IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEBRA BARTLEY-RICE — APPELLANT

V. — CASE NO. 2013-CA-0966

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, IDALAN HAYMON AND JUDY AUSTIN — APPELLEES

APPEAL FROM THE CIRCUIT COURT OF HOLMES COUNTY, MISSISSIPPI

BRIEF OF APPELLEE IDALAN HAYMON

ORAL ARGUMENT IS REQUESTED

J. Seth McCoy, MSB #101577
William M. Dalehite, JR. MSB#5566
STEEN DALEHITE & PACE, LLP
Post Office Box 900
Jackson, MS 39205-0900
Tel: 601/969-7054
Fax: 601/353-3782

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 judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Debra Bartley-Rice, plaintiff/appellant

2. Tylvester Goss, counsel for plaintiff/appellant
   Goss & Williams, PLLC
   1441 Lakeover Road
   Jackson, MS 39213

3. Michael Williams, counsel for plaintiff/appellant
   Goss & Williams, PLLC
   1441 Lakeover Road
   Jackson, MS 39213

4. Idalan Haymon, co-defendant/appellee
   2310 Shady Lane Road
   Pickens, MS 39146

5. William M. Dalehite, Jr., counsel for co-defendant/appellee Haymon
   STEEN DALEHITE & PACE, LLP
   401 East Capitol Street, Suite 415
   Post Office Box 900
   Jackson, Mississippi 39205

6. J. Seth McCoy, counsel for co-defendant/appellee Haymon
   STEEN DALEHITE & PACE, LLP
   401 East Capitol Street, Suite 415
   Post Office Box 900
   Jackson, Mississippi 39205

7. Judy Austin, co-defendant/appellee

8. Tiffany P. Grove, counsel for co-defendant/appellee Austin
   Williford McAllister & Jacobus, LLP
   303 Highland Park Cove, Suite A
   Ridgeland, MS 39157-6059

9. William H. Creel, Jr., Esq., counsel for co-defendant/appellee State Farm
Currie Johnson Griffin Gaines & Myers
P. O. Box 750
Jackson, MS 39205-0705

10. Honorable Jannie M. Lewis
P.O. Box 149
Lexington, MS 39095-0149

By: /s/J. Seth McCoy

J. Seth McCoy
William M. Dalehite, Jr.
STEEN DALEHITE & PACE, LLP
401 E. Capitol Street, Suite 415
Post Office Box 900
Jackson, MS 39205
Tel: 601-969-7054
Fax: 601-353-3782
COUNSEL FOR APPELLEE, IDALAN HAYMON

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STATEMENT OF THE CASE

The automobile accident at issue in the present case occurred on Interstate 55 North near the Sowell Road exit in Madison County, Mississippi and involved vehicles driven by the plaintiff/appellant Debra Bartley-Rice, (hereafter "Bartley-Rice") a Madison County resident, co-defendant/appellee Judy Austin (hereafter "Austin"), a Madison County resident and this co-defendant/appellee Idalan Haymon (hereafter "Haymon"). Haymon was, at the time of the accident, and is currently a resident of Holmes County, Mississippi.

Bartley-Rice chose the Holmes County venue and filed her complaint in Holmes County on August 5, 2011. **[R. 8-12/RE. 1-5]** Bartley-Rice's complaint alleged negligence against appellees Haymon and Austin arising from the automobile accident. **[R. 8-12/RE. 1-5]** The complaint further sought uninsured motorist recovery against State Farm, who was Bartley-Rice's liability insurer. **[R. 8-12/RE. 1-5]**

The case proceeded to trial on May 6, 7 and 8, 2013, in the Circuit Court of Holmes County.

