued through November 3, 2009. Mr. Johnson on his case in chief called Marty Cumberland as an adverse witness, himself, Diane Cumberland, John Lilley and then the Plaintiff rested. Mr. Cumberland called Ashley Cumberland, Jennifer Amanda Phillips, Michael Gray, Ann Johnson, and himself on direct then rested. Mr. Johnson in rebuttal called Diane Cumberland, Debbie Malone, and Erin Cumberland. The jury returned a verdict in favor of the Defendant on November 3, 2009 as to the Complaint filed by Mr. Johnson. On November 5, 2009 the jury was called back and told that they did not enter a verdict on the Counter-Complaint filed by Marty Cumberland. Mr. Johnson nor his counsel objected to reconvening the jury nor was a motion for mistrial on said Counter-Complaint filed at that time or orally stated. On November 5, 2009 the jury returned a verdict in favor of Marty

Cumberland on his Counter-Complaint and awarded damages in the amount of ten thousand dollars ($10,000.00).

2. STATEMENT OF RELEVANT FACTS

On or about June 2006, Marty and Diane Cumberland were married and living together in Neshoba County, Mississippi. Tommy Johnson had just sold them a business and equipment to roll pine straw for sale. (TR 24) Over the next two years, Tommy Johnson and Diane Cumberland became closer and closer.

Mr. Johnson offered Diane a job watching his father-in-law. He began staying at his father-in-law's home while Diane was watching him. (TR 27, TR 35) He started taking Diane flying in his plane and coming over to the Cumberland's home during social gatherings. When the couple separated Mr. Johnson paid for a trailer for Diane and helped her find a place to put the trailer. While the Cumberland's were separated Mr. Johnson and Diane went to Hawaii at the same time. (TR 85) On Diane's birthday, she and a group of friends went to the Silver Star Casino. Amanda Phillips saw Mr. Johnson show up at the casino and he and Diane went off together and reappeared holding hands about an hour later. (Supplement to Transcript 6-7 (herein ST))

Marty asked on several occasions after the separation for the couple to reconcile; however during the time of separation, Mr. Johnson and Diane became closer and Diane refused to reconcile with Marty. (TR 28-29)

On March 31, 2007, Marty Cumberland became very suspicious of Tommy Johnson and Diane Cumberland's relationship after learning that Tommy Johnson had left his wife and was living in a motor home. Marty discovered where the motor home was located and decided to go over to Mr. Johnson's home around 3:00 a.m. In that visit Marty discovered his wife's vehicle parked behind the motor home hidden in the woods. Marty could not see any lights on in the motor home and decided to photograph the vehicle and the motor home. While photographing the vehicle, Mr. Johnson came out of the motor home and Marty let him know he was there. Mr. Johnson charged Marty and Marty defended himself. (TR 38-48)

Marty and Diane divorced on April 16, 2008, and have never reconciled.

III.

SUMMARY OF THE ARGUMENT

The Trial Court under the hearsay rules correctly disallowed the entry into evidence of the medical records and medical expenses that Tommy Johnson tried to introduce into evidence. Tommy Johnson offered no witnesses to authenticate the medical records and expenses. Further, Tommy Johnson was allowed to testify about his injuries and the medical expenses related to those injuries. The jury decided against Tommy Johnson on his Complaint. The jury was recalled to consider the Counter-Complaint of Mary Cumberland and Tommy Johnson made no objection to recalling the jury. The jury returned with a verdict in favor of Marty Cumberland and awarded him damages in the amount of ten thousand dollars ($10,000.00). Tommy Johnson contends that the only damages the jury considered were Marty Cumberland's lost income; however, Mr. Johnson conveniently forgets that there was testimony about the lost relationship, companionship and love of his wife. Further, there was testimony about his physical and emotional distress.

This Court should affirm the judgment of the lower court on both the complaint of Tommy Johnson and on the counter-complaint

of Marty Cumberland affirming the damages of the lower court and assess interest.

IV.

ARGUMENT

I. WHETHER THE TRIAL COURT WAS CORRECT IN DISCHARGING THE JURY AND RECONVENING THE JURY TWO DAYS LATER TO CONSIDER THE COUNTER-COMPLAINT OF MARTY CUMBERLAND WHEN NO OBJECTION WAS MADE BY TOMMY JOHNSON.

Whether the trial court was correct in discharging the jury and reconvening the jury two days later to consider the Counter-Complaint of Marty Cumberland when no objection was made by Tommy Johnson. Rules 3.10 *Uniform Rules of Circuit and County Court Practice*, gives the Court guidance on defective verdicts when it states "If a verdict is so defective that the court cannot determine from it the intent of the jury, the court shall, with proper instructions, direct the jurors to reconsider the verdict. No verdict shall be accepted until it clearly reflects the intent of the jury." However, in the case before this court, the verdict from the jury on November 3, 2009 was clear in that it found for Marty Cumberland. The court and Tommy Johnson accepted that verdict as to his complaint. The Court did error in not sending the jury back to consider the counter-complaint filed by Marty Cumberland. However, that error does

not apply to the first verdict of the jury as it pertains to Tommy Johnson's complaint.

