

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TOMMY E. JOHNSON

APPELLANT

V.

CAUSE NO. 2010-CA-00735

MARTY G. CUMBERLAND

APPELLEE

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BRIEF OF THE APPELLANT

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APPEAL FROM THE CIRCUIT COURT OF NESHOBAMA COUNTY, MISSISSIPPI

CAUSE NUMBER 08-CV-0020-NS-G

ORAL ARGUMENT NOT REQUESTED

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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. Marty G. Cumberland ----- Appellee
3. Marcus D. Gordon ----- Circuit Judge
4. D. Joseph Kilgore  
Robert L. Thomas  
Alford, Thomas & Kilgore ----- Counsel for Appellant
5. Marvin E. Wiggins, Jr. -----Co-Counsel for Appellant
6. Douglas J. Graham  
Steven D. Settlemires  
Settlemires & Graham ----- Counsel for Appellee

SUBMITTED on this, the 13<sup>th</sup> day of June, 2011.

  
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### STATEMENT OF THE ISSUES

The Appellant herein, Tommy Johnson, hereby designates 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.

For convenience and economy of time in considering the said issues, the Appellant shall address Issues IV, V, and VI together, as the authorities and factors relative to those issues are similar. The Appellant shall address Issues I, II, III, VII, and VIII separately.

### STATEMENT OF THE CASE

In the Circuit Court of Neshoba County, Mississippi, in Cause Number 08-CV-0020-NS-G thereof, with Hon. Marcus A. Gordon, Circuit Judge, presiding, Tommy E. Johnson [hereinafter cited as "Tommy", "Johnson", "Mr. Johnson", "the Plaintiff", and/or "the Appellant"] filed his Complaint on January 31, 2008, against Marty G. Cumberland [hereinafter cited as "Marty", "Cumberland", "Mr. Cumberland", "the Defendant", and/or "the Appellee"]. Mr. Johnson alleged that Mr. Cumberland attacked him on March 27, 2007, while in Tommy's yard in Neshoba County, and that Marty beat, kicked, and threatened to kill Mr. Johnson, producing a knife. (CP12) Tommy alleged that Marty had run from the woods toward Mr. Johnson, ripping off Tommy's shirt while kicking and beating him, and repeatedly saying "I'm gonna kill you" during the attack. (CP12) Marty allegedly then drove to the home of a local Deputy Sheriff, restating his plans to kill Tommy. (CP12)

Mr. Johnson claimed as injuries from the beating a broken nose, two (2) blackened eyes, two (2) popped ear drums with blood pouring from each ear, a fractured cheek, and a brain hemorrhage. (CP13) Taken by ambulance to Rush Hospital in Meridian, Tommy underwent CAT scans, an MRI, and other emergency treatment. As a result thereof, the Plaintiff cited medical and hospital expenses in the amount of approximately Fifteen Thousand One Hundred Thirteen Dollars and Fifty Cents (\$15,113.50. (CP13)

Tommy also claimed to suffer in body and mind, to suffer with difficulties in walking and constant severe headaches, and

to be still under a doctor's care. (CP13) Due to ongoing effects of his beating, Tommy claimed to be unable to continue the operations of his pine straw gathering business, causing him to cease operations and costing him at least Ten Thousand Dollars (\$10,000.00) in lost income. (CP13) Also, Tommy sought punitive damages, as a result of Marty's alleged reckless behavior, in the amount of One Hundred Thousand Dollars (\$100,000.00). (CP13-14) Finally, Mr. Johnson requested an award of an attorney's fee and for costs of other expenses to be determined. (CP14)

Served on February 4, 2008, (CP16) Marty, on March 4, 2008, filed his Answer. (CP17-20) He issued a general denial of all salient claims in the Complaint and raised as other defenses the failure to state a claim for which relief may be granted, insufficient service of process, excuse and justification, (CP17-18) and, by title only, a list of affirmative defenses. (CP17-18)

On April 22, 2008, Marty filed the "Defendant's Counter Complaint and Demand for Jury Trial", (CP21-26) essentially claiming that Tommy was at fault for Marty's loss of the affections of Mrs. Diane M. Cumberland, [hereinafter cited as "Diane" or "wife"] who had filed for divorce from Mr. Cumberland. (CP21-24) Mr. Cumberland claimed that, prior to November, 2006, he and Diane resided together as husband and wife. (CP22) He added that he had enjoyed and cherished his association and relationship with his wife, including the services of his wife, consortium, and the affections of his wife, including her companionship, society, love, and comfort. (CP22)



Marty alleged that, sometime prior to November, 2006, Tommy had pursued a course of conduct designed to establish a romantic relationship with Diane and that, due to this course of conduct, Diane moved out of the marital home and filed for divorce. (CP22-23) Marty added that Tommy's allegedly wrongful conduct caused him to lose "his wife's love, affection, and consortium." (CP23)

Marty could not state with certainty whether Tommy had acted negligently, intentionally, or with conscious, callous, malicious, and knowing disregard of Marty's rights, including either the intentional or negligent infliction of emotional distress. (CP23;24) Marty described Tommy's alleged conduct as wrongful, whether intentional, grossly negligent, or simply negligent. (CP23) Notwithstanding the uncertainty, Marty asserted that he had "expended substantial time and money in his persistent efforts to recover his wife's love, affection and consortium, to no avail." (CP23) He claimed to have suffered, and would continue to suffer, the loss of relationship and association with Diane, "including his right to the services of his wife, consortium, the affections of his wife, including her companionship, society, love and comfort, as well as his own pain and suffering, emotional distress and mental anguish, and a loss of quality of life as guaranteed by the Constitution, laws, and treaties of the United States, and the Constitutions [sic] and laws of the State of Mississippi." (CP23)

Marty claimed other damages, including loss of property and future "legal, expert, investigative, travel, and other expenses

related to medical bills, divorce costs, attorneys fees and any other type of 'actual damages' sustained and as a direct and proximate result of" the alleged misconduct of Mr. Johnson. (CP24) Marty said that he had suffered, and would continue to suffer physically and mentally, including medical and mental treatment expenses, due to extreme sadness, humiliation, embarrassment, aggravation, annoyance, frustration, vexation, fear, worry, anxiety and loss of peace of mind", all of which was foreseeable to Tommy. (CP24) Marty sought damages adequate to compensate him for past and future damages, plus punitive damages to be awarded, along with the award of an attorney's fee, costs of court, and prejudgment interest from the filing. (CP24-25)

Tommy filed his Answer on May 27, 2008, (CP27-30) denying the claims regarding the state of Marty and Diane's union pre-November, 2006, and Marty's expenses, if any, to regain Diane's allegedly lost affections. (CP28) Tommy generally denied the rest of the Counter-complaint, (CP27-29) and affirmatively stated that Marty had lost Diane's affections through his own wrongful conduct and threatening behavior. (CP27) Tommy further stated affirmatively that any relationship between Diane and him "did not, and could not, result in sexual activity and/or criminal intercourse and is not, nor has it ever been an illicit romantic relationship." (CP27) He admitted jurisdiction and venue. (CP27)

From June 30, 2008, until October 26, 2009, a variety of discovery proceedings were filed, along with several orders of continuance. (CP31-75) Hon. Douglas J. Graham was substituted for

Hon. Jonathan P. Mills as counsel for Mr. Cumberland, (CP33-34) and the matter was set for trial at the November, 2009, term of court, by Order entered on June 29, 2009. (CP60)

The trial commenced on November 2, 2009, and continued through November 3, 2009. (Ti;1) Testifying on November 2, 2009, for the Plaintiff were Tommy Johnson, Marty Cumberland, Diane Cumberland, Ashley Cumberland, John Lilley, (T15; Supplement to Transcript [hereinafter cited as "ST"] 1-6) Jennifer Amanda Phillips, Michael Gray, Ann Johnson, and Ashley Cumberland (T20; ST2-3;6-7). On November 3, 2009, on the Defendant's case, testimony was heard from Marty Cumberland. (T22-76) On rebuttal for the Plaintiff, testimony was provided by Diane Cumberland, (T77-86) Debbie Malone, (T86-89) and Erin Cumberland. (T89-93)

As discerned in the Transcript filed herein, testimony on November 2, 2009, was not recorded. (T15;20) The trial court stated on the record on November 3, 2009, that there had been problems with the courtroom recording equipment on November 2, 2009. (T20-21) However, there were no stenographic notes of the said testimony, and, by Order of the Supreme Court of Mississippi, entered December 20, 2010, a supplement to the transcript for November 2, 2009, was permitted. The summary of testimony of November 2, 2009, was filed via the Neshoba County Circuit Clerk on March 17, 2011. [See Order, December 20, 2010.]

