IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TOMMY E. JOHNSON — APPELLANT

V. — CAUSE NO. 2010-CA-00735-COA

MARTY G. CUMBERLAND — APPELLEE

REPLY BRIEF OF THE APPELLANT

APPEAL FROM THE CIRCUIT COURT OF NESHOBA COUNTY, MISSISSIPPI

CAUSE NUMBER 08-CV-0020-NS-G

ORAL ARGUMENT NOT REQUESTED

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TABLE OF CONTENTS

ALPHABETICAL TABLE OF AUTHORITIES

STATUTES AND RULES:

SECONDARY AUTHORITY:

CASELAW:

STATEMENT OF THE ISSUES

The Appellant, Tommy Johnson, hereby restates his issues to be considered by this Court. These issues are stated hereinbelow.

ISSUE I: WHETHER THE TRIAL COURT ERRED IN DISCHARGING THE JURY AND RECONVENING THE JURY TWO DAYS LATER TO CONSIDER COUNTER-COMPLAINT OF MARTY CUMBERLAND.

ISSUE II: WHETHER THE TRIAL COURT ERRED IN NOT SUPERVISING THE PREPARATION OF A RECORD OF THE FIRST DAY OF PROCEEDINGS AND WHETHER THE LACK OF SUCH A RECORD OF THE FIRST DAY OF PROCEEDINGS WARRANTS A REVERSAL FOR A NEW TRIAL.

ISSUE III: WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING TOMMY JOHNSON TO ADMIT INTO EVIDENCE A COMPILATION OF MEDICAL EXPENSES.

ISSUE IV: WHETHER THE TRIAL COURT ERRED 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, IN DENYING THE MOTIONS FOR NEW TRIAL AND TO SET ASIDE THE VERDICT, AND IN REFUSING TO DIRECT A REMITTITUR AND/OR NEW TRIAL.

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

ISSUE VI: WHETHER THE VERDICTS OF THE JURY ON NOVEMBER 3, 2009, AND NOVEMBER 5, 2009, WERE THE RESULT OF BIAS, PASSION, AND/OR PREJUDICE AGAINST TOMMY JOHNSON.

ISSUE VII: WHETHER THE JURY AWARDED RELIEF NOT REQUESTED IN THE PLEADINGS.

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

As done earlier, the Appellant shall address together Issues IV, V, and VI, due to similar authorities and factors, and shall address separately Issues I, II, III, VII, and VIII. Further, Tommy E. Johnson shall be cited as "Tommy", "Johnson", "Mr. Johnson", "the Plaintiff", and/or "the Appellant", and Marty G. Cumberland shall be cited as "Marty", "Cumberland", "Mr. Cumberland", "the Defendant", and/or "the Appellee"].

ISSUE I: WHETHER THE TRIAL COURT ERRED IN DISCHARGING THE JURY AND RECONVENING THE JURY TWO DAYS LATER TO CONSIDER COUNTER-COMPLAINT OF MARTY CUMBERLAND.

In his Brief, the Appellee contends that the jury's verdict in favor of Marty Cumberland on November 3, 2009, was accepted by the Appellant, as to his Complaint. *Brief of Appellee*, p.8. The Appellee also asserts that the recall of the jury on November 5, 2009, to consider anew the remainder of the case was not error. **Id**. Further, Cumberland argues that Johnson failed to raise the issue at trial, and, thus, was procedurally barred from doing so on appeal. **Id**. at p.9.

Regarding the latter assertion, Cumberland cites two (2) criminal cases: **Gunn v. State**, 56 So. 3d 568 (Miss. 2011) and **Barnes v. State**, 374 So. 2d 1308 (Miss. 1979). Marty cites **Barnes**, claiming that Tommy's purported failure to object was a waiver of any such error. *Brief of Appellee*, p.9. This reliance upon **Barnes** is misplaced, as that case involved a voluntary and affirmative agreement by a murder defendant and his counsel to permit a jury not to be sequestered overnight during a two-day trial, due to a lack of motel and hotel space. **Barnes**, 374 So. 2d at 1309. No attenuating circumstances were involved.

Likewise, **Gunn** is inapposite to the instant proceeding. In **Gunn**, the defendant argued that a photographic lineup was improperly suggestive. **Gunn** at 572 ¶17. The Court noted that the defendant was procedurally barred from raising the issue for the first time on appeal. **Id**. However, the Court noted further that, "[n]otwithstanding the procedural bar, this issue lacks merit"

due to the circumstances surrounding the lineup process used by officers in identifying the defendant. **Id**. More importantly, the Court determined that, despite two week's advance notice, defense counsel failed to file any pretrial suppression motion and failed to make any similar motion during trial. **Id**. at n.14.