Rule 3.11 of the *Uniform Rules of Circuit and County Court Practice*, states that "Within the discretion of the Court, a recess of jury deliberations may be held. The jury may be reconvened at the time and place set by the Court. In cases where the jury is not sequestered the judge shall instruct the jury as to the following:" The Rule then gives the judge the six instructions that are to be given to the jurors. The Appellant is correct when he states that the judge did not give the instructions to the jury.

However, the Appellant Tommy Johnson did not object to the reconvening of the jury nor did the Appellant make any motion before the jury was reconvened for a mistrial. This Court has found that if an issue is not raised properly at trial it is then procedurally barred from arguing the issue for the first time on appeal. **Gunn v. State**, 56 So.3d 568, 572 (Miss. 2011). Further, the Appellant's failure to object or make a motion could be considered his consent and agreement to reconvening the jury and therefore, he waived the requirements under Rule 3.11 of the *Uniform Rules of Circuit and County Court Practice* and no error was committed by the Court. **Barnes v. State,** 374 So.2d 1308, 1309 (Miss 1979).

The Appellant did not object or ask for a mistrial on the verdict of November 3, 2009 and took the verdict to be a final judgment of his Complaint. Then when the jury was reconvened on November 5, 2009 to consider the Counter-Complaint, the Appellant did not object to the reconvening nor did he ask for a mistrial on that basis. Therefore, the Appellant has waived the requirements of Rule 3.11 of the *Uniform Rules of Circuit and County Practice* or is procedurally barred from raising the issue now on appeal.

II. WHETHER THE TRIAL COURT WAS CORRECT IN ORDERING THE PARTIES TO SUPPLEMENT THE RECORD WHEN IT WAS FOUND THE FIRST DAY OF TESTIMONY WAS UNAVAILABLE AND WHETHER THE TRIAL COURT ORDERING THE RECORD SUPPLEMENTED UNDER THE RULES WAS SUFFICIENT.

The Appellant is correct in his statement that the record was incomplete and that this court ordered that the record be supplemented. However, the Appellant was asked by the trial court to supplement the record. His failure to do so could be construed as an attempt to raise a reversible error.

Rule 10(c) of the *Mississippi Rules of Appellate Procedure* states that "If no stenographic report or transcript of all or part of the evidence or proceedings is available, the appellant may prepare a statement of the evidence or proceedings from the

best available means, including recollection." Further, if the parties agree on the statement then under Rule 10(d) the parties can submit a joint statement of the case and of the issues of the appeal. The procedure in Rule 10(d) was completed by the parties after this Court ordered the parties to do so. If the Appellant did not agree with the supplemental record, then he should not have agreed with it. Further, he could have asked for a hearing under Rule 10(e) to correct or modify the record. Essential to the Appellant's argument that the record was not sufficient is that his proffer of evidence on the medical records and expenses was not included; however, his argument and description of the testimony to be presented in chambers with the Trial Court is recorded in the record. (TR 15-19) Therefore, the Court on this issue should affirm the decision of the Trial Court.

III. WHETHER THE TRIAL COURT WAS CORRECT IN NOT ALLOWING TOMMY JOHNSON TO ADMIT INTO EVIDENCE A COMPILATION OF MEDICAL RECORDS AND EXPENSES.

The appellant did seek to enter into evidence a compilation of medical records and expenses from the navy department. The court ruled that the evidence was inadmissible as hearsay because the appellant did not offer any witness to authenticate the records. Under Rule 801(c) of the *Mississippi Rules of Evidence*, "Hearsay is a statement, other than one made by the

declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." There are twenty-five (25) exceptions to the rule; however, during trial the Appellant did not assert any of those exceptions nor does the records qualify under any of the exceptions. Since no exception to the hearsay rule was raised, the Appellant should be barred from raising the issue at appeal. **Gunn**, 56 So.3d at 572.

The Appellant did cite **James v. Jackson**, 514 So.2d 1224 (Miss. 1987) in support of his proposition. **James** can easily be distinguished from the case at hand. The issue of whether the bills were allowed into evidence was not the issue in **James**. **Id.** The Court in **James** did not create an exception to the hearsay rule. A party cannot testify and authenticate his own medical records and expenses. Clearly, the Court in **James** allowed the bills into record but we are not told how they came into the record. **Id.** The Appellant offers no exception to *Rule 801(c)* nor does he offer any case in which this Court has ruled that a party can authenticate his own medical records and expenses obtained from a hospital or insurance provider.

IV. WHETHER THE TRIAL COURT WAS CORRECT IN REFUSING TO PERMIT COUNSEL FOR TOMMY JOHNSON TO MOVE FOR A DIRECTED VERDICT AT THE CLOSE OF THE CASE OF MARTY CUMBERLAND ON HIS COUNTER-COMPLAINT AND DENYING SAID MOTION AFTER THE

TRIAL AND IN DENYING THE MOTIONS FOR NEW TRIAL AND TO SET ASIDE THE VERDICT, AND IN REFUSING TO DIRECT A REMITTITUR AND/OR NEW TRIAL.