Three exhibits were admitted for Mr. Johnson. (T15) Exhibit P-1 was an abstract of the Neshoba County Justice Court, indicating the plea of guilty by Marty Cumberland to a charge of

simple assault occurring on March 31, 2007. (Ex. P-1, p.2) Exhibits P-2 and P-3 were photographs of the Plaintiff, Mr. Johnson, taken shortly after the beating. (Ex. P-2, P-3, pp. 3-4)

Four exhibits were admitted for Mr. Cumberland. (T31-33; 43) Exhibits D-2, D-3, and D-4 were income tax returns for 2006, 2007, and 2008, respectively. (Ex. D-2, D-3, D-4, pp. 5-27; 28-39; 40-53) Exhibit D-5 consisted of a composite of five photographs purported to be of the area behind the residence of the Plaintiff. (Ex. D-5A, -5B, -5C, -5D, and -5E, pp. 54-58)

Before trial, the court granted Johnson's motions moved to exclude evidence regarding Johnson's insurance and, from the Cumberland's divorce action, the opinion of Chancellor J. Max Kilpatrick. (T11-13) Marty moved to preclude as hearsay certain proposed testimony as to his having been an abusive husband and regarding his alleged affairs. (T13-14) The trial court sustained both motions, subject to relevance at trial. (T13-14)

During the November 2, 2009, hearing, counsel for Mr. Johnson proffered into evidence, outside the presence of the jury, a compilation of medical expenses incurred by Mr. Johnson since 2007. (T16-18) Counsel argued that the expenses, considered with the testimony of the patient/plaintiff, raised the presumption that the bills were necessary and reasonable, subject to rebuttal by the defense. (T16) The document, a payment log received from the Department of the Navy, indicated each medical charge related to expenses incurred by Mr. Johnson, and were provided to defense counsel via discovery prior to trial. (T17)

According to counsel, the plaintiff had not gone to the doctor prior to the March, 2007, attack upon him and that the expense log was admissible, with his testimony, subject to rebuttal. (T17-18)

Allusion to the Plaintiff's testimony was made at this time by counsel. (T17-18) However, the record was devoid of the actual testimony. (T15) The summary of testimony of March 117, 2011, indicated that Mr. Johnson had testified to having incurred significant medical expenses and would incur future medical expenses. (ST6) The trial court refused to permit the admission of the expense log. (T18-19)

At the close of Cumberland's case on his counter-complaint, counsel for Johnson moved for a directed verdict. (T76-77) The trial judge refused to entertain the motion, declaring that the motion was "not proper at this time." (T77)

During the instructing of the jury, the trial court provided instructions on assault and battery, alienation of affection, self-defense, burdens of proof, damages, and the number of jurors needed to carry a verdict. (T85-96) The court further instructed the jury as to the form of the verdict, giving Instruction D-21 covering the complaint and counter-complaint. (CP97,102-103; RE13,21-22)

The trial court gave the form of the verdict instruction after giving the others. (T110-111) The trial court then further explained to the jurors that, "in this case, you have two different lawsuits." (T111) The judge then explained the finding

of a verdict in the Johnson assault and battery case against Cumberland. (T111) The judge followed by explaining the finding of a verdict in the Cumberland alienation of affection case against Johnson. (T111-112)

During deliberations, the jury sent out two (2) notes. (T123; CP98,100; RE14,16) The first note asked if a dollar figure of \$0 was acceptable. (T123; CP98; RE14) The court replied, "Yes". (T123; CP98-99; RE14-15) The second note asked how long Mr. Cumberland had to pay the \$100 per month on the simple assault verdict. (T123; CP100; RE16) The court replied that the jury had received all the evidence in the case and that the court could not comment thereupon. (T123; 101; RE17)

Later that afternoon, on Tuesday, November 3, 2009, the jury announced its verdict, with at least nine jurors in agreement. (T124; RE23) The verdict was that, "We the jury find for the Defendant, Marty G. Cumberland." (T124; CP102; RE12) After the jury was polled, the jury was recessed, pending other trials during that week and the following week. (T125; RE24)

On Thursday, November 5, 2009, the trial court reconvened the jurors discharged on November 3, 2009, and informed them that there had been no verdict in the counter-complaint. (T126; RE25) The trial court had the jurors to retire and to consider the evidence from the trial on November 2 and 3, 2009, subject to the instructions provided on November 3, 2009, and to an additional instruction provided at that time. (T126; RE25) The court then provided an instruction as to the form of the verdict, but

different from the instruction previously given. (T127; CP103; RE18;26) This instruction was filed on November 5, 2009. (CP103; RE18) The judge then asked the foreman of the jury on November 3, 2009, Mr. Cater, if he understood the instruction and his responsibilities, and further told him that only the counter claim was to be considered. (T127; RE26)

Later on November 5, 2009, the reconvened jury announced its second verdict, agreed by at least nine jurors. (T128; RE27) After polling the jurors, the verdict was announced as being in favor of Marty G. Cumberland, against Tommy Johnson, and assessed damages in the amount of \$10,000.00. (T129; CP104; RE10;28) The issue of punitive damages was waived by Cumberland's counsel after the rendition of the second verdict and the jurors were again released. (T131) Judgments in conformity with the two verdicts were then entered. (CP106-107; RE7-8)

Tommy filed two post-trial motions. The first, for a directed verdict and to set aside the verdict, repeated the motion attempted at the close of Marty's case on his counter-complaint. (CP109-111) Tommy claimed that the evidence, along with any inferences drawn therefrom, could not support the verdict, that no wrongful conduct on Johnson's part had been proven, and that no causal connection between any conduct by Johnson and any loss by Cumberland had been established. (CP109) This motion was overruled on April 13, 2010. (CP117; RE11)

The second motion sought a new trial and/or remittitur. (CP112-115) This motion alleged that the discharge, and the

subsequent reconvening of the November 3, 2009, jury, was outside the power of the trial court and that the results thereof were improper. (CP112) The motion further alleged that the original verdict was so defective as to warrant a new trial. (CP113) Further, Johnson asserted the lack of a record of the testimony of November 2, 2009, and the refusal by the trial court to hear the motion for directed verdict at the close of the case on the counter-complaint. (CP114) Finally, Johnson requested the trial court to suggest a remittitur, with a new trial to be granted upon any rejection thereof. (CP114) This motion was overruled by Order entered March 15, 2010. (CP116; RE10)

Subsequent thereto, the notice of appeal by Johnson was timely filed herein. (CP118-119) During the process of reviewing the record, Hon. D. Joseph Kilgore, trial counsel for Johnson, wrote to Hon. Patti Duncan Lee, Circuit Clerk of Neshoba County, Mississippi. He expressed, by letter of September 2, 2010, the issue of the lack of any testimony from November 2, 2009, which involved the testimony of Johnson's witnesses on his case in chief. (CP Appendix; RE29) Hon. Douglas J. Graham, by letter of September 17, 2010, argued that no summary of such testimony had been offered and that the record was complete. (CP Appendix)

In response to a motion filed by appellate counsel for the development of the record, pursuant to Rule 10, Mississippi Rules of Appellate Procedure, this Court permitted the supplementation of the transcript herein. **See** Order entered December 20, 2010. The supplemental transcript was filed on March 17, 2011.



### SUMMARY OF THE ARGUMENT

The trial court committed error first by discharging the jurors on November 3, 2009, and then by reconvening them on November 5, 2009, without proper instruction, to consider anew the counter-complaint of Marty Cumberland. The jurors had been fully instructed at the close of the case on November 3, 2009, including a detailed verbal and written explanation of the form of the verdict. Further, the trial judge provided an additional explanation of the form of the verdict, telling jurors that they were effectly hearing two cases. This latter explanation, in layman's terms, clearly informed the jurors of their task.

Upon the receipt of the November 3, 2009, verdict finding for Marty Cumberland, with no damage amount indicated, the trial court polled the jury and acted as if the jury had ruled in favor of Cumberland on all issues, but awarded no damages. The court even instructed Cumberland's counsel to draft an order in conformity therewith. The jury was then discharged, without any cautionary instructions; had the jury simply been in recess, the court should have provided appropriate cautionary instructions.

The trial court also bears supervisory duties in ensuring the preservation of the record of proceedings. The lack of any record of the testimony of Johnson's witnesses from the entire first day of trial is manifest error, prohibits the full review of said proceedings by this Court, and denies to Johnson a fundamentally fair hearing of this appeal and of due process. Not only was Johnson denied the opportunity to admit evidence

regarding the medical expenses incurred post-attack, but he has been prejudiced by the concomitant absence from the record of the testimony offered by him as to the said expenses. The jurors were denied the information as to expenses, and this Court cannot fully review the issue, due to the lack of a record.