SEQUENCE OF EVENTS REGARDING JURY VERDICT

1) Co-defendant Austin and Bartley-Rice submitted potential verdict forms to the Court. **[R.340], [R.365] and [T. 158-161/RE.56-59]**

2) The trial court, with input from counsel representing the various parties, including Bartley-Rice granted a Special Verdict Form which was taken substantively from a jury instruction submitted by Austin. **[T. 158-161/RE.56-59] and [R.442-443/RE.37-38]**

3) The trial court further granted an instruction on unavoidable accidents. **[R.425/RE.20]**

4) At the conclusion of closing arguments, the trial court instructed the jury that when the jury reached a verdict "the foreperson will complete the special form verdict, number 27 in the

instructions." **[T. 187/RE.85]**

5) Following deliberations, before the jury re-entered the courtroom, the bailiff brought the jury's verdict to the judge. **[T. 188/RE.86]**

6) The trial judge informed counsel for all parties that the jury completed the Special Verdict Form and a handwritten verdict. **[T. 188/RE. 86]**

7) The trial judge stated to counsel for all parties that the verdicts were "not really contradictory"and that they ended up "being the same thing." **[T. 188/RE. 86]**

8) The trial judge further specifically asked if counsel for the parties wanted the trial court to send the jury "back." **[T. 188/RE. 86]**

9) Counsel for Haymon suggested that the court conform the verdict by her orders. **[T.188/RE.86]**

10) Counsel for Bartley-Rice agreed with the procedure and stated "if it's consistent, I don't have a problem with it. If it works out to about the same thing." **[T. 188/RE. 86]**

11) Judge Lewis confirmed that "The end result is the same." **[T. 188/RE. 86]**

12) Counsel for Bartley-Rice then again confirmed his agreement by stating "okay." **[T. 188/RE. 86]**

13) The jury was then brought back in the courtroom and Judge Lewis addressed the jury foreperson Kim Carthans in the presence of the jury, prior to reading the verdict. **[T. 189/RE.87]**

14) Judge Lewis stated to the jury foreperson: "You all completed the special verdict form and then you kind of hand-written a verdict that I'm going to take it that pretty much they both mean the same thing, is that correct?" **[T. 189/RE. 87]**

15) The jury foreperson then stated affirmatively "Yes, ma'am." **[T. 189/RE. 87]**

16) Judge Lewis then read the Special Verdict Form and then the jury's handwritten verdict ending with the statement "We the jury conclude that the accident was unavoidable in any event and return a verdict for the defendants, Idalan Haymon and Judy Austin and the amount of damages is zero." **[T. 189-190/RE. 87-88]**

17)After reading the verdict Judge Lewis asked each individual juror whether such was his or her verdict; **[T. 190-191/RE. 88-89]**

18) All twelve jurors confirmed that the jury verdict was his or hers. **[T. 190-191/RE. 88-89]**

19) The jury was then dismissed. **[T. 191/RE. 89]**

A Final Judgment consistent with the jury's verdict and the trial court's reformation of such was entered on or about May 14, 2013. **[R.453-457/RE. 39-43]** Objections were not made by Bartley-Rice to the entry of the Final Judgment.

Bartley-Rice filed a post trial motion *outside* the proper time period and such failed to allege any error with regard to the Court's reformation of the verdict. **[R. 458-460/RE. 44-46]** Bartley-Rice's post-trial motion was never set for hearing and it was abandoned in favor of the instant appeal, which was perfected by Bartley-Rice. **[R. 461/RE. 47]**

The only two issues raised in Bartley-Rice's appeal are as follows:

1) Whether the trial court erred when it failed to require the jury to clarify its verdict; and

2) Whether the jury verdict is unsupported by the evidence and evinces bias, prejudice and passion by the jury.

SUMMARY OF THE ARGUMENT

Bartley-Rice contends that because the jury filled out Special Verdict Form and then handwrote their verdict in favor of Haymon and Austin that the jury's verdict is contradictory, confusing and improper. Bartley-Rice thus argues that the trial court erred because it did not send

the jury back to reword or reform their verdict.

Bartley-Rice further contends that the jury's award of -0- dollars in damages on both the Special Verdict Form and the handwritten verdict "shocks the judicial conscience" and raises an inference that bias, passion, prejudice or other improper causes influenced the verdict. Bartley-Rice also argues that the lack of damages awarded to Bartley-Rice is against the overwhelming weight of the evidence.