The Appellant did attempt to make a motion for directed verdict and the court responded that it was not the proper time. (TR 76). Then the Court asked counsel for the Appellant if he had any further testimony, to which his counsel stated that "we have rebuttal testimony". (TR 76). The Court responded "That's what I am asking for." (TR 76). The Appellant failed to make a motion for directed verdict after all the rebuttal testimony and the Appellee offered no further testimony. (TR 93). The Appellant failed to make a motion for directed verdict and now wants a reversal on said issue. Under **Gunn**, if relief is not requested at trial it cannot be raised for the first time on appeal. **Id.** at 572.

The Court properly denied the motion of the Appellant for additur/remittitur. Under **Biloxi Electric Co. v. Thorn** this Court found that "The damages, therefore, must be so excessive as to strike mankind, at first blush, as being, beyond all measure, unreasonable, and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption." **Biloxi,** 264 So.2d 404, 405 (Miss 1972). The jury award in this case was ten thousand dollars ($10,000.00). I see no reason to think that this amount of

damages is so excessive as to strike mankind as beyond all measure. This Court has found that damages in alienation of affections cases are not limited to the loss of consortium. **Gorman v. McMahon**, 792 So.2d 307, 315 (Miss.App. 2001).

V. WHETHER THE VERDICTS OF THE JURY ON NOVEMBER 3, 2009, AND NOVEMBER 5, 2009, WERE WITH THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Marty Cumberland testified about his loss of his wife's affections and how that affected him. Further, the evidence presented throughout the trial by several witnesses indicated the loss and damages that Marty Cumberland suffered. **Gorman** states that the elements of alienation of affection claims are the wrongful conduct by the defendant, the loss of affection or consortium toward the injured spouse, and a causal connection between the wrongful conduct and the loss of affection or consortium. **Id.** at 421. In the trial there was testimony about Diane and Mr. Johnson's relationship and about (1) how he would stay with her while she was supposedly working for him, (2) he would take her riding in his plane, (3) and him buying her a trailer after she left Marty. The Appellant's arguments about the jury finding damages out of the thin air are offensive and without merit. The Appellant is arguing that a marriage relationship has no value.

As to the argument of the Appellant regarding the verdict in favor of Marty Cumberland on Mr. Johnson's Complaint, he provides no case law or statues as to why the jury should have found in his favor. His argument revolves around arguing the facts. However, the Appellant leaves out the facts that the morning of the incident that there was contradicting testimony as to who attacked who first. Further, he fails to point out that the testimony showed that Marty had come to Mr. Johnson's house sometime between 4:00 a.m. and 6:00 a.m. that morning and had discovered his wife's vehicle parked in the woods behind the Motor home Mr. Johnson was living in.

VI. WHETHER THE VERDICTS OF THE JURY ON NOVEMBER 3, 2009, AND NOVEMBER 5, 2009, WERE THE RESULT OF THE EVIDENCE BEFORE THEM.

The Appellant argues that the verdicts were a result of bias, passion, and/or prejudice against Tommy Johnson. In **Biloxi Electric Co. v. Thorn**, the Court stated that "the only evidence of corruption, passion, prejudice or bias on the part of the jury is an inference, if any, to be drawn from contrasting the amount of the verdict with the amount of the damages." **Id.** at 406. Again the amount of the verdict awarded by the jury in this case was minimal at best, considering the damages of Marty Cumberland losing his wife's love, companionship, and contributions to the household. There was substantial evidence

to support the jury's findings in this case. Therefore the Court should affirm the decision of the lower court as to this issue.

VII. WHETHER THE JURY AWARDED RELIEF THAT WAS REQUESTED IN THE PLEADINGS.

The Appellant in his argument on this issue states that the jury based their award of damages solely on Marty Cumberland's lost income which he states was not plead in Marty's Complaint. However, no objection was made at trial to the introduction of evidence as to Marty's lost income. This Court has stated numerous times that if there is no objection at trial, it cannot be raised for the first time on appeal. **Gunn**, 56 So.3d at 572. Enumerated by the Court of Appeals in **Williams v. State**, 2010-KA-00504-COA.

Further, the Appellant ignores all of the testimony about the loss of consortium and intentional infliction of physical and emotional distress. The evidence of lost income the Appellant claims was the couple's tax returns before the divorce and Marty's income after the divorce. That evidence could also be used to show the loss of his spouse's contributions to the marriage.

VIII. WHETHER THE ERRORS CONSTITUTED CUMULATIVE ERROR, WARRANTING A REVERSAL FOR A NEW TRIAL.

If no error is found by the Court then this issue is not relevant to the appeal. However, if an error is found in one of

the issues raised by the Appellant then the Court should find that said error is not prejudicial and a simple error and the judgment of the lower Court should be affirmed.

V.