The Appellant would further state unto this Court that the trial court committed manifest error and abused its discretion in denying the motions for new trial, for directed verdict, to set aside the verdict, and for remittitur. The trial court further erred in refusing to permit Johnson to offer into evidence the proffered medical expense log provided by the Department of the Navy, and to which Johnson could have testified, subject to rebuttal by Cumberland.

Under the usual "manifest error" standard of review, the appeals court will generally affirm the holding of the trial judge, unless the incorrect legal standard has been applied or there is no substantial evidence to support the holding. In the instant case, this has occurred.

The amount awarded to Cumberland was not based upon substantial evidence; no explanation for this amount was cited. Further, the relevant elements of alienation of affection were not proven at trial. Thus, the correct legal standard was not followed by the jury.

By finding no assault, battery, and damage to Johnson, the jury indicated its bias, prejudice, and predisposition against Johnson. Such a finding was against the overwhelming weight of

evidence. Further, the summary language in the first verdict is indicative of this bias. Marty Cumberland's plea of guilty to the simple assault of Tommy Johnson alone justified at least nominal damages, while the photographs of the beaten 71-year-old man were proof enough of physical damage. Cumberland's testimony simply enhanced these exhibits.

Finding Johnson liable for alienation of affection, and awarding damages of \$10,000.00, also evinced bias against Johnson. This finding also was against the overwhelming weight of the evidence. Even Cumberland testified that, on March 27, 2007, he still thought of Johnson as a friend and had nothing against him. Had he been so distraught over the loss of his wife's affection, Cumberland would have sought remedy on his own, rather than waiting until after Johnson had filed suit. There was barely any proof of damage and no proof of misconduct by Johnson causing Diane Cumberland to leave Marty. Finally, Marty did not even ask for lost income in any pleadings, and should not be allowed such.

In light of the foregoing, this Court should reverse the decision below and render judgment for the Appellant. In the alternative, this Court should remand the cause for further proceedings below.

### STATEMENT OF THE FACTS

#### A. Assault and Battery/Complaint of Tommy E. Johnson

When beaten, Tommy was 71 years old and had operated a business packaging pine straw, along with other business interests. (ST5-6) He was married to Annette Johnson and lived in a mobile home near Philadelphia, Mississippi. (ST5) Prior to 2006, he made the acquaintance of Marty Cumberland, (T23-24) and, sometime in late 2005, he met Diane. (T24) In 2006, Tommy sold to Marty and Diane the pine straw equipment and business. (T24)

On March 27, 2007, Tommy was in the yard behind his mobile home around 4:00 a.m. to 6:00 a.m. (ST6) While in his own yard, he encountered Marty, who repeatedly stated that "I'm gonna kill you" and produced a knife with a 6-to-8-inch blade. (ST5) During the attack, Tommy received a broken nose, two blackened eyes, two popped ear drums with blood streaming from each ear, fractured cheek bones, and blood on the brain. (ST6) Johnson, who had been healthy and capable of operating an outdoor business, was no longer able to continue operating his business as a result of the beating. (ST6) He incurred substantial medical expenses, would face future expenses, and lost income. (ST6)

Marty testified that, while he was on Tommy's property, he was not there seeking to attack Tommy, but to find Diane. (T46) After Tommy left the safety of his mobile home, Marty stated that he moved to within fifteen to twenty feet of Marty and announced himself. (T46) Marty claimed that there was no animosity in him toward Tommy, stating, "[a]nd at this point I am still kinda

thinking we are friends, you know. I mean I didn't have no problems with him." (T46)

After announcing his whereabouts to Tommy, Marty claimed that Tommy started to curse him and to approach him with upraised arms. (T47) Marty stated that he grabbed Tommy's arms, tussled with him, and shoved him away, after surprising him in his own yard before daybreak. (T47) Marty then claimed that the 71-year-old man then came back toward him and cursed him. (T48)

Being afraid of what the old man would do to him, "I hit him when he got close enough to me to keep him from getting on me." (T48) Marty stated that he did not see Diane until after having hit Tommy twice. (T48) Admitting that he had the upper hand on Tommy, Marty then stated that Tommy went to cursing him again while Diane ran away screaming. (T48) He then struck Tommy once or twice more, knocking him to the ground. (T48) He then stopped hitting Tommy, and Diane hit Marty with a stick to the head. (T48-49) Diane shortly filed for divorce, after watching her husband physically beat an elderly man to the ground. (T49)

Marty left the Johnson residence and went to the home of Deputy Sheriff John Lilley. (T49) He explained that he had been in a fight with Tommy Johnson. (T49) He later testified that he did not believe Tommy to be in that bad of shape. (T66) He added that he did not believe that he was responsible for what he did to Mr. Johnson, notwithstanding trespassing to do it. (T71-72)

Deputy Lilley testified that Marty reported to him about the fight with Tommy. (ST1) Deputy Lilley testified that Marty

had declared that "I whipped him" and that he had a large knife. (ST1) Deputy Lilley also testified that Marty bore no noticeable injuries at the time. (ST1)

Diane Cumberland testified that she and Tommy Johnson were having coffee at Mr. Johnson's residence between 4:00 a.m. and 6:00 a.m. on March 27, 2007. (ST4) When she exited Johnson's motor home, she saw the fight and hit Marty with a stick. (ST4)

Most probative was the abstract of the Neshoba County Justice Court of the guilty plea by Marty Cumberland before Judge Steve Cumberland to the charge of simple assault for the March 27, 2007, attack on Tommy. (Ex. P-1, p.2) Marty was fined \$100.00 per month until paid. For additional corroboration, Johnson entered as exhibits photographs of his head contemporaneous with the March 27, 2007, incident. (Ex. P-2, P-3, pp. 3-4)

Tommy testified that he lost wages and earning capacity due to the attack. (ST6) He also testified as to the extent of his injuries and corrective procedures, including having surgeries to drain fluid from his head. (ST6) He was precluded by the trial court from testifying as to medical expenses noted in a log provided by the Department of the Navy. (T16-19) Further, his full testimony was not included as a part of the record herein, due to the lack of any recording or of any stenographic notes from the first day of trial on November 2, 2009. (T15, 20)

B. Alienation of Affection/Marty Cumberland Counter-complaint

By Counter-complaint, Marty cited a host of damages arising from the alleged alienation by Tommy Johnson of the affections of

Diane Cumberland. Among these were loss of property, future legal, expert, investigative, travel, and other expenses related to medical bills, divorce costs, attorney's fees, and any other type of actual damage, past and future mental and medical treatment for mental and emotional distress, extreme sadness, humiliation, embarrassment, aggravation, annoyance, frustration, vexation, fear, worry, anxiety, loss of peace of mind, and substantial time and money in trying to regain his wife's love. (CP23-24) Marty further contended that he suffered the loss of his wife's services, consortium, affections, companionship, society, love, comfort, and loss of quality of life. (CP23)

Strangely absent from the foregoing laundry list of boiler-plate damages was a claim for loss of income. (CP21-26) Surprisingly, this was the one area mostly addressed by the Appellee as damages in the trial below, including 2006, 2007, and 2008 income tax returns offered as evidence at trial. (Ex. D-2, D-3, D-4, pp. 5-53) Despite protestations of lost love, Marty made far greater lamentation for the loss of income from his former full-time employment. (T22-76)

Marty was allegedly suffering from a myriad of mental and medical losses after Diane moved from the marital residence and filed for divorce. (CP21-26) However, from the Thanksgiving, 2006, divorce announcement until the March, 2007, beating of Tommy Johnson, the only things done by Marty to regain Diane's lost affections were to be nice and friendly, to help move her

stuff into her new mobile home, and to put a heater in the said trailer. (T76) Little time or money was thusly expended.

On cross-examination, Tommy's counsel asked Marty if he had filed the counter-complaint because Tommy had sued him for nearly killing him and that he needed something with which to retaliate. (T65) In reply, Marty stated:

A. I am here today because he couldn't drop this and move on and put it behind us and, like you said, like you said yourself there, you know, I had to be here, and it is obvious that he done what he done, so if you want to - why not?