In the case below, on November 3, 2009, the alternate juror was released, per statute, at the commencement of deliberations. (T122) Later that day, the jury announced that it had reached a verdict and was brought into the courtroom, where the jurors were polled. (T123; RE23) After the verdict was read, stating that "We, the jury, find for the Defendant, Marty G. Cumberland", (T123; RE23), the jurors were polled a second time. (T125; RE24)

Pursuant to practice in the Eighth Circuit Court District, the jury was recessed to await other possible, but unlikely, action that week. This was noted by the trial court:

> ***You are recessed***. You can call, but there is no cases [sic] to be tried tomorrow. ***You are recessed to call in after five o'clock tomorrow.*** A research of my docket appears that ***there will be no more cases to be tried this week***. Yet, as a matter of precaution, I want you to call in after five o'clock tomorrow.
>
> Now, Monday, as far as I now know, we will have a murder case, and we will bring in all the juries for the selection of thirteen jurors on that case. I have a number of criminal cases that are set for trial next week so next week you can look forward to being pretty busy. ***You are recessed.*** You may pass out of the Courtroom.

(T125; RE24)(emphasis added) As of November 3, 2009, the jury had ruled in favor of Cumberland, and all parties concerned took no action to call to the jury's attention that any additional work was to be done. To the contrary, the jurors were told not to

expect any further action until the next week's docket was called, but, as a precaution, to call at 5:00 p.m. on the following day, November 4, 2009.

At the close of business on November 3, 2009, the trial court thus considered the instant case to be at an end, directing Cumberland's counsel to prepare the judgment. (T125; RE24) The transcript below indicates that the jury was recalled by the trial court on Thursday, November 5, 2009, to consider the remaining issues, namely, the counter-complaint of Cumberland and any related punitive damage claim. (T126; RE25)

In his brief, Cumberland states that Johnson did not oppose the recall of the jury. *Brief of Appellee*, p.9. This is not correct. Johnson had filed a Motion for New Trial/for Remittitur. (CP112-115) Unlike counsel in **Gunn**, a proper response had been made. This motion was noted by the court on November 5, 2009:

> BY THE COURT: Therefore, this case is finally over with subject to ruling on motions. Any day next week, Joey [counsel for Plaintiff, Hon. D. Joseph Kilgore], I can take up your motions.

(T130) The Judgments were entered on November 10, 2009.

Further, the Motion for New Trial/for Remittitur noted that, following the November 3, 2009, verdict, and before the November 5, 2009, recall of the jury, additional action had occurred regarding this cause. "***On November 4, 2009 the verdict was ruled defective and improper*** and the Court required the jury to reconsider and amend or complete it's [sic] verdict."

(CP112)(emphasis added) This action does not appear anywhere in the record, but it is corroborated by the mere fact that the jury was actually recalled for this purpose the next day.

As contended in the Brief of the Appellant, the trial court herein failed to ensure that a record of its proceedings herein was maintained. The entire testimony of November 2, 2009, fell victim to the dual calamities of malfunctioning recording equipment and loss of reporter's notes. ((T21; *Brief of the Appellant*, pp. 28-30; Supplemental Transcript of March 17, 2011)

As such, any argument against the recall of the jury was also lost. However, despite this contention of Cumberland as to any bar, the motion itself is indicative of the issue's having been raised prior to this appeal.

The trial court gave no cautionary or other proper instructions prior to the November 3, 2009, jury discharge or its recall on November 5, 2009. Such failure violates a primal guarantee. In **United Services Automobile Association v. Lisanby**, 47 So. 3d 1172 (Miss. 2010), the Supreme Court declared that:

> The Mississippi Constitution guarantees that "the right of trial by jury shall remain inviolate." Miss. Const. art. 3 §31. In addition, the guarantee of due process of law contemplates a verdict rendered by a fair and impartial jury. [cit. om.] Thus, trial courts have a duty to assure that an impaneled jury is "competent, fair and impartial." [cit. om.]

Id. at 1180 ¶28. As a consequence of this duty, rules to promote fair juries were promulgated. Where a judge receives a proper verdict, it is filed and the jurors are discharged; but, where

> 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.

Rules 3.10, *Uniform Rules of Circuit and County Court Practice* **See** *Mississippi Code Annotated* §11-7-161 (1972) as amended and revised. ("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".)

A recessed jury may be reconvened, but, if jurors are not sequestered, the court shall instruct the jurors not to converse with anyone about the case, not to form an opinion about the case, not to view any place connected to the case, not to read, listen, or watch any news accounts regarding the case, to report to the court any attempted or actual communication about the case, and on any other matter deemed appropriate. Rule 3.11, *Uniform Rules of Circuit and County Court Practice*. **See** **Oliver v. Goodyear Tire and Rubber Company**, 10 So. 3d 976, 978 ¶9 (Miss. App. 2009)(Rule 3.10 allows court to direct further deliberations where a verdict is "so defective that the court cannot determine from it the intent of the jury").