Bartley-Rice's argument as it pertains to the trial court's actions in reforming the jury verdict is without merit and such has been waived. Counsel for Bartley-Rice was specifically made aware by the trial court, that the jury had filled out the Special Verdict Form and a handwritten verdict. Possessing this information, counsel for Bartley-Rice failed to object or request any relief with regard to the actions of the trial court regarding the verdict while in the courtroom, or at any time thereafter up to the filing of this appeal.

The present case goes above and beyond the mere failure of counsel for Bartley-Rice to object. In fact, Bartley-Rice's attorneys specifically *agreed* that the Court should not send the jury back and that the trial judge should conform the verdict by her orders. Counsel for Bartley-Rice agreed to this procedure knowing that both the Special Verdict Form and a handwritten verdict had been completed.

The Appellant's assertion of error regarding the trial judge's reformation of the jury's verdict is not ripe for review by this Court on appeal as such is being presented for the first time on appeal. In addition, Bartley-Rice's argument regarding the form of the verdict instructions presented to the jury has been waived and is not properly before this Court on appeal.

Substantively, the trial court's action regarding the jury's verdict was proper. The intent of the jury was easily ascertainable by the trial court. The definitive statement made by the jury's

handwritten verdict combined with the fact that the jury was *required* by the trial judge to fill out the Special Verdict Form and assign percentages equaling 100% illustrates the jury's clear intent and complete lack of confusion. The jury's intent is also evidenced by their failure to award damages to Bartley-Rice under either verdict.

The clear intent of the jury was further illustrated when the trial court, specifically asked the jury foreperson, in the presence of the entire jury if the verdicts were meant to represent the same thing and the foreperson confirmed that the two were intended to "mean the same thing."

Further, after the jury's verdict was read, the trial court polled the jury to determine that their intent had been reflected by the verdict read by the trial court. The jury unanimously confirmed the verdict. If there was any confusion with regard to the jury's intent, it was somehow shared by all twelve jurors and the trial judge.

ARGUMENT

I. Standard of review

The instant appeal involves the trial court's reformation of the jury verdict and whether such verdict was unsupported by the evidence and indicative of bias, passion and/or prejudice.

The standard of review for jury verdicts is well established:

> Once the jury has returned a verdict in a civil case, [the Court] is not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion on [the Court's] part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found.

Sivira v. Midtown Restaurants Corp., 753 So.2d 492 (Miss. Ct. App. 1999) (*citing Starcher v. Byrne*, 687 So.2d 737, 739 (Miss. 1997).

Ordinarily, a verdict is sufficient in form if it expresses the intent of the jury so that the court can understand it or that the verdict is an intelligible answer to the issues submitted to the

jury. *Wilson v. State*, 197 Miss. 17, 19 So.2d 475, 475 (1944).

To determine whether the verdict was against the overwhelming weight of the evidence, we look at the facts in the light most favorable to the verdict. *Bush v. State*, 895 So.2d 836, 844(18) (Miss.2005).

Bartley-Rice cites the *Bobby Kitchens* case in her standard of review argument for the premise that a new trial can be granted when a verdict is against the overwhelming weight of the evidence, or when the jury had been confused by fault jury instructions or when the jury has departed from its oath and its verdict is a result of bias, passion and prejudice. **[Appellant's brief at p. 7]** The *Bobby Kitchens* case actually *affirms* the denial of the motion for new trial handed down by the trial court. See generally *Bobby Kitchens, Inc. V. Mississippi Ins. Guar. Ass'n*, 560 So.2d 129 (Miss.1989).

The *Bobby Kitchens* case held that the "Court will reverse a trial judge's denial of a request for new trial only when such denial amounts to an abuse of the judge's discretion. *Bobby Kitchens*, 560 So.2d at 132.

In the present case, Bartley-Rice did not file any post-trial motion which alleged any error with regard to the jury's verdict form, or the trial court's reformation of the jury's verdict. **[R. 458-460/RE.44-46]** The motion for jnov or for new trial filed by Bartley-Rice as it pertains to the issues in this appeal was based generally on Bartley-Rice's argument that the verdict was allegedly against the overwhelming weight of the evidence. **[R. 459/RE.45]** Bartley-Rice's motion was never set for hearing and was abandoned in favor of this appeal. **[R. 461/RE.47]** As such, the standard applied in the *Bobby Kitchens* case is inapplicable to the present case.