Q. **But you wouldn't have filed that if he hadn't filed against you.** Is that what you are telling me?

A. **That's right.** Because I wanted to let everybody move on after the divorce and stuff there, you know.

(T66) (emphasis added) The Counter-complaint was filed on April 22, 2008, nearly a year and a half after the November, 2006, divorce announcement and over a year from the March 27, 2007, attack upon Mr. Johnson. (CP21)

Tommy testified that he and his wife, Annette, had been asked to help Diane and that they had done so. (ST5) Although having taken Diane for rides in his airplane and Mercedes, and having been on vacation in Hawaii at the same time, there was no romantic relationship between them. (ST5)

Diane testified that she had separated from Marty Cumberland well before the March 27, 2007, incident at Tommy Johnson's motor home yard. (ST3) Prior to the separation, she and Marty slept in separate rooms, with her sleeping behind a locked door with a loaded gun, due to her fear of Cumberland. (ST3)



Diane further testified that she had wanted out of her marriage to Marty long before she had encountered Tommy Johnson. (ST3) Prior to the separation, Marty had threatened to "beat the hell out of" Diane, and she testified that his threatening conduct, and affairs of his own, led to the end of the marriage. (ST3) Diane and Marty announced the divorce during Thanksgiving dinner in November, 2006, during a family gathering; Mr. Johnson was also present. (ST3)

On rebuttal, Diane testified that the decision to announce a divorce on Thanksgiving, 2006, arose from Marty's threat that he was "getting ready to beat the hell out of me." (T78) Afterward, Diane and Ashley went to the home of Debbie Malone. (T80) She further testified that, about two years prior, she had received a telephone call, after which her feelings about her marriage changed for the negative. (T80) The Thanksgiving dinner culminated the two-year decline in the relationship. (T80-81)

Because Erin Cumberland was still at the home, Diane returned, completing the Thanksgiving meal and having the dinner. (T80,82) Afterward, she stayed in the office, with the door locked and armed, and, eventually, asked Mr. and Mrs. Johnson for help. (T82) She testified that, after the separation and divorce, she took the vending machine business and debts and helped Marty to organize the bills, not leaving him in a financial bind. (T83-85) She denied having any intimate relationship with Tommy. (T85)

Debbie Malone confirmed that Diane went to her home after the Thanksgiving, 2006, altercation with Marty. (T87-88) She also

was aware of problems between Marty and Diane for about a year prior to that incident. (T89)

Erin Cumberland, a daughter of Marty and Diane, was thirteen years old when she testified. (T90) Erin testified that Marty was constantly cursing Diane and telling her that he was going to beat her. (T91-92) She had heard discussions concerning another woman, but not another man. (T92) She added that Tommy was there some, but not a lot. (T93)

Ashley Cumberland was the twelve-year-old daughter of Marty and Diane. (ST2) Miss Cumberland testified that her parents had an unhappy marriage, but that she had been unaware of any problems until after Tommy had entered the picture. (ST2) Her parents slept in separate bedrooms after the Thanksgiving, 2006, announcement of the upcoming divorce, and, shortly thereafter, Diane moved out. (ST2) Despite noting that Tommy was often present, Miss Cumberland testified that she had not seen anything inappropriate between Diane and Tommy. (ST2)

Jennifer Phillips testified that Diane and Marty had a good relationship before Tommy entered the picture. (ST6-7) However, she could testify only as to an outing by a group of friends at the casino, during which Tommy had appeared and disappeared with Diane for about an hour. (ST7) Nothing otherwise was noted. (ST7)

Marty testified that Diane and he had married in September, 1992. (T22) Things went along well, even after Diane met Tommy Johnson. (T22-24) In October, 2005, Diane and Marty bought the pine straw business from Tommy, who continued to assist them with

it. (T24) Diane was primarily responsible for the pine straw business, while Marty operated the vending machine operation and worked full-time for Herring Gas Company. (T23-25)

Marty stated that the things that he and Diane did together included going to ball games, the casino, and to eat. (T57) He had lost weight after she left, (T36) because there was no one to cook and he had no appetite. (T36;67) There was little other reference to any anxiety, mental distress, or related disorders.

Although Diane initially did not like being around Tommy, that allegedly changed by mid-2006, when she went to work for Tommy and Annette Johnson, leaving Marty to operate all three businesses. (T25) Diane helped Mrs. Johnson to care for her father. (T25) Marty claimed that Tommy was always hanging around Diane was. (T25-26) Tommy allegedly called several times a day, while Marty was working. (T26) When asked if Diane began to appear with new items, Marty claimed that Diane had a new company computer and they also flew on Tommy's airplane. (T27-28)

Marty said that Diane slept in the office room for two weeks while her trailer was being installed. (T28) Marty helped her to move her furniture and items to the new residence, while supposedly trying to talk her out of leaving him. (T28-29) When Marty said that he would be at the trailer, Tommy would arrive shortly thereafter. (T29) This followed her leaving Marty because of his threats. (T82)

Marty contended that Tommy was the root of all the problems between Marty and Diane. Despite going through hurdles and

obstacles, for sixteen years, they had never spent a night apart due to fussing. (T50) Then, Tommy Johnson arrived on the scene and was there repeatedly, until things fell apart. (T50) Marty claimed then to have big bills to pay, having been left with everything, and the children were upset. (T51) Even when Diane moved into the new trailer, Tommy was there with a track hoe to help her, and, when Marty went there to help with the heater, Tommy accused him of doing things to Diane. (T51-52)

After the March 27, 2007, incident, Marty became convinced that Tommy's interference caused the loss of Diane's affections. (T52) However, as recently as the Thanksgiving, 2006, divorce announcement, Marty stated that "I didn't verbally blame him, but in the back of my mind, I felt like it was going on", (T56), in part because he was always present at her work. (T58) Of course, she was then working for Mrs. Johnson at the home of her father, and Marty did not blame Tommy for being around there. (T58)

After the separation, Diane and Marty started shutting down the vending machine business. (T30,83-84) Diane eventually got the vending business (T84) while Marty got the pine straw business, the more lucrative of the two. (T30;63) He voluntarily quit the propane truck job for Herring Gas Company, claiming that the debt from the pine straw business drove him to do so. (T30;61-62) He did not explain how the move from full-time to part-time employment helped in paying his bills. (T62)

The Cumberlands' joint tax return for 2006 indicated total wages of \$38,425.00, a vending machine profit of \$3,002.00 and a

pine straw loss of \$7,009.00, netting a loss of \$4,007.00. (Ex. D-2, pp.5,7,9) Marty's W-2 for 2006 showed wages of \$35,063.15. (Ex. D-2, p.23) Afterward, he voluntarily left Herring Gas Company. (T62) The 2007 return for Marty showed wages of only \$9,510.00, with business income of the pine straw business of \$4,770.00. (Ex. D-3, pp. 28,31) The 2008 return for Marty showed wages of \$7,355.00, with business income of the pine straw business of \$9,035.00. (Ex. D-4, pp. 40,43)

After the divorce, a fair division of the businesses and the bills was effected. (T63) Diane, like Marty, was liable on the pine straw contract and the house payments, subject to the division. (T63) Marty said that, when Diane left, he was stuck with a huge bill for the pine straw business -- owed to Tommy Johnson. (T33-35) He said that they owed \$18,000.00 to \$20,000.00 on the equipment, with contracts to fill, and, thus, he quit a job paying \$28,000.00 to \$30,000.00 per year for a business making at its most the amount of \$9,035.00. (T33-34; Ex. D-3, p.43) He also blamed Tommy Johnson for causing him to lose in the divorce the vending machine business, which, at most, made little over \$3,000.00 in 2006. (T34;62; Ex. D-2)

Despite the foregoing, no testimony was adduced as to any wrongful action by Tommy, which would, by direct causation, have resulted in the loss by Marty of Diane's affections for him. Even at best, Marty's contentions were that Tommy was always present in family dealings, gatherings, and times of need. None of this rose to wrongful acts of intent and malice.

## ARGUMENT

### 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.

On November 3, 2009, the jurors were released by the trial judge, after polling of the jury and announcement of a verdict in favor of Marty Cumberland. No cautionary or other instruction appears of record, nor does any other proper protection.

Rules 3.10 and 3.11, *Uniform Rules of Circuit and County Court Practice*, are authoritative to this point. Upon reaching a verdict, the jury returns to the courtroom, the judge receives the verdict, and, after the reading thereof, and the polling of the jury, "the verdict shall be ordered filed and entered of record and the jurors discharged from the cause". Rule 3.10, *supra*. After the filing of the verdict or discharge of the jury, no polling is allowed. Id. Further,

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.

Id. 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".)

If the jury has been recessed, rather than discharged, it may be reconvened. However, where the jurors are not sequestered, the court shall instruct the jury as to six (6) cautionary matters, including 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*.

In the instant action, neither course prescribed by Rules 3.10 and 3.11 were followed. If discharged, the jury was no longer subject to the court's power to reconvene the jury. If recessed, the court failed to provide the mandatory cautionary instructions. Where the jury has departed and the defect is of substance, the power to reconvene should cease. **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.