As stated in the *Brief of the Appellant*, the trial judge disregarded Rules 3.10 and 3.11. A discharged jury is no longer subject to the court's power to reconvene it, and, if the jury is recessed, the court must provide the mandatory cautionary instructions. Neither course was followed below. Where the jury has departed and the defect is of substance, the power to reconvene should cease. *Brief of the Appellant*, pp. 25-28. **See**

Am. Jur. 2d *Trial* §1895. In light of such a mistake, the court should restrict its relief to a new trial. **Id**. at §1913.

Further, the Brief of the Appellant cited several cases in which this Court has questioned, and often reversed, the post-deliberation acts of trial courts. Significant among these is **Folk v. State**, 576 So. 2d 1243, 1251 (Miss. 1991), in which this Court reversed the seating of an alternate juror post-deliberations and post-discharge, without proper instruction or sequestration.

A recent alienation of affection case addressed Rule 3.10. In **Wood v. Cooley**, 2010-CA-00359-COA (Miss. App. 2011), the trial court was held to have followed properly the procedures outlined in Rule 3.10. In **Wood**, the jury awarded the plaintiff attorney fees and court costs against the wife's paramour. Such fees not being jury issues, the trial judge retired the jury again. A second verdict awarded $100,000.00 to the plaintiff. **Id**.

The paramour argued on appeal that the first verdict clearly evinced the jury's intent to award only an amount equal to court costs and attorney's fees. However, this Court affirmed the second verdict, finding that it was in substantial compliance with the rules regarding verdicts. The test thereof was described as "whether or not it is an intelligent answer to the issues submitted to the jury and expressed so that the intent of the jury can be understood by the court." **Id**. (**quoting Oliver v. Goodyear Tire and Rubber Company**, 10 So. 3d 976, 978 ¶7 (Miss. App. 2009)).

Wood stated that "the meaning of the verdict must be obtained from the language used, … otherwise, it is the duty of the court to require the jury to retire and return a verdict responsive to the issue in the case[.]" **Id. quoting Morris v. Robinson Brothers Motor Company**, 144 Miss. 861, 866, 110 So. 683, 684 (1927)). Had there been any award of damages, even nominal damages, there would have been substantial compliance. **Id.**

Hereinbelow, had Judge Gordon considered the verdict to be defective on November 3, 2009, he should have retired the jury for more deliberations or declared a mistrial. Instead, he treated the verdict as valid, had it filed, and sent the jury home without cautionary instructions. The reconvening of the same jurors on November 5, 2009, without mandatory protecting instructions, to consider the remainder of the case, was error.

Exasperated by the lack of regard for rules of practice, two justices once observed that, "the primary issue of this case is whether the Mississippi Rules of Civil Procedure are going to be enforced … or whether we will have 'trial by ambush'". **Rawson v. Buta**, 609 So. 2d 426, 432 (Miss. 1992)(Prather, J. concurring in part and dissenting in part). Likewise, "the defendant should be bound by the rule or the rule should be changed." **Id.** at 435. (McRae, J., concurring in part and dissenting in part).

In a recent reversal, this Court found obvious non-compliance with Rule 9.06, *Uniform Rules of Circuit and County Court Practice*, regarding a mental evaluation of a defendant, and criticized the denial of a motion for new trial, contrary to Rule

10.05, *Uniform Rules of Circuit and County Court Practice*. **Jay v. State**, 25 So. 3d 257, 261, 263 ¶¶23, 35 (Miss. 2009).

This sentiment should also play a role in this Court's review of the lower court's failure to follow the mandates of Rules 3.10 and 3.11. This Court should reverse this cause.

ISSUE II: WHETHER THE TRIAL COURT ERRED IN NOT SUPERVISING THE PREPARATION OF A RECORD OF THE FIRST DAY OF PROCEEDINGS AND WHETHER THE LACK OF SUCH A RECORD OF THE FIRST DAY OF PROCEEDINGS WARRANTS A REVERSAL FOR A NEW TRIAL.

In his brief, Cumberland tries to have his cake and eat it, too. The November 2, 2009, testimony of Johnson's witnesses, including Johnson, was not made a part of this record, due to an electronic malfunction and to the loss of the stenographic notes of the same testimony. The issue was presented to the trial court, to no avail, and, ultimately, this Court directed the parties to attempt to summarize the testimony over a year later.

Cumberland now accuses Johnson of an "attempt to raise a reversible error" by not having provided a summary during the initial record preparation, *Brief of the Appellee*, p.10. The insult is compounded by the injury of being forced to resort to an inadequate summary supplementation, to which Cumberland states that, if Johnson did not like the summary, "then he should not have agreed with it." **Id**. at p.11.