CONCLUSION

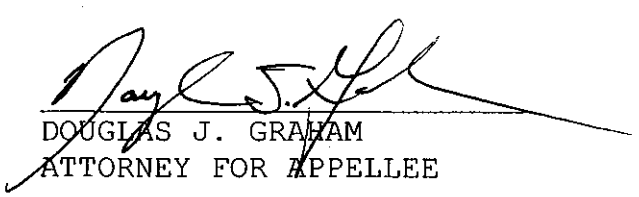
This Court should affirm the judgment of the lower Court. The Court properly reconvened the jury when the Appellant failed to object to the reconvening of the jury or move the Court for a mistrial. The trial court was correct in excluding the medical records and expenses from being entered into evidence under the hearsay rules.

The Appellant never made a motion for directed verdict after the conclusion of the rebuttal testimony. Therefore the lower court made no error since the motion was never made. Further the Court was correct in denying all of the post-trial motions of the Appellant.

This Court should find that the jury was correct in finding damages from the evidence presented in the trial. Further, the Appellant should be barred from raising issues on appeal that were not raised at the trial. This Court should affirm the judgment of the lower court.

SUBMITTED ON THIS, THE 16TH DAY OF SEPTEMBER, 2011

RESPECTFULLY,



DOUGLAS J. GRAHAM
ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

I, Douglas J. Grahaam, Attorney for Appellant, do hereby certify that a true and correct copy of the above and foregoing document have been served upon each of the following:

HON. MARCUS D. GORDON
Circuit Judge
Eighth Circuit Court District
P.O. Box 220
Decatur, MS 39327

HON. KATHY GILLIS
Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205-0249

HON. MARVIN E. WIGGINS, JR.
Attorney at Law
P.O. Box 696
DeKalb, MS 39328

HON. ROBERT THOMAS
Alford, Thomas & Kilgore
P.O. Box 96
435 Center Avenue
Philadelphia, MS 39350

Dated: September 16, 2011

Douglas J. Graham
Attorney for the Appellee
Settlemires & Graham
410 E. Beacon Street
Philadelphia, MS 39350
MSBN [redacted]

Mississippi Rules of Civil Procedure, and shall be placed in the bottom right hand corner of each page.

All instructions will be read by the court in whatever order the court chooses, will be available for the attorneys during their argument, and will be carried by the jury into the jury room when they retire to consider their verdict.

Rule 3.08
DUTY OF BAILIFF

The bailiff will escort the impaneled jury each time they enter or leave the courtroom during the trial and after the verdict. All attorneys, litigants, and spectators will be seated when the jury enters or leaves the courtroom.

Rule 3.09
UNNECESSARY WITNESSES

No party shall subpoena unnecessary witnesses to repeatedly prove the same fact or set of facts. The court may, in its discretion, tax the per diem and mileage of all unnecessary witnesses against the party or attorney for the party causing them to be subpoenaed whether or not they are called to testify. In all cases, the mileage and per diem of any witness not called to testify will be taxed against the party causing them to be subpoenaed, unless good cause to the contrary be shown. Attorneys are directed to confer with their witnesses prior to commencement of trial, and no recesses shall be permitted for conferring with witnesses who were accessible before trial.

Rule 3.10
JURY DELIBERATIONS AND VERDICT

The court may direct the jury to select one of its members to preside over the deliberations and to write out and return any verdict agreed upon, and admonish the jurors that, until they are discharged as jurors in the cause, they may communicate upon subjects connected with the trial only while the jury is convened in the jury room for the purpose of reaching a verdict.

The jurors shall be kept together for deliberations as the court reasonably directs.

The court shall permit the jury, upon retiring for deliberation, to take to the jury room the instructions and exhibits and writings which have been received in evidence, except depositions.

Appendix "A"

After the jurors have retired to consider their verdict the court shall not recall the jurors to hear additional evidence.

The court, after notice to all attorneys, may recall the jury after it has retired and give such additional written instructions to the jury as the court deems appropriate.

If the jury, after they retire for deliberation, desires to be informed of any point of law, the court shall instruct the jury to reduce its question to writing and the court in its discretion, after affording the parties an opportunity to state their objections or assent, may grant additional written instructions in response to the jury's request.

In criminal cases if there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed; if the jury cannot agree with respect to all defendants, the defendant or defendants as to whom it does not agree may be tried again.

In criminal cases if different counts are charged in the indictment or if the court instructs the jury as to related or lesser offenses, the jurors shall, if they convict the defendant, make it appear by their verdict on which counts or of which offenses they find the defendant guilty.

If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give an appropriate instruction.

If it appears to the court that there is no reasonable probability of agreement, the jury may be discharged without having agreed upon a verdict and a mistrial granted.