In a similar situation, this Court reversed the decision and remanded. An alternate juror, discharged after the case went to the jury, was subsequently recalled to the courthouse and seated on the deliberating jury. Reversal was required because "the Court made the substitution after juror Boyd had been finally discharged without sequestration or instructions. In this the court erred." **Folk v. State**, 576 So. 2d 1243, 1251 (Miss. 1991). This Court reversed the seating of an alternate post-deliberations and post-discharge; the Attorney General conceded the reversal. **See** **Luster v. State**, 515 So. 2d 1177, 1180 (Miss. 1987) (alternate jurors are to be discharged per statute and shall participate in deliberations only as provided by statute).

Courts have an affirmative duty to return jurors to deliberate further if the verdict is defective. Failure to do so warrants a mistrial. Adams v. Green, 474 So. 2d 577 (Miss. 1985).

This Court found error in the agreement of counsel to let the jury return home on the first night of a sequestered trial. However, no reversal occurred, since nothing substantial had been affected. Watts v. State, 733 So. 2d 214, 243 (Miss. 1998).

An older case resolved a similar situation by remanding for a new trial. In Yazoo & Mississippi Valley Railroad Co. v. Gore, 151 Miss. 145, 117 So. 521 (1928), the jury was discharged after announcing that it could not agree on a verdict. The next day, the appellant filed a motion to enter judgment, based upon the jurors' mistaken belief that a 9-3 decision was insufficient. After a hearing, the trial judge declared a mistrial. This Court affirmed, holding that allowing juries to say, "'We would have decided differently had we understood the instructions' would open a way of attack upon every verdict and result in delay and many complications." Id. at \_\_\_, 117 So. at 522.

In this cause, Judge Gordon gave detailed instructions to the jurors regarding the form of the verdict, both in writing and verbally, and then, for extra clarification, provided a layman's interpretation. The jury still got it wrong. The trial judge then had the verdict filed, polled the jury, and sent the jurors home without any further instruction. This compounded the error.

Where a verdict is not in the proper form, the trial court is duty-bound to send the jurors back to correct the problem:



In fact this court [has] placed this responsibility and duty squarely on the shoulders of the trial judge when it said ... 'The trial court was under the duty to see that loss of time and the expense of the trial should not be nullified by the failure of the jury to put their verdict in proper form' "

Harrison v. Smith, 379 So. 2d 517, 519 (Miss. 1980) (quoting Saucier v. Walker, 203 So. 2d 299, 303 (Miss. 1967)). See Morris v. Robinson Brothers Motor Co., 144 Miss. 861, \_\_\_, 110 So. 683, 684 (1927) (verdict must be responsive to the issue, or duty of court to require jury to return with proper verdict).

Faced with a defective verdict on November 3, 2009, the trial court should have retired the jury for more deliberations or declared a mistrial. Instead, the court 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, to consider the remainder of the case, was error. Further, the only proper options were either to grant a new trial or to determine that the jury had ruled for Cumberland on all issues, awarding no damages, consistent with its first question -- could it award \$0 in damages? 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.**

On December 20, 2010, this Court entered its Order permitting the supplementation of the transcript of the November 2, 2009, testimony below. See Order, December 20, 2010, Appendix A hereto. This step only partially remedies the defect, as it is not possible to develop the full record in that manner. Further,

the court reporter below stated that the recording equipment malfunctioned on November 2, 2009, and that her shorthand book containing her notes from the said date could not be located. **See Letter**, March 9, 2011, from Hon. Rita Brown, Court Reporter, to Hon. Kathy Gillis, Supreme Court Clerk, Appendix B hereto.

"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 lack of a record for November 2, 2009, hit Tommy hard; all of his witnesses testified that day, including the Appellant. None of the testimony appears herein, except in a truncated, summarized form. A full review of the record is thus precluded, denying to the Appellant the fundamental fairness of appellate review, in contravention of the Fifth and Fourteenth Amendments to the Constitution of the United States and of correlative provisions of the Constitution of the State of Mississippi.

Further, the Appellant is prejudiced by the denial of the record of his testimony regarding medical expenses. The trial court precluded the admission of a summary of such expenses, over the objection and motion of Johnson's counsel. The discussion as to Issue III hereinbelow is incorporated herein by this reference thereto. Although Johnson was permitted to proffer by description the proposed evidence, no full record was allowed. Counsel's argument -- that the evidence would be supported by Johnson's

testimony, subject to Cumberland's rebuttal -- is vitiated by the lack of a record of such testimony. At minimum, the denial thereof, and that of fundamental fairness, constitute prejudice to Johnson. See Watts v. State, 717 So. 2d 314, 318 (Miss. 1998), citing United States v. Renton, 700 F.2d 154, 157 (5<sup>th</sup> Cir. 1983) (appellant is to show prejudice from missing parts of record).

The full review of this appeal, including the issue of the admissibility of Johnson's medical expense log, has been hindered by the lack of a record herein. 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.**

Tommy sought the admission of a medical expenses log detailing his medical treatment since 2007. He argued that the compilation was of various bills paid via the Navy Department, and would be probative of the reasonable and necessary treatments received by Johnson after the brutal beating from Cumberland. The trial court refused to admit the compilation, and the proffer was limited to the description thereof, notwithstanding counsel's well-reasoned argument that such evidence is admissible, subject to the rebuttal of the other party. (T16-19)

Counsel correctly cited James v. Jackson, 514 So. 2d 1224 (Miss. 1987) in support of the proposition. In James, this Court first noted 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. This Court added:

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

Id. at 1226 (quoting Jackson v. Brumfield, 458 So. 2d 736, 737 (Miss. 1984)).

In Wal-Mart Stores, Inc. v. Frierson, 818 So. 2d 1135, 1145 ¶22 (Miss. 2002), this Court noted:

We utilize an abuse of discretion standard when reviewing evidentiary rulings by a trial judge. [cit. om.] In order to reverse a case on the admission or exclusion of evidence, the ruling must result in prejudice and adversely affect a substantial right of the aggrieved party. [cit. om.] Thus, not only must the trial judge abuse his discretion, the harm must be severe enough to harm a party's substantial right.

Id. To be reversed, the refusal to admit the expense log had to interfere with a substantial right and be an abuse of discretion.

While discretion infers a limited right to be wrong, the interference with substantive rights violates sacrosanct notions, such as due process. As stated in James, the testimony of the proponent as to medical bills constitutes a *prima facie* finding of reasonableness and necessity. In a personal injury action alleging intentional acts by a tortfeasor, such evidence is crucial in establishing elements of damage. The refusal of the trial court to permit Johnson's testimony, and the refusal to admit the proof of expenses, gutted the case of the Appellant. In effect, he could offer proof that he had been hurt, but could not explain or show to the jury the degree thereof.

The presentation of the prima facie case as to damages is substantial in the trial of a personal injury action. The ruling of the trial court eviscerated Johnson's case at the start. 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.**

**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.**

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.

A. Standard of Review

The standard of review for jury verdicts is that a jury must not be reversed, unless the "evidence as a whole, taken in the light most favorable to the verdict, is such that no reasonable hypothetical juror could have found the same way."

**Gorman v. McMahon**, 792 So. 2d 307, 312 ¶9 (Miss. 2001).

If the facts are so overwhelmingly in favor of the appellant that reasonable and fair-minded jurors could not have arrived at a contrary verdict, then this Court must reverse and render ... [However], if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Id. (quoting Mississippi Transportation Commission v. SCI, Inc. 717 So. 2d 332, 338 (Miss. 1998)). "Our institutional role mandates substantial deference to the jury's findings of fact". City of Jackson v. Locklar, 431 So. 2d 475, 478 (Miss. 1983).

B. Motions for Directed Verdict, New Trial, and Judgment NOV

Subject to *ad hoc* modifications, these motions arise at different stages of trial:

***the motion for a directed verdict at the conclusion of the plaintiff's evidence***, a request for a peremptory instruction at the conclusion of the plaintiff's and defendant's case and a motion for judgment n.o.v. upon the jury's verdict, but prior to judgment. These motions necessarily contemplate a consideration of different evidence and inferences arising during the course of a trial. ***A motion for directed verdict encompasses testimony of the plaintiff and its favorable inferences***, whereas the evidence considered on a request for a peremptory instruction or a judgment n.o.v. embraces the testimony on behalf of the plaintiff as well as that of the defendant ...

Paymaster Oil Mill Co. v. Mitchell, 319 So. 2d 652, 656 (Miss. 1975). (emphasis added) The standard of review for denial of a judgment notwithstanding the verdict and a motion for directed verdict are identical. Buckley v. Natchez-Adams School District, 827 So. 2d 725, 730 ¶13 (Miss. App. 2002). Such review is *de novo*. Pierce v. Cook, 992 So. 2d 612, 616 ¶18 (Miss. 2008).