Due process requires preserving a record for appellate review. These constitutional mandates have been addressed in rule form, placing the obligation upon the trial court. *Brief of the Appellant*, pp.28-30. "In appeals on the record it is the duty of the lower court … to make and preserve a record of the

proceedings sufficient for the court to review. Such record may be made with or without the assistance of a court reporter." Rule 5.02, *Uniform Rules of Circuit and County Court Practice.*

The denial by the trial court of this fundamental due process protection constitutes prejudice to Johnson. **See Watts v. State**, 717 So. 2d 314, 318 (Miss. 1998), **citing United States v. Renton**, 700 F.2d 154, 157 (5th Cir. 1983) (appellant is to show prejudice from missing parts of record). This would supersede the cursory application of Rule 10, *Mississippi Rules of Appellate Procedure*, advocated by Cumberland. *Brief of the Appellee*, p.11.

The lack of a record of the November 2, 2009, action has barred the full review of the case below. The Uniform Rules place the duty of securing a record upon the trial court. This Court should reverse for a new trial to remedy this defect.

ISSUE III: WHETHER THE TRIAL COURT ERRED IN NOT ALLOWING TOMMY JOHNSON TO ADMIT INTO EVIDENCE A COMPILATION OF MEDICAL EXPENSES.

As a prelude to the trial on November 2, 2009, the trial court sustained the objection of Cumberland to Johnson's proposed offer into evidence of a medical expenses log detailing his medical treatment since 2007. The compilation was of various bills paid via the Navy Department for Johnson. Since he rarely saw a doctor pre-assault, the records were probative of his reasonable and necessary treatments after his brutal beating from Cumberland, since he rarely saw a doctor pre-assault. The court rejected the offer and limited the proffer. (T16-19)

Marty asserts that Tommy is attempting to create a new hearsay exception by trying to "authenticate his own medical

records." *Brief of the Appellee*, p. 12. He further alleges that Tommy offered hearsay records in lieu of having actual medical-care providers to verify the billing records. **Id.** at pp. 11-12. Finally, Cumberland cites the **Gunn** case as prohibiting Johnson from raising a hearsay exception on appeal. **Id.** at p.12.

To the contrary, no 26th hearsay exception is necessary. This Court has created a prima facie standard for such matters. The trial counsel for Johnson argued this standard pre-trial, and, consistent with other rulings herein, the trial judge would not allow the admission of the tendered records. This was error.

In **Boggs v. Hawks**, 772 So. 2d 1082 (Miss. App. 2000), this Court addressed the issue of providing evidence of medical expenditures. This Court posited the following:

> Proof that medical, hospital, and doctor bills were paid or incurred because of any illness, disease, or injury shall be *prima facie* evidence that such bills so paid or incurred were necessary or reasonable. Miss. Code Ann. 41-9-119 (Rev. 1993). Therefore, the issue is not based entirely on the "seriousness of the injury Boggs suffered" as contended by Hawks but is based on whether it is fair, necessary, and reasonable. However, the opposing party may rebut necessity and reasonableness by "proper evidence" and then the question is for the jury.

Id. (**quoting Jackson v. Brumfield**, 458 So. 2d 736, 757 (Miss. 1984)). Boggs failed to offer such rebuttal evidence as to necessity and reasonableness, instead attacking the credibility of the plaintiff's witnesses. Similarly, **James v. Jackson**, 514 So. 2d 1224, 1226 (Miss. 1987) likewise cited **Jackson v. Brumfield**, while noting the elements of damages for personal injury as past and future pain and suffering, past and future medical expenses, lost wages, and future disability. **Id.** at 1226.

Burnwatt v. Ear, Nose, & Throat Consultants of North Mississippi, PLLC, 47 So. 3d 109 (Miss. 2010), considered similar points, while juxtaposing Rules 401 and 403, *Mississippi Rules of Evidence*. In **Burnwatt**, the trial court dismissed a defendant upon one theory of liability, and then allowed expert testimony inculpating the dismissed party while exculpating a second defendant under a different theory. **Id.** at 114-115 ¶¶22-24. In permitting the testimony, the Supreme Court found that the probative value thereof outweighed any danger of confusion of the issues or of misleading the jury. **Id.** at 118 ¶35.

The Court stated that "[t]he threshold for admissibility of evidence is not high, and Rule 401 favors the admission of evidence when it has probative value to the case." **Id.** at 114 ¶21. There would be no reversal regarding admission of evidence, "[u]nless a substantial right of a party is affected." **Id.** at 114 ¶17. The Supreme Court thus affirmed the admission of the testimony. **Id.** at 119 ¶38.