When the jurors have agreed upon a verdict they shall be conducted into the courtroom by the officer having them in charge. The court shall ask the foreman or the jury panel if an agreement has been reached on a verdict. If the foreman or the jury panel answers in the affirmative, the judge shall call upon the foreman or any member of the panel to deliver the verdict in writing to the clerk or the court. The court may then examine the verdict and correct it as to matters of form. The clerk or the court shall then read the verdict in open court in the presence of the jury. The court shall inquire if either party desires to poll the jury, or the court may on its own motion poll the jury. If neither party nor the court desires to poll the jury, the verdict shall be ordered filed and entered of record and the jurors discharged from the cause, unless a bifurcated hearing is necessary. If the court, on its own motion, or on motion of either party, polls the jury, each juror shall be asked by the court if the verdict rendered is that juror's verdict. In a criminal case where the verdict is unanimous and in a civil case where the required number of jurors have voted in the affirmative for the verdict, the court shall order the verdict filed and

entered of record and discharge the jury unless a bifurcated hearing is necessary. If a juror dissents in a criminal case or in a civil case if less than the required number cannot agree the court may: 1) return the jury for further deliberations or 2) declare a mistrial. No motion to poll the jury shall be entertained after the verdict is ordered to be filed and entered of record or the jury is discharged.

If a verdict is so defective that the court cannot determine from it the intent of the jury, the court shall, with proper instructions, direct the jurors to reconsider the verdict. No verdict shall be accepted until it clearly reflects the intent of the jury. If the jury persists in rendering defective verdicts the court shall declare a mistrial.

While it is appropriate for the court to thank jurors at the conclusion of a trial for their public service, such comments should not include praise or criticism of their verdict.

After the verdict has been received by the court and entered on the record, the testimony or affidavits of the jurors shall not be received to impeach the verdict, except as permitted by the Mississippi Rules of Evidence.

Rule 3.11
JURY RECESS

Within the discretion of the court, a recess of jury deliberations may be held. The jury may be reconvened at the time and place set by the court. In cases in which the jury is not sequestered the judge shall instruct the jury as to the following:

1. That the jurors are not to converse with anyone, including family members or another juror, about the case or on any subject connected with the trial. However, a juror may inform another about the juror's schedule.

2. That the jurors are not to form or express an opinion on the case or any subject connected with the trial.

3. That the jurors are not to view any place connected with the case or subject connected with the trial.

4. That the jurors are not to read, listen to, or watch any news account or other matter relating to the case or other subject connected with the trial.

5. That the jurors shall report to the court any communications or attempts to communicate with them on the case or subject connected with the trial.

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5. That the jurors shall report to the court any communications or attempts to communicate with them on the case or subject connected with the trial.

Appendix "B"

6. On such other matters as the court deems appropriate.

When the jury is reconvened, the court, in its discretion, may poll the jury to determine if the jury has complied with the court's instructions.

In cases where the jury has been sequestered the court may instruct the jury on as many of the above matters as are appropriate.

Rule 3.12
MISTRIALS

Upon motion of any party, the court may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, misconduct by the party, the party's attorneys, or someone acting at the behest of the party or the party's attorney, resulting in substantial and irreparable prejudice to the movant's case.

Upon motion of a party or its own motion, the court may declare a mistrial if:

1. The trial cannot proceed in conformity with law; or

2. It appears there is no reasonable probability of the jury's agreement upon a verdict.

Rule 3.13
ASSESSMENT OF COSTS UPON SETTLEMENT OF CASE

The court may assess all costs, including fees and mileage of jurors who have been required to be present for the trial, against whichever party litigant or attorney it deems appropriate, for failure of an attorney to try the case or for failure to notify the court of settlement of a case before 5:00 P.M. on the day before the trial.

Rule 3.14
NOTE TAKING BY JURORS

1. Note Taking Permitted in the Discretion of the Court. The court may, in its discretion, permit jurors to take written notes concerning testimony and other evidence. If the court permits jurors to take written notes, jurors shall have access to their notes during deliberations. Immediately after the jury has rendered its verdict, all notes shall be collected by the bailiff or clerk and destroyed.

RULE 10. CONTENT OF THE RECORD ON APPEAL

(a) Content of the Record. The parties shall designate the content of the record pursuant to this rule, and the record shall consist of designated papers and exhibits filed in the trial court, the transcript of proceedings, if any, and in all cases a certified copy of the docket entries prepared by the clerk of the trial court.

(b) Determining the Content of the Record.

(1) *Designation of Record.* Within seven (7) days after filing the notice of appeal, the appellant shall file with the clerk of the trial court and serve both on the court reporter or reporters and on the appellee a written designation describing those parts of the record necessary for the appeal.

(2) *Inclusion of Relevant Evidence.* In cases where the defendant has received the death sentence, the entire record shall be designated. In any other case, if the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) *Matters Excluded Absent Designation.* In any case other than a case where the defendant has received a death sentence, the record shall not include, unless specifically designated,

i. subpoenas or summonses for any witness or defendant when there is an appearance for such person:

ii. papers relating to discovery, including depositions, interrogatories, requests for admission, and all related notices, motions or orders;

iii. any motion and order of continuance or extension of time;

iv. documents concerning the organization of the grand jury or any list from which grand or petit jurors are selected;

v. pleadings subsequently replaced by amended pleadings;

vi. jury *voir dire*.