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*. The rule allows the court

to determine whether there is any question of fact to be submitted to the jury and whether any verdict other than the one directed would be erroneous a matter of law; it is conceived as a device to save the time and trouble involved in a lengthy jury determination.

Comment, Rule 50(a), *Mississippi Rules of Civil Procedure*.

C. Additur/Remittitur Consideration

It is proper for a court to consider a remittitur or an additur, where the verdict is not supported by the evidence.

James v. Jackson, 514 So. 2d 1224, 1227 (Miss. 1987). Also,

The rule for determining whether a jury verdict is excessive or inadequate is stated in Biloxi Electric Co. v. Thorn, 264 So. 2d 404, 405 (Miss. 1972):

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. In short, the damages must be flagrantly outrageous or extravagant, or the court cannot undertake to draw the line, for they have no standard by which to ascertain the excess.

264 Miss. at 405.

Whether or not the jury verdict evinces such bias, passion or prejudice on the jury's part as to shock the conscience is the test to be applied in determining the excessiveness or inadequacy of a verdict.

Walton v. Scott, 365 So. 2d 630, 631-632 (Miss. 1978). "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*." Biloxi Electric Co. v. Thorn, 264 So. 2d 404, 406 (Miss. 1972). (emphasis added) "In essence, we will not disturb a jury's award of damages unless its size, in comparison to the actual amount of damages, 'shocks the conscience.'" Wal-Mart Stores, Inc. v. Frierson, 818 So. 2d 1135, 1145 ¶22 (Miss. 2002) quoting City of Jackson v. Locklar, 431 So. 2d 475, 478 (Miss. 1983).

D. Alienation of Affection Criteria

A claim under this tort accrues when the alienation is finally accomplished and the affections of the spouse involved in the extramarital relationship have been alienated. Fulkerson v. Odom, 2009-CA-01848-SCT ¶11 February 8, 2011. The affections of the injured spouse are irrelevant in determining the accrual. Id. The injury is not the affair, but the loss of consortium and affection of the marriage, personal to the victim. Id. at ¶16.

A plaintiff has the burden of proving the elements, which include 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. Gorman v. McMahon, 792 So. 2d 307, 313 ¶12 (Miss. App. 2001). The claim must be proven with evidence "that the acts of the defendant in alienation of the affections of the spouse were done with malice or that there were circumstances of aggravation." Bland v. Hill, 735 So. 2d 414, 421 ¶33 (Miss. 1999). The burden of proof is on the plaintiff to prove "a direct interference on the part of defendant sufficient to satisfy the jury of alienation". Martin v. Illinois Central Railroad Co., 246 Miss. 102, 110-111, 149 So. 2d 344, 348 (1963). The plaintiff "must show that there was a direct interference upon the part of the defendant that not only was there infatuation of the husband or wife for the defendant, but that the defendant by wrongful act was the cause of it." Stanton v. Cox, 162 Miss. 438, \_\_\_, 139 So. 458, 460-461 (1932). Testimony must show that "the acts of the



defendant in alienating the spouse were done with malice or that there were circumstances or aggravation. Id. See Walter v. Wilson, 228 So. 2d 597, 598 (Miss. 1969).

E. Application

The trial court refused to permit the motion for directed verdict at the close of Cumberland's case, contrary to Rule 50. This was compounded by the jury's failure to heed the instructions regarding the assault, the battery, and alienation of affection. The jury was properly instructed in these matters, as well as the form of the verdict. The jurors ignored the form of verdict directions, and, likewise, allowed bias and passion to sway them from the other instructions.

Despite restricted evidence of damages presented by Tommy, the jury still could see Cumberland's guilty plea and pictures of the wounded Plaintiff. They even asked how long Marty had to pay off the fine for the assault charge. No reasonable juror could have known of the guilty plea to the assault, and then found self-defense in the beating of a 71-year-old man. Nominal damages were warranted on the basis of the guilty plea alone.

As for a directed verdict and the weight of evidence as to the alienation of affection count, Marty simply failed to prove any malice or intentional act on the part of Tommy. Even Marty's pleadings alleged negligence in describing the purported acts. Further, there was no proof adduced indicative of any infatuation toward Tommy by Diane, of any direct interference by Tommy in Marty's married life, and of any act by Tommy directly inducing

Diane to leave Marty. As noted in Diane's testimony, she still lived in her trailer, not improving her stead any.

No causative link between Tommy and the loss of affection between Diane and Marty was proven. Most of the proof on the subject was that Tommy was present a lot; nothing tended to establish more than a friendly working relationship between Diane and Tommy. Even Marty said that he still thought that Tommy and he were friends, just before beating him to a pulp in his yard.

Out of thin air did the jury form a verdict, once it had been reconvened improperly on November 5, 2009. The trial judge gave them a new instruction, directing them to consider only Marty's claim and to determine any damage. Two days after the close of the evidence and their release from the case, the jurors crafted its damages figure, with only sporadic tax information as guidance. The jury, wanting to award \$0 on November 3, 2009, determined a figure of \$10,000.00 on November 5, 2009.

Comparing the damages to Tommy to the nothing awarded, and comparing the award to Marty to the nothing proven, a reasonable person could easily find bias, prejudice, and/or passion in the finding of the jury. There certainly was no substantial evidence supporting the findings. This Court should reverse for the errors cited in the above issues.

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

In his Counter-complaint, Cumberland cited a wide-ranging list of damages and injuries for which he sought recompense. However, his proof adduced at trial was indicative only of

general and 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 move into her new home. He had pleaded that he suffered from 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. As to bills and expenses, Diana and Marty divided 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. Marty only offered solid numerical proof in one area -- lost income.

Cumberland's primary claim of damage was lost income. However, in his Counter-complaint, he never sought lost income. While elements of damage for this tort have been enumerated recently in Fitch v. Valentine, 959 So. 2d 1012, 1024 ¶30 (Miss. 2007), such claims are nevertheless governed by their pleadings. See 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).

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.**

As a general rule, "where there is no error in part, there can be no reversible error to the whole". Gowdy v. State, 2009-KA-00890-SCT, ¶13 December 16, 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 Blake v. Clein, 903 So. 2d 710 (Miss. 2005) [Blake I], this Court addressed the matter of cumulative error, noting that the trial court had committed several errors regarding the exclusion of relevant evidence and witnesses. This Court held:

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.

Id. at 732 ¶68. (emphasis added) See Estate of Hunter v. General Motors Corporation, 729 So. 2d 1279, 1279-1280 55 (Miss. 1999) (finding cumulative error, Court held serious doubt as to

whether the plaintiffs were presented with a fair opportunity to recover for their catastrophic injuries).

Hereinbelow, the trial court discharged the jury, rather than retiring it for further deliberations, and the testimony of the entire first day of trial was lost. Questions regarding the findings of the jurors abound, and the trial court denied motions that should have been sustained. Whereas any one of these issues may not warrant reversal, the cumulative effect thereof should.

### CONCLUSION

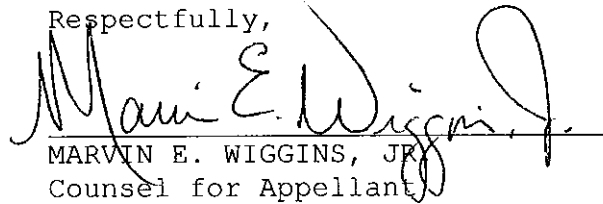
This Court should reverse the judgment below, remanding this cause for a new trial on all issues. The lower court erred in reconvening a discharged jury and/or a jury not properly given cautionary instructions. The trial court also erred in barring the Appellant from admitting his medical expenses compilation, 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. Likewise, the other post-trial motions were warranted, particularly as to a remittitur and/or new trial. Bias evidently crept into the jurors' thinking.

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 13<sup>th</sup> day of June, 2011.

Respectfully,

  
MARVIN E. WIGGINS, JR.  
Counsel for Appellant

ROBERT THOMAS  
Counsel for Appellant

**CERTIFICATE OF SERVICE**

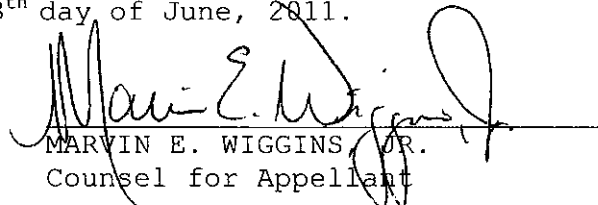
This is to certify that true and correct copies of the above and foregoing document have been served upon each of the following:

HON. MARCUS D. GORDON  
Circuit Judge  
Eighth Circuit Court District  
Post Office Box 220  
Decatur, Mississippi 39327

HON. DOUGLAS J. GRAHAM  
Settlemyres & Graham  
Counsel for Appellee  
410 East Beacon Street  
Philadelphia, Mississippi 39350


HON. KATHY GILLIS  
Supreme Court Clerk  
Post Office Box 249  
Jackson, Mississippi 39205-0249

Certified on this, the 13<sup>th</sup> day of June, 2011.