In **Wal-Mart Stores, Inc. v. Frierson**, 818 So. 2d 1135, 1145 ¶22 (Miss. 2002), this stated that its standard of review in evidentiary matters is "abuse of discretion". To reverse an admission or rejection of evidence, "the ruling must result in prejudice and adversely affect a substantial right of the aggrieved party", **Id.**, and "the harm must be severe enough to harm a party's substantial right." **Id.**

In addition thereto, the Supreme Court has recently addressed discretion:

> simply because a matter is left within the discretion of the trial judge does not mean "that the trial judge [can] do anything he or she [wishes]. ***Sound discretion imports a decision by reference to legally valid standards.***" Where a trial judge in determining a matter committed to his sound discretion makes his decision by reference to an erroneous view of the law, this Court has authority to take appropriate corrective action on appeal. To require reversal, "***the error must be of such magnitude as to leave no doubt that the appellant was unduly prejudiced.***"

Deviney Construction Company, Inc. v. Marble, 60 So. 3d 797, 802 ¶13 (Miss. 2011). (emphasis added)

The refusal to admit the expense log interfered with a substantial right of Johnson's -- the right to prove his case. The records were probative, subject to rebuttal by Cumberland. The exclusion of testimony and records eviscerated Tommy's case, leaving him only the two photographic exhibits of his face post-attack to explain his damages to the jury.

The testimony regarding medical bills was highly probative and constituted a *prima facie* finding of reasonableness and necessity. In a personal injury action alleging intentional acts, such evidence is crucial in establishing elements of damage. The prima facie proof of damages is substantial in the trial of a personal injury action.

This evidence was not too complex for a jury, and the defense could rebut the proof by proper evidence. This court should reverse the cause, with directions as to admission of the medical expense log.

ISSUE IV: WHETHER THE TRIAL COURT ERRED 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, IN DENYING THE MOTIONS FOR NEW TRIAL AND TO SET ASIDE THE VERDICT, AND IN REFUSING TO DIRECT A REMITTITUR AND/OR NEW TRIAL.

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ISSUE VI: WHETHER THE VERDICTS OF THE JURY ON NOVEMBER 3, 2009, AND NOVEMBER 5, 2009, WERE THE RESULT OF BIAS, PASSION, AND/OR PREJUDICE AGAINST TOMMY JOHNSON.

As noted in the Statement of the Issues, the Appellant will present to this Court Issues IV, V, and VI for joint consideration. Due to the similarity in factors to be considered, economy will be served in this manner.

In replying to Issue IV, Marty states that Tommy did not move at the proper time for a directed verdict. *Brief of the Appellee*, p.13. Marty next makes two fallacious arguments. First, he claims that Tommy improperly moved for a new trial at the close of Marty's case. **Id.** Second, he claims that Tommy should have so moved after his own rebuttal case. **Id.** This discounts the rule that motions for directed verdicts are made by a defendant at the close of the plaintiff's case, or, as in this cause, by a counter-defendant at the end of the counter-plaintiff's case.

The motion for directed verdict is properly made "at the close of the evidence offered by an opponent". Rule 50(a), *Mississippi Rules of Civil Procedure*. **See Paymaster Oil Mill Co. v. Mitchell**, 319 So. 2d 652, 656 (Miss. 1975)(directed verdict motion at the conclusion of the plaintiff's evidence encompasses testimony of the plaintiff and its favorable inferences).

The initial motion for a new trial was made by Johnson at the close of Cumberland's case. (T76-77) The trial court refused to permit the motion at that time. It was renewed as a separate

post-trial motion. (CP109-111) The matter was not waived, and it was not raised for the first time on appeal, notwithstanding the assertion of Cumberland. *Brief of the Appellee*, p.13.

Further, Cumberland discordantly cites **Biloxi Electric Company, Inc. v. Thorn**, 264 So. 2d 404 (Miss. 1972) and **Gorman v. McMahon**, 792 So. 2d 307 (Miss. App. 2001). *Brief of the Appellee*, pp. 13-14. He cites **Biloxi Electric** to state the general rule regarding excessive verdicts, but then gives his personal opinion in regard thereto: "I see no reason to think that this amount of damages is so excessive as to strike mankind as beyond all measure." *Brief of the Appellee*, pp. 13-14. He omits the remainder thereof, that the damages must be flagrantly outrageous and extravagant, for they have no standard by which to ascertain the excess. **Biloxi Electric**, 264 So. 2d at 405.

The proof adduced below by Cumberland touched upon those elements cited in **Gorman**. Marty correctly claims that damages thereunder are not limited to loss of consortium. However, there was only one area of these damages for which financial proof was offered -- that of lost income. However, (a) Cumberland did not allege lost income in his pleadings, (b) there was no amendment to permit such consideration, and (c) he offered no amounts as to those elements which were in his pleadings.

In reply to Issue V, Marty again cites **Gorman**, alleging the three (3) elements to establish an alienation of affection claim. These elements are (1) wrongful conduct of the defendant; (2) loss of affection or consortium; (3) causal connection between

such conduct and loss. **Gorman v. McMahon**, 792 So. 2d 307, 313 ¶12 (Miss. App. 2001).