(4) *Statement of Issues.* Unless the entire record, except for those matters identified in

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(b)(3) of this Rule, is to be included, the appellant shall, within the seven (7) days time provided in (b)(1) of this Rule, file a statement of the issues the appellant intends to present on the appeal and shall serve on the appellee a copy of the designation and of the statement. Each issue in the statement shall be separately numbered. If the appellee deems inclusion of other parts of the proceedings to be necessary, the appellee shall, within 14 days after the service of the designation and the statement of the appellant, file with the clerk and serve on the appellant and the court reporter a designation of additional parts to be included. The clerk and reporter shall prepare the additional parts at the expense of the appellant unless the appellant obtains from the trial court an order requiring the appellee to pay the expense.

(5) *Attorney's Examination and Proposed Corrections.* For fourteen (14) days after service of the clerk's notice of completion under Rule 11(d)(2), the appellant shall have the use of the record for examination. On or before the expiration of that period, appellant shall return the record to the trial court clerk, and shall append to the record (i) a written statement of any proposed corrections to the record, (ii) a certificate that the appellant or the appellant's attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service indicating that the record has been returned to the clerk. For fourteen (14) days after receipt of the certificate of service from appellant, appellee shall have the use of the record for examination. On or before the expiration of that period, appellee shall return the record to the trial court clerk, and shall append to the record (i) a written statement of any proposed corrections to the record, (ii) a certificate that the appellee or the appellee's attorney has carefully examined the record and that with the proposed corrections, if any, it is correct and complete, and (iii) a certificate of service, indicating that the record has been returned to the clerk. Corrections as to which all parties agree in writing shall be deemed made by stipulation. If the parties propose corrections to the record but do not agree on the corrections, the trial court clerk shall forthwith deliver the record with proposed corrections to the trial judge. The trial judge shall promptly determine which corrections, if any, are proper and enter an order under Rule 10(e). Within five days, the trial court clerk shall serve all parties and their attorneys with a copy of the order. If a party does not agree with the court's order, that party shall, within five days of service of the order, request a hearing. Such a request shall be assigned priority status on the trial judge's docket, and after a hearing, the trial judge shall promptly enter an order directing the court reporter and/or the trial court clerk to make the appropriate correction(s), if any, and to finalize completion of the record for transmission to this Court. Once the order is entered, or if no hearing request is made, the record shall be returned to the court reporter and/or the trial court clerk who shall within seven days make corrections directed by the order. The trial court clerk shall verify that any approved changes have been made and that the required certifications are appended to the record before sending it to the Supreme Court.

(c) Statement of the Evidence When No Report, Recital, or Transcript Is Available.

If no stenographic report or transcript of all or part of the evidence or proceedings is available, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection. The statement should convey a fair, accurate, and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or his counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. If the appellee objects to the statement as filed, the appellee shall file objections with the clerk of the trial court within 14 days after service of the notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this Rule.

(d) Agreed Statement as the Record on Appeal. In lieu of a record on appeal designated pursuant to subdivisions (b) or (c) of this Rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the trial court and shall then be certified to the Supreme Court as the record on appeal.

(e) Correction or Modification of the Record. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted to and settled by that court and the record made to conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated in the record, the parties by stipulation, or the trial court, either before or after the record is transmitted to the Supreme Court or the Court of Appeals, or either appellate court on proper motion or of its own initiative, may order that the omission or misstatement be corrected, and, if necessary, that a supplemental record be filed. Such order shall state the date by which the correction or supplemental record must be filed and shall designate the party or parties who shall pay the cost thereof. Any document submitted to either appellate court for inclusion in the record must be certified by the clerk of the trial court. All other questions as to the form and content of the record shall be presented to the appropriate appellate court.

(f) Limit on Authority to Add to or Subtract From the Record. Nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate, and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.

[Amended effective January 1, 1999; amended July 1, 1999; amended effective July 1, 2011

to revise the procedure for attorney's examination and proposed corrections.]

Advisory Committee Historical Note

Effective June 24, 1999, Rule 10(b)(5) was amended to effect editorial changes. 735 So.2d XIX (West Miss.Cases 1999).

Effective January 1, 1999, Rule 10(b)(5) was amended to require counsel to make certifications regarding the record and to extend the examination period to 14 days. 717-722 So.2d XXVII (West Miss.Cases 1998).

Effective January 1, 1995, Miss.R.App.P. 10 replaced Miss.Sup.Ct.R. 10, embracing proceedings in the Court of Appeals. 644-647 So.2d XXXVIII-XLI (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 10 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice. 632-635 So.2d LI (West Miss.Cases 1994).

Comment

Rule 10 is based on Fed. R. App. P. 10, taking into account modifications suggested by the more recent Ala. R. App. P. 10 and Tenn. R. App. P. 24.

The purpose of the Rule is to permit and encourage parties to include in the record on appeal only those matters material to the issues on appeal. While subdivision (b) will govern most appeals, subdivisions (c) and (d) provide alternate methods of preparing the record, either when no transcript is available, or when the parties can agree on a "statement of the case" that will adequately present the issues on appeal.