  
MARVIN E. WIGGINS, JR.  
Counsel for Appellant

ROBERT THOMAS  
Counsel for Appellant

Counsel for Appellant:

  
MARVIN E. WIGGINS, JR.  
Attorney at Law  
Post Office Box 696  
DeKalb, Mississippi 39328  
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MSB# [REDACTED]

ROBERT THOMAS  
Alford, Thomas & Kilgore  
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Telephone: (601) 656-1871  
Facsimile: (601) 656-0189  
MSB# [REDACTED]

FILED

DEC 20 2010

Serial: 166771

IN THE SUPREME COURT OF MISSISSIPPI SUPREME COURT CLERK

No. 2010-CA-00735

*TOMMY E. JOHNSON*

*Appellant*

v.

*MARTY G. CUMBERLAND*

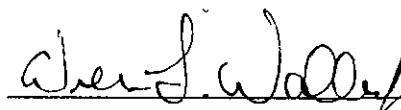
*Appellee*

ORDER

This matter is before the undersigned Justice on the Motion for Development of Record filed by Appellant. Appellant states that part of the trial transcript is missing and asks that this Court direct supplementation of the record. After due consideration the undersigned Justice finds that the motion is granted in that briefing should be suspended so that the parties may attempt to supplement or recreate the record pursuant to M.R.A.P. 10.

IT IS THEREFORE ORDERED that the Motion for Development of Record filed by Appellant is granted to the extent stated herein. Briefing is suspended until February 22, 2011, for supplementation or recreation of the appeal record pursuant to M.R.A.P. 10.

SO ORDERED, this the 20<sup>th</sup> day of December, 2010.

  
\_\_\_\_\_  
WILLIAM L. WALLER, JR., CHIEF  
JUSTICE

**APPENDIX A**

**RITA BAILEY BROWN, CSR No. 1120  
OFFICIAL COURT REPORTER  
8<sup>TH</sup> JUDICIAL CIRCUIT COURT DISTRICT  
150 LOVE ROAD  
KOSCIUSKO, MISSISSIPPI 39090**

662.289.5555

601.750.9311

March 9, 2011

Ms. Kathy Gillis  
Clerk of the Supreme Court  
Post Office Box 249  
Jackson, Mississippi 39205-0249

Re: **TOMMY E. JOHNSON  
VS.  
MARTY G. CUMBERLAND  
CAUSE No. 08-CV-0020-NS-G  
IN THE CIRCUIT COURT OF NESHOPA COUNTY, MISSISSIPPI  
No. 2010-CA-000735**

Atten: Debra

Dear Debra:

Thank you very much for your telephone call on this date regarding the captioned cause.

Please be advised that:

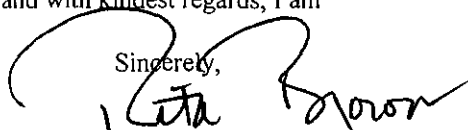
- 1) I served as the Official Court Reporter in the trial of the captioned matter;
- 2) My recording equipment in the Courtroom malfunctioned on November 2, 2009;
- 3) My shorthand book containing my notes of the first day of the trial cannot be located;
- 4) I have prepared the record, to the best of my ability, for chambers conferences on November 2, 2009, and for all proceedings on November 3, 2009;

It is my understanding and belief that the Honorable Marcus D. Gordon ordered the attorneys involved in the case to meet to reconstruct and recreate the proceedings of November 2, 2009, if possible.

Inasmuch as I have forwarded to the Clerk of Neshoba County Circuit Court all proceedings I have in my possession or under my control, and inasmuch as I have prepared the record to the best of my ability, I respectfully request that my participation in this appeal process be accepted as completed.

Thanking you for your assistance, and with kindest regards, I am

Sincerely,



**RITA BAILEY BROWN,  
OFFICIAL COURT REPORTER**

cc: Honorable Marcus D. Gordon, Circuit Judge  
Post Office Drawer 220  
Decatur, Mississippi 39327

**APPENDIX B COPY**



lants had ample time to review the State's jury instructions and were not prejudiced. Blue v. State, 716 So. 2d 567 (Miss. 1998).

**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.

**JUDICIAL DECISIONS**

**Illustrative cases.**

The use of two witnesses to testify to the dying declarations of a murder victim did not violate this rule since the testimony of

both witnesses was required to satisfy the requirements for the introduction of the dying declarations. Morris v. State, 777 So. 2d 16 (Miss. 2000).

**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.

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

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## CIRCUIT AND COUNTY COURT PRACTICE     RULE 3.10

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.

error. *McLarty v. State*, 842 So. 2d 590 (Miss. Ct. App. 2003).

**Supplemental instructions.**

Approximately thirty minutes into jury deliberations, the jury sent the trial judge a written note that asked whether defen-

dant was being charged with armed or attempted robbery. The trial court did not abuse its discretion in giving a supplemental instruction to the jury in accordance with Miss. Unif. Cir. & County Ct. Prac. R. 3.10. *Hughes v. State*, 983 So. 2d 270 (Miss. 2008).

**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.
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.

**JUDICIAL DECISIONS**

Hearsay evidence.  
Jury deliberations.  
Motion properly denied.  
Prosecutorial misconduct.  
Illustrative cases.

**Hearsay evidence.**  
Trial court did not err in denying defendant's motion for a mistrial in a case involving receiving stolen property because any prejudice flowing from a pros-

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**JUDICIAL DECISIONS****Judicial Review.**

Where a city discharged an employee for directing a police dog towards a suspect who was resisting arrest, the civil service commission properly reinstated the employee because the testimony of the

arresting officer and the police department's policies substantially supported the commission's finding that the use of the dog was not excessive force. *City of Laurel v. Brewer*, 919 So. 2d 217 (Miss. Ct. App. 2005).

**Rule 5.02. Duty to make record.**

In appeals on the record it is the duty of the lower court or lower authority (which includes, but is not limited to, state and local administrative agencies and governing authorities of any political subdivision of the state) 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. The time and manner for the perfecting of appeals from lower authorities shall be as provided by statute.

**Rule 5.03. Scope of appeals from administrative agencies.**

On appeals from administrative agencies the court will only entertain an appeal to determine if the order or judgment of the lower authority:

1. Was supported by substantial evidence; or
2. Was arbitrary or capricious; or
3. Was beyond the power of the lower authority to make; or
4. Violated some statutory or constitutional right of the complaining party.

**JUDICIAL DECISIONS****Role on review.****Illustrative cases.****Role on review.**

Court of appeals misapprehended its burden of proof for an agency decision, under Miss. Unif. Cir. & County Ct. Prac. R. 5.03, by reversing a circuit court decision affirming a denial of a claimant's disability retirement benefits because there was conflicting medical evidence of disability but substantial evidence supporting the administrative decision. *Thomas v. Public Employees' Ret. Sys.*, 995 So. 2d 115 (Miss. 2008).

Acting de novo is not the appellate court's role on review, and if the court upheld the decision that the employee was not disabled as a result of depression for disability retirement benefits purposes, the court would have been acting de novo. *Case v. Pub. Emples. Ret. Sys.*, 973 So. 2d 301 (Miss. Ct. App. 2008).

**Illustrative cases.**

While the court found that the Public Employees' Retirement System's decision to deny benefits under Miss. Code Ann. § 25-11-113(1)(a) regarding an employee's physical condition was supported by substantial evidence, the court was unable to do so with regard to her mental condition, for purposes of Miss. Unif. Cir. & County Ct. Prac. R. 5.03. *Case v. Pub. Emples. Ret. Sys.*, 973 So. 2d 301 (Miss. Ct. App. 2008).

Primary issue before the court was not whether there was evidence to support the employee's disability, but whether there was substantial evidence to support the finding that she was not disabled, for disability retirement benefit determination under Miss. Code Ann. § 25-11-113(1)(a). *Case v. Pub. Emples. Ret. Sys.*, 973 So. 2d 301 (Miss. Ct. App. 2008).

Public Employees' Retirement System's decision to deny benefits under Miss. Code

## JUDICIAL DECISIONS

## 1. In general.

Since § 11-7-159 does not require that a verdict be reformed at the bar, it is merely directory, and therefore, the trial court did not err in directing the jury to retire to the juryroom and reform its verdict. *Monroe County Elec. Power Ass'n v. Pace*, 461 So. 2d 739 (Miss. 1984).