In his rendition of facts, Marty has exaggerated somewhat the evidence provided below. *Brief of the Appellee*, p.14. Marty writes in his brief that Tommy would stay with Marty's wife 'while she was supposedly working for him" and "him buying her a trailer after she left Marty." The Brief of the Appellant noted that Mrs. Cumberland worked for Johnson, which made it hard not to be around him. There was no "supposedly" about this work, and several witnesses established the point. However, the only proof regarding the mobile home in which Mrs. Cumberland was residing was that she was paying rent on it to Johnson, (ST4) and that Marty helped her to set up the trailer and to furnish it. (T28)

Cumberland contends that the "Appellant's arguments about the jury finding damages out of the thin air are offensive and without merit." *Brief of the Appellee*, p. 14. However, Marty found nothing offensive about beating a 71-year-old man bloody and to the ground while threatening to kill him. Marty did not find offense in his quitting a solid, full-time fifteen-year-long job to live off a part-time pine straw business, causing his loss of income. He did not find offensive the threats that he made to his wife in front of his daughters. He was not offended by telling Deputy Sheriff John Lilley that he threatened Tommy Johnson with a knife. His sensibilities are out of whack.

The Appellee also claims that the jury had no reason to find in favor of Tommy, accusing him of leaving out facts and

citing no authority for the position. In so doing, Marty attempted to justify his assault of Tommy by accusing Tommy of failing to point out to this Court that Marty allegedly found his wife's vehicle behind Tommy's house between 4:00 a.m. and 6:00 a.m. while Marty was trespassing in Tommy's yard while preparing his attack. *Brief of the Appellee*, p.15. In effect, Marty is blaming Tommy for causing his own brutal beating.

Unfortunately for Marty, Tommy's brief is replete with references to the beating incident of March 27, 2007. Brief of the Appellant, pp. 2, 15-16, 17, 23, 36. Several of these refer to the time frame. Tommy has not ignored the facts, as has Marty.

Marty has ignored three salient facts. One, he pleaded guilty to assaulting Tommy. (Exhibit 1) Two, he stated that he had no intention of filing any legal action until after Tommy sued him. (T66) Third, and most significant, there has not been, at any time, from any witness, any proof of ***ANY*** relationship, other than friendship, between Mrs. Cumberland and Tommy Johnson.

Gorman is easily distinguished from the instant case. Here, there is no proof whatsoever of any wrongful conduct between Mrs. Cumberland and Tommy. Thus, the first and third elements fail to materialize. In **Gorman**, there was no doubt as to the sexual relationship between the wife and the paramour; the only question was as to the instigator. 792 at 313 ¶¶12-14. Likewise, in **Wood v. Cooley**, 2010-CA-00359-COA (Miss. App. 2011), the paramour was clearly involved with the wife, although not discovered until the divorce was underway. The Court upheld the $100,000.00 verdict.

The first **Gorman** element requires wrongful conduct on the part of the defendant. More wrongful conduct credited to Marty's account than to Tommy's. If anyone caused Diane Cumberland to lose her affections for Marty, it was Marty, who threatened her, cursed her, and caused marital discord before meeting Tommy.

As to Issue VI, Marty again cites **Biloxi Electric**, generally contending that there was substantial evidence of Marty's damages to support what he considers a verdict which was "minimal at best". *Brief of the Appellee*, p.15. As noted above, there was no proof of an amount of any damage constituent, other than loss of income, which was not requested in the pleadings.

In **Biloxi Electric**, the jury awarded $6,500.00 to a traveling salesman whose car was struck from behind. Having seen the parties, the witnesses, and the doctors, the jurors set its award. The trial court directed an additur of an extra $6,000.00. The Supreme Court found no bias, prejudice, or passion in the jury and reversed. **Biloxi Electric**, 264 So. 2d at 405-06.

That Court approved an amount which Marty would probably call "minimal at best". The amount is not the criterion; rather, the goal is a well-reasoned verdict based upon evidence. There was scant evidence of damages, no evidence of wrongful conduct by Tommy, no proof of any sexual or wrongful relationship between Tommy and Mrs. Cumberland, and no claim for loss of income in Marty's his pleadings. The verdict for Marty was baseless.

The absolute failure to consider even nominal damages for Tommy is indicative of a bias against Tommy. For a jury to have

an elderly man beaten to a pulp by his admitted assailant, to have said assailant plead guilty to a criminal charge stemming from the assault, and to have photographs of the bloody victim within minutes of the attack, and then not to find liability and not to award at least nominal damages is patently a textbook case of prejudice and bias.

In **Entergy Mississippi, Inc. v. Bolden**, 854 So. 2d 1051 (Miss. 2003), Bolden was injured in a collision with defendant's employee Strawbridge. Bolden's lost wages was $9,600.00 and her medical costs were $31,686.06. The jury awarded $532,000.00. **Id.** at 1053-54 ¶¶2-4. A peremptory instruction was granted on the issue of negligence, on the basis that "rules and case law allow for questions to be removed from the jury's consideration when there exists no factual question for it to resolve." **Id.** "No reasonable juror could have concluded from the evidence presented that Strawbridge was not negligent." **Id.** at 1054 ¶9.