Subdivision (b) eliminates the confusion that followed *City of Mound Bayou v. Roy Collins Const. Co.*, 457 So. 2d 337 (Miss. 1984). That case directed court reporters to record everything transpiring at trial, including *voir dire* and bench and chambers conferences. It also, however, ended the jurisdictional requirement of designating the record pursuant to Miss. Code Ann. § 9-13-33(1) to (4) (Supp. 1986). In doing so, it inadvertently encouraged use of the entire record, a practice the Court then condemned in *Byrd v. F-S Prestress, Inc.*, 464 So. 2d 63, 69 (Miss. 1985). This rule reinstates the express requirement that the appellant designate those parts of the record to be included on appeal. Form 2 in the Appendix of Forms is a form for designation of the record. This requirement is no longer jurisdictional, but a failure to comply with it could lead to dismissal pursuant to Rule 2(a)(2). This is consistent with federal practice.

Pursuant to subdivision (b)(3), a general designation will not be construed to include certain papers normally irrelevant to the issues on appeal. The rule thus encourages the omission of these nonessential matters. Because counsel customarily do not file trial court briefs with the clerk, briefs are not included in the (b)(3) list. Briefs do not normally belong in a record on appeal, unless necessary to show that an issue was presented to the trial court.

A designation of certain issues under subdivision (b)(4) does not preclude a party from stating other issues in its brief under Rule 28(a)(3). However, a party asserting other issues in its brief will bear responsibility for the cost of preparing any additional portions of the record subsequently designated by any other party in response to the statement of additional issues. As a result, accurate designation under (b)(4) is advisable.

Subdivision (f) clearly states that the flexible procedures of this rule are not intended to permit a party to augment the record with matters entered *ex parte*.

the effective date of the Mississippi Rules of Evidence. Subsequent to the *Hudspeth* amendment, Rule 706(e) was amended to retain the substance of Rule 706(e) as originally approved by the Court in *Hudspeth* while deleting any reference to and dependence upon a specific statutory provision.

[Amended January 31, 1990; March 20, 1995.]

ARTICLE VIII. HEARSAY

A witness's testimony is evaluated on the basis of four factors: perception, memory, narration, and sincerity. In order that the testimony can be properly considered in the light of these factors, the testimony should comply with three conditions. The witness should testify (1) under oath, (2) in the presence of the trier of fact, and (3) be subjected to cross-examination. Past experience as well as common sense indicate that some testimony which does not conform to these three conditions may be more valuable than testimony that does. The four factors may, in some instances, be present in the absence of compliance with the three aforementioned conditions. The solution that the common law developed over a period of time was a general rule against hearsay which permitted exceptions which furnished guarantees of trustworthiness and reliability.

The hearsay provisions of the uniform rules retain the common law scheme. The traditional common law hearsay exceptions have been retained in Rules 803 and 804. Rule 803 concerns itself with situations where availability of the declarant is immaterial. Rule 804 pertains to exceptions which are usable only where the declarant is unavailable. The concluding provisions of both Rule 803 and 804 (Rule 803(24) and Rule 804(b)(5) respectively) allow for the use of hearsay statements which do not fall within the recognized exceptions, when the guarantees of trustworthiness and necessity are present. These two provisions are a recognition that the law is not stagnant; they are designed to encourage the development of this area of the law.

Rule 801. Definitions

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

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(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if:

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving the person; or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

[Amended effective July 1, 2009.]

Advisory Committee Historical Note

Effective May 27, 2004, the Comment to Rule 801 was amended to include the paragraph concerning subsection (d)(1)(C).

Effective March 1, 1989, the Comment was amended to delete the statement about Rule 801(d)(1)(C) and to include an additional comment about 801(d)(2). 536-538 So.2d XXXII (West MissCas.1989).

Comment

Subsection (a) defines with clarity the concept of a statement. The significant point is that nothing is an assertion unless intended to be one. This becomes particularly important in situations which deal with nonverbal conduct. Some nonverbal conduct is clearly tantamount to a verbal assertion, e.g., pointing to someone to identify that person. The definition of statement excludes nonverbal conduct which is not assertive. Thus, the definition of hearsay in Rule 801(c) concerns itself with conduct that is assertive.

When evidence of conduct is offered on the basis that the conduct was not a statement and, therefore, not hearsay, the trial judge must make a preliminary determination to ascertain whether an assertion was intended by the conduct. The burden is upon the party claiming that the intention existed.

Subsection (c) codifies and simultaneously clarifies the common law definition of hearsay. If the significance of a statement is simply that it was made and there is no issue about the truth of the matter asserted, then the statement is not hearsay.

Under this definition of hearsay an out-of-court statement made and repeated by a witness testifying at trial is hearsay. The key is whether the statement is made while testifying or whether it is out-of-court. An out-of court statement otherwise hearsay is technically no less hearsay because it was made in the presence of a party.

Subsection 801(d) has two major parts and both are departures from past Mississippi practice. The purpose of subsection (d) is to exclude statements which literally fall within the definition of hearsay from the hearsay rule.

Subsection 801(d)(1) is concerned with prior statements of the witness. In three specific instances, a witness's prior statement is not hearsay.