Code 1942, § 1670 does not require at least three days notice of amendment before the amendment is actually made, and there was no error in the trial court correcting the verdict of the jury without the required notice, particularly in view of the fact that this section [Code 1942, § 1515] provides that if the verdict is informal or defective the court may direct it to be reformed at the bar. *Poynter v. Trotter*, 250 Miss. 812, 168 So. 2d 635 (1964).

Where a jury trying a defendant had announced in open court that it had arrived at a verdict, which was handed to the clerk and, as read, found the defendant guilty as charged, whereupon one of the jurors mistakenly advised the court

that the verdict was incorrect, and the word "not" was inserted in the verdict, but before the jury had adjourned, the court, being advised that amended verdict was wrong, ordered the jury back to the jury room for further deliberations and defendant was again found guilty, the court did not err in overruling defendant's motion for a new trial where it was shown that defendant's rights were not prejudiced by the occurrence. *Anderson v. State*, 231 Miss. 352, 95 So. 2d 465 (1957).

Action of circuit court in permitting jury to reassemble and put its verdict in proper form before they had left courtroom or sight and presence of court was proper under this section [Code 1942, § 1515], where verdict was first returned, "We, jury, find the defendant guilty-charge," and was corrected to read, "We, the jury, find the defendant guilty as charged," and was signed by each member of jury. *Serio v. City of Brookhaven*, 208 Miss. 620, 45 So. 2d 257 (1950).

## RESEARCH REFERENCES

**ALR.** Amendment of record of judgment in state civil case to correct judicial errors and omissions. 50 A.L.R.5th 653.

**Am Jur.** 75B Am. Jur. 2d, Trial §§ 1886 et seq.

**CJS.** 89 C.J.S., Trial §§ 899-916.

**§ 11-7-161. If verdict not responsive, jury to deliberate further.**

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.

**SOURCES:** Codes, 1906, § 780; Hemingway's 1917, § 563; Laws, 1930, § 572; Laws, 1942, § 1516.

**Cross References** — Lack of agreement on verdict of two or more defendants in criminal case, see § 99-19-7.

## JUDICIAL DECISIONS

1. In general.
2. Reversal of verdict.

## 1. In general.

When jury in negligence case involving 3 defendants returns verdict which finds for 2 of defendants but makes no mention

of third defendant, court may accept verdict as to defendants specifically mentioned but must return jury to jury room to reform verdict as to question of liability of third defendant; failure to do so will result in mistrial as to that defendant

APPENDIX F

# RULES OF CIVIL PROCEDURE

# RULE 50

defendant with whom plaintiff settled before trial. *W.J. Runyon & Son v. Davis*, 605 So. 2d 38 (Miss. 1992).

sue, but a party is not required to do both. *Jones v. Westinghouse Elec. Corp.*, 694 So. 2d 1249 (Miss. 1997).

## Omitted issues.

Appropriate method for preserving claim of error concerning omitted issue in special verdict instruction is to either make clear objection for record, stating basis for objection, or propose a special interrogatory which includes omitted is-

## Standards.

Case was reversed and remanded for new trial on issue of damages, due to obvious confusion inherent in jury's response to instructions on special verdicts. *First Bank of Southwest Mississippi v. Bidwell*, 501 So. 2d 363 (Miss. 1987).

## Rule 50. Motions for a directed verdict and for judgment notwithstanding the verdict.

(a) *Motion for directed verdict: when made; effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted without having reserved the right to do so and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) *Motion for judgment notwithstanding the verdict.* Not later than ten days after entry of judgment in accordance with a verdict, a party may file a motion to have the verdict and any judgment entered thereon set aside; or if a verdict was not returned, a party, within ten days after the jury has been discharged, may file a motion for judgment. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

### (c) Conditional rulings on grant of motion.

(1) If the motion for judgment notwithstanding the verdict provided for in subdivision (b) of this rule is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for a judgment notwithstanding the verdict may file a motion for a new trial pursuant to Rule 59 not later than ten days after entry of the judgment notwithstanding the verdict.

(d) *Denial of motion.* If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on the motion may, as appellee, assert

APPENDIX G

grounds entitling him to a new trial on the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment nothing in this rule precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted. (Amended effective July 1, 1994; July 1, 1997.)

# ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1994, Rule 50(b) was amended so that a motion for directed verdict is not a prerequisite to file a motion for judgment notwithstanding the verdict. 632-635 So.2d XXX-XXXI (West Miss. Cases 1994).

Effective July 1, 1997, Rule 50(b) was

amended to clarify that Rule 50(b) motions must be filed not later than ten days after entry of judgment. — So. 2d — (West Miss. Cases).

[Adopted August 21, 1996; amended effective July 1, 1997.]

# COMMENT

Simplistically stated, it is the law in Mississippi that questions of fact are for the jury and questions of law are for the court. *Cantrell v. Lusk*, 113 Miss. 137, 73 So. 885 (1917). Yet there are situations in which the process of applying the law to the facts may sometimes be for the court. See generally, authorities cited in 14 Miss. Digest, *Trial*, key numbers 134-181 (1973). Rule 50 is a device for the court to enforce the rules of law by taking away from the jury cases in which the facts are sufficiently clear that the law requires a particular result. Rule 50 applies only in cases tried to a jury with a power to return a binding verdict. It does not apply to cases tried without a jury nor to those tried to the court with an advisory jury.

Rule 50(a) provides for a motion for a directed verdict at the close of the plaintiff's evidence or at the close of all evidence and before the case is submitted to the jury. The rule enables the court to determine whether there is any question of fact to be submitted to the jury and whether any verdict other than the one directed would be erroneous as a matter of law; it is conceived as a device to save the time and trouble involved in a lengthy jury determination. This provision requires that the motion for a directed verdict state the specific grounds therefor, which is contrary to prior Mississippi practice. Cf. *Covington County v. Morris*, 122 Miss. 496, 84 So. 462 (1920) (defen-

dant need not point out specific reasons for request for peremptory instruction).

Rule 50(a) also provides that if a motion for a directed verdict made by a party at the close of his opponent's evidence is not granted, the movant may offer evidence as if the motion had not been made without expressly preserving the right to do so. In ruling on the motion for a directed verdict, the court should proceed along the same guidelines and standards that have governed prior peremptory instruction and directed verdict practice in Mississippi: the court should look solely to the testimony on behalf of the opposing party; if such testimony, along with all reasonable inferences which can be drawn therefrom, could support a verdict for that party, the case should not be taken from the jury. See *White v. Thomason*, 310 So.2d 914 (Miss. 1975); *Ezell v. Metropolitan Ins. Co.*, 228 So.2d 890 (Miss. 1969); *Holmes v. Simon*, 71 Miss. 245, 15 So. 70 (1893); but see *Paymaster Oil Mill Co. v. Mitchell*, 319 So.2d 652, 656-7 (Miss. 1975) (suggests different standards for testing the sufficiency of evidence on motions for directed verdict and motion for peremptory instruction or judgment n. o. v.). A motion for a directed verdict, pursuant to MRCP 50(a), supersedes both the former peremptory instruction practice and the demurrer to the evidence.

Rule 50(b) differs from its federal rule counterpart in that a motion for a directed

verdict is not a prerequisite to a motion for a new trial. *N. & Associates*, 1992). A party may move for a directed verdict at the close of his opponent's evidence or at the close of the movant's evidence on behalf, *Patric*, 220 So.2d 273 (1962); *Gatlin*, 243 So.2d 1 (1962); however, the motion must be renewed at the time the verdict is entered. The renewed motion is not subject to a ruling in light of the case. Even though the motion is denied, the issue is cured if subsequent to the moving party's motion the opponent's case is presented. *Federal Prac* § 2534 (1971).

Rule 50(b), which provides that judgment notwithstanding the verdict may be entered as a matter of course, is a departure from the former practice: form notwithstanding the verdict is required to be made by the court. *Evers v. Truly*, 197 So.2d 100 (Miss. 1967), under Rule 50 within ten days after the verdict is entered, irrespective of whether the case is adjourned. MR

Rule 50(c) provides that if the court grants a motion for judgment notwithstanding the verdict, the court may take any action it deems appropriate as an alternative for the motion. The court may notwithstanding the verdict may deny the motion, grant a new trial, or grant a new trial on the motion; (3) it may grant the motion notwithstanding the verdict if the motion is granted on appealability of the verdict. The appellate court may reverse the verdict on any of the following courses is followed:

1. If the trial court grants judgment notwithstanding the verdict but the appellate court reverses the verdict, the order of the trial court shall be a new trial granted on the motion for a new trial.

2. If the trial court grants the verdict notwithstanding the verdict, the