> There are no fixed standards as to when an additur or remittitur is proper. [cit. om.] We will not disturb a jury's award of damages ***unless its size, in comparison to the actual amount of damage, shocks the conscience.*** [cit. om.] The standard of review for the denial of a remittitur is abuse of discretion. [cit. om.] A remittitur is appropriate when either (1) the jury or trier of fact was influenced by bias, prejudice or passion, or (2) the damages were contrary to the overwhelming weight of the evidence. [cit. om.] "***The bias, prejudice, or passion standard is purely a circumstantial standard***[.] [cit. om.] ***Evidence of*** corruption, passion, prejudice or ***bias on the part of the jury (if any) is an inference,*** ... to be drawn from contrasting the amount of the verdict with the amount of damages. [cit. om.]

Id. at 1058 ¶20. (emphasis added) Reversing the judgment, this Court held that the trial court abused its discretion in not

directing a remittitur to $232,000.00. "We conclude that the scant testimony offered in support of damages for pain and suffering does not justify such a large award of damages for pain and suffering." Id. at 1058 ¶21.

Regarding a motion for directed verdict, a trial court is to consider "whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated", [cit. om.] looking "solely to the testimony of behalf of the party against whom a directed verdict is requested." **McGee v. River Region Medical Center**, 59 So. 3d 575, 578 ¶8 (Miss. 2011).

Although "minimal at best", the amount awarded by the jury below was against the overwhelming weight of the evidence. Bias may be easily inferred from the verdict arising from little proof and from a clear determination to ignore Marty's liability. This Court should reverse the lower court's judgment.

ISSUE VII: WHETHER THE JURY AWARDED RELIEF NOT REQUESTED IN THE PLEADINGS.

Cumberland did not claim lost income in his pleadings. (CP17-26) Further, despite the lugubrious list of miseries cited in his pleadings, except for the non-pleaded lost income, the proof supported only generic claims. He cited the loss of money and time in trying to regain his wife's affections, but testified only that he had been nice to her and helped her to settle into her new residence. He claimed embarrassment and humiliation, but testified that he had filed his action only after being sued by Johnson and that he had been willing to let everybody move onward

with their lives. Diana and Marty divided their bills in the divorce action, Diane got the least productive business, and Marty received the debt to Tommy Johnson, along with the pine straw business. The only solid financial proof offered by Marty was the allegedly lost income he did not seek in his pleadings.

Yet again, Cumberland has cited **Gunn**, asserting that Tommy failed to raise at trial any objection to the introduction of the evidence regarding lost income. Cumberland also cited **Williams v. State**, 2010-KA-00504-COA, for the same proposition. This reliance is misplaced. **Williams** addressed numerous alleged deficiencies of trial counsel, including admission into evidence of bad acts, incidents involving co-defendants, and other matters. "In general, issues that were not raised at trial are barred from our consideration on appeal". **Id**. at ¶11. However, the Court went further, finding that the issues would have been barred anyway or mitigated by cross-examination. **Id**. at ¶¶12-35.

The Appellee also notes testimony regarding loss of consortium and infliction of emotional distress. *Brief of the Appellee*, p.16. The Appellee fails to note that none of that testimony indicated any romantic or other relationship between his former wife and Johnson or that the non-existent relationship caused the alienation of his wife's affections.

What Cumberland fails to appreciate is that "[a] party is not entitled to an absolute right to amend pleadings. Amendments are to be denied if allowing the amendment would prejudice the defendant." **Mahaffey v. Maner**, 47 So. 3d 1190, 1193 ¶11 (Miss.

App. 2010). Such amendments should be prompt and not due to a lack of diligence. **Id.**

The elements of damage for alienation of affection were recently enumerated in **Fitch v. Valentine**, 959 So. 2d 1012, 1024 ¶30 (Miss. 2007). Claims thereunder are limited by their pleadings. **See United States Fidelity and Guaranty Company v. Pearthree**, 389 So. 2d 109, 111 (Miss. 1980)("under our decisional law the claim cannot include issues not raised by the pleadings); **Barnes v. Town of Burnsville**, 385 So. 2d 623, 624 (Miss. 1980)("As a general rule, in the absence of a statute, the relief awarded by the judgment will be restricted to that claimed by the party in his pleadings"); **West Center Apartments, Ltd. v. Keyes**, 371 So. 2d 854, 858 (Miss. 1979)(relief not prayed for should not have been granted as not supported by any allegation in complaint); **Fondren v. Fondren**, 348 So. 2d 431, 432 (Miss. 1977)(alimony not in pleadings; award violates fail notice requirement of due process); **Niles v. Sanders**, 218 So. 2d 428, 430 (Miss. 1969)("Fairness, as well as ordinary rules of pleading, require that the opposite party be apprised" of claim).