Prior inconsistent statements have generally been admissible for impeachment purposes but not admissible as substantive evidence. *Moffett v. State*, 456 So.2d 714, 719 (Miss. 1984). This has been the traditional practice in Mississippi. Under Rule 801(d)(1)(A) the prior inconsistent statements may be admissible as substantive evidence if they were made under oath, e.g., at a deposition or at a judicial proceeding. This covers statements made before a grand jury. There is no requirement that the prior statement be written. If the defendant in a criminal trial has made a prior inconsistent statement, the situation is governed by Rule 801(d)(2).

Rule 801(d)(1)(B) provides that prior consistent statements may be introduced for substantive evidence when offered to rebut a charge against the witness of recent fabrication.

Rule 801(d)(1)(C), which declares that prior statements of identification made by a witness are not hearsay, is not a departure from pre-rule practice. The Court in *Fells v. State*, 345 So.2d 618 (Miss. 1977), departed from the traditional view that such statements were hearsay by adopting what was then the minority view that statements of identification could be admitted as substantive evidence of that identification. The scope of the rule is broader than the *Fells* holding in that: (1) there is no need for a prior attempt to impeach the witness for the identifying statement to be admissible; (2) the testimony about the prior statement may be from the witness who made it or another person who heard it; (3) the witness who made the statement need not make an in-court identification; and (4) the statement may have been made either in or apart from an investigative procedure. Statements physically describing a person are not statements of identification under this rule. The Confrontation Clause is not violated when a third party testifies about an out-of-court identification made by a witness who is unable to recall or unwilling to testify about that identification, provided the identifying witness testifies at the trial or hearing and is subject to cross-examination. *U.S. v. Owens*, 484 U.S. 554, 108 S.Ct. 838, 98 L.Ed. 2d 951 (1988).

Rule 801(d)(2) deals with admissions made by a party-opponent other than admissions made pursuant to M.R.C.P. 36(b). Admissibility of admissions made pursuant to M.R.C.P. 36(b) is controlled by that rule and is not affected by Rule 801(d)(2). The practice has been in Mississippi to treat an admission as an exception to the hearsay rule. Rule 801(d)(2) achieves the same result of admissibility although it classifies admissions as non-hearsay. There are five classes of statements which fall under the rule:

(A) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required. It is only necessary that the statement be relevant to representative affairs.

(B) If a party adopts or acquiesces in another person's statement, it will be deemed that the statement is indeed his admission. Knowledge is not a necessary ingredient. *Matthews v. Carpenter*, 231 Miss. 677, 97 So.2d 522 (1957); *Haver v. Hinson*, 385 So.2d 606 (Miss. 1980). This raises the question of when silence is a form of admission. Silence may constitute a tacit admission if a person would have, under the circumstances, protested the statement made in his presence if the statement were untrue. In civil cases, this does not pose a significant problem. In criminal cases, much may depend on the person's constitutional right not to incriminate himself.

(C) The general principle survives that a statement by an agent authorized to speak by a party is tantamount to an admission by a party. The rule covers statements made by the agent to third persons as well as statements made by the agent to the principal. The essence

of this is that a party's own records are admissible against him, even where there has been no intent to disclose the information therein to third persons.

(D) The common law required that the agent's statement be uttered as part of his duties, i.e., within the scope of his agency. 801(d)(2)(D) regards this rigid requirement and admits a statement "concerning a matter within the scope of his agency" provided it was uttered during the existence of the employment relationship.

(E) This section codifies the principle that only those statements of co-conspirators will be admissible which were made (1) during the course of the conspiracy and (2) in furtherance of it. This is consistent with the United States Supreme Court's ruling in *Krulewitch v. United States*, 336 U.S. 440, 69 S.Ct. 716, 93 L.Ed. 709 (1949), which deemed inadmissible statements made after the conspiracy's objectives had either succeeded or failed.

Rule 801(d)(2) provides that the court shall consider the contents of the declarant's statement in resolving preliminary questions relating to a declarant's authority under subdivision (C), the agency or employment relationship and scope thereof under subdivision (D), and the existence of a conspiracy and the identity of the participants therein under subdivision (E). Generally, foundational facts are governed by Rule 104, not the law of agency. *See Bourjaily v. United States, 107 S.Ct. 2775 (1987).* Under Rule 104(a), these preliminary questions are to be established by a preponderance of the evidence. Of course, in determining preliminary questions, the court may give the contents of the statement as much (or as little) weight as the court in its discretion deems appropriate. Moreover, Rule 801(d)(2) provides that the contents of the statement do not alone suffice to establish the preliminary questions. Rather, the court must in addition consider the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, and evidence corroborating the contents of the statement. *See Ponthieux v. State,* 532 So.2d 1239, 1244 (Miss. 1988) ("on appeal ... [w]e search the entire record to determine whether the preliminary fact has been established); *Martin v. State,* 609 So.2d 435 (Miss. 1992).

[Comment amended effective March 1, 1989; amended effective May 27, 2004; amended effective July 1, 2009.]

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by law.

Comment