"The issues are framed, formed and bounded by the pleadings of the litigants. The Court is limited to the issues raised in the pleadings and the proof contained in the record." **Seymore v. Greater Mississippi Life Insurance Company**, 362 So. 2d 611, 614 (Miss. 1978). Adding thereto,

> Courts do not instigate or initiate civil litigation. They act only when called on for aid, and only in respect to that which is within the call. The potentiality of a court to consider and determine a given class of cases over which

> it has jurisdiction is made actual, in a particular case within that class, only when a party entitled to relief with respect thereto has applied to the court by his written pleading and even then his written application must state the facts upon which it is based or else it will still be ineffectual to actuate the court to grant any relief. The power of the court, then, will be exerted only upon, and Will not move beyond, the scope of the cause as presented by the pleadings, for the pleadings are the means that the law has provided by which the parties may state to the court what it is they ask of the court and the facts upon which they ask it; and Proof is received and is considered only as to those matters of fact that are put in issue by the pleadings, and never beyond or outside of them. If the rule were otherwise courts could become the originators instead of the settlers of litigious disputes, and parties would never know definitely what they will be required to meet or how to meet it. [V.] Griffith, *Mississippi Chancery Practice* (2d ed. 1950) 564 pp. 586-87. (emphasis added)

Id. at 614-615. Judge Griffith succinctly stated Marty's failure.

Cumberland did not apprise Johnson of his intent to seek lost income in his pleadings. No amendment to conform to proof was made at trial. Notwithstanding **Fitch**, one may not arbitrarily be awarded remedies not sought in pleadings. Thus, even if this Court finds that the jury found all the elements of alienation of affection, this Court should find that the award of damages was improperly based upon an element not pleaded and reverse.

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

Cumberland cited no authority in replying to Issue VIII. "A party's failure to cite authority in support of an argument precludes consideration of the issue on appeal." **Ryals v. Bertucci, 26** So. 3d 1090, 1098 ¶32 (Miss. App. 2009). This rule also applies to the failure of an appellee to respond to a part of an appellant's brief. **Turner v. State**, 383 So. 2d 489, 491

(Miss. 1980). Thus, this failure to respond is tantamount to a confession of error, and is generally so treated. **Id**.

To reiterate from Johnson's brief the general rule, "where there is no error in part, there can be no reversible error to the whole". **Gowdy v. State**, 56 So. 3d 540, 544, ¶13 (Miss. 2010). However, the appellate courts "may reverse a conviction and sentence based upon the cumulative effect of errors that independently would not require reversal." **Dunigan v. State**, 915 So. 2d 1063, 1072 ¶41 (Miss. App. 2005). In discussing cumulative error, the Supreme Court recently opined:

> A comprehensive review of the record reveals multiple and substantial errors by the trial court. ***While any of these errors standing alone might not require reversal, the cumulative effect of errors deprived the defendants of a fair trial***. Therefore, the judgment of the trial court is reversed, and this case is remanded for a new trial consistent with this opinion.

Blake v. Clein, 903 So. 2d 710, 732 ¶68 (Miss 2005) [**Blake** I]. (emphasis added)

The trial court herein discharged the jury, rather than retiring it for further deliberations. The testimony of the entire first day of trial was lost. Crucial probative evidence was rejected, a directed verdict should have been granted, with directions for nominal damages, and the trial court denied motions that should have been sustained. While any single issue may not merit reversal, the cumulative effect thereof should.

CONCLUSION

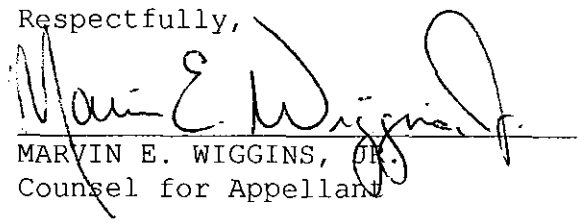
This Court should reverse the judgment below, remanding this cause for a new trial on all issues. The lower court erred in reconvening a discharged jury and/or a jury not properly given cautionary instructions. The trial court also erred in barring the Appellant from admitting his medical expenses compilation, precluding the jury from full knowledge of his damages.

The lower court erred in not directing a verdict at the close of the Appellee's case, finding it untimely. Granted then or post-trial, the motion was warranted by the lack of proof of malice and causation as to the counter-claim and by the uncontradicted proof of liability for assault on the complaint. Other post-trial motions were warranted, particularly as to a remittitur and/or new trial, due to the obvious jury bias.

The jury compounded its errors by awarding Marty damages for lost income, which was not pleaded. The lack of any record of the first day of trial also violated notions of fairness in this appeal. Finally, the accumulation of errors below, especially involving the jury and lack of record, should compel reversal.

SUBMITTED on this, the 2nd day of November, 2011.

Respectfully,



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CERTIFICATE OF SERVICE

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