The *Solanski* decision is cited by Bartley-Rice for the proposition that where a "error within the trial mechanism itself has caused a legally incorrect or unjust verdict to be rendered" a

new trial is appropriate. **[Appellant's brief at p. 7]** The *Solanski* case also dealt with the trial court's denial of a new trial on the alleged basis that the jury's verdict was confusing, biased or prejudiced. *Solanski v. Ervin*, 21, So.3d 552, 570 (Miss.2009). The *Solanski* case is inapplicable in light of Bartley-Rice's failure to file and/or pursue a motion for new trial in this matter on the bases at issue in this appeal.

The *Parker* decision is cited generally by Bartley-Rice for the principle that jurors follow the trial judge's instructions. **[Appellant's brief at p. 7]** Bartley-Rice further alleges that the presumption that the jury followed the Court's instructions in the present case has been sufficiently rebutted. The *Parker* case involves a medical malpractice suit where statements were made regarding a party's "dis-fellowship" from his church. *Parker v. Jones County Community Hosp.*, 549 So.2d 443 (Miss.1989). As such, the case has no substantive applicability to the present situation.

Furthermore, Bartley-Rice's argument that the jury did not follow the law as instructed is incorrect. The jury in fact specifically followed the Court' instructions to fill out the Special Verdict Form and the instructions on that form that the percentages were to equal 100%. The jury further obviously chose to handwrite a verdict based on the unavoidable accident instruction.

II. Scope of Bartley-Rice's appeal

This appeal is limited, based on Bartley-Rice's own notice of appeal to the "judgment entered in this case on May 14, 2013." **[R. 461-462/RE. 47-48]** Bartley-Rice's brief raises but two assignments of error, both relating not to the Final Judgment at issue but to the jury's verdict as read in open court at the conclusion of the trial.

This appeal is not based on the substance of any jury instruction or the jury instructions as whole. The appeal also does not address the sufficiency of any of the evidence presented at the

trial of this matter except as it relates to the award of zero damages. Any other issues are not under consideration.

III. Bartley-Rice's argument regarding the trial court's reformation of the jury verdict is presented for the first time in the instant appeal

Bartley-Rice's first assertion of alleged error is that the trial court "erred when it failed to require the jury to clarify its verdict where the general verdict form was in obvious conflict with the special verdict form." **[Appellant's brief at p. 7]** This issue was not presented to the trial judge by counsel for Bartley-Rice at any time, either at trial following the reading of the verdict and the polling of the jury, or in Bartley-Rice's post-trial motion, which has since been abandoned in favor of this appeal. **[R. 458-460/RE. 44-46]**

A party must raise an issue before the trial judge and receive a ruling to preserve the right to allege an error on appeal. *Haddox v. State*, 636 So.2d 1229 (Miss.1994), as modified on denial of reh'g, (June 14, 1994); *Bishop v. State*, 771 So.2d 397 (Miss.Ct.App. 2000). The failure to raise an issue at trial bars consideration on an appellate level. *Birkhead v. State*, 57 So.3d 1223 (Miss.2011).

More specifically, where a party makes no objection to the form of a verdict returned by the jury, that party is barred from raising errors related to such on appeal. *Thorson v. State,* 895 So.2d 85 (Miss.2005). In *Thorson,* the Mississippi Supreme Court held that an objection to the jury's verdict was procedurally barred when the defendant made no objection to the form of the verdict when such was returned by the jury and read aloud by the Court and when the defendant further did not object to the form in the party's motion for new trial. See *Thorson* 895 So.2d at 100.

In the present case, counsel for Bartley-Rice did not object to the jury's verdict: when counsel was advised by the trial judge of the jury's decision, when the foreperson was interviewed

in the presence of the full jury, when the verdict was read, when the jury was polled, or at any time prior to the jury being released. **[T.188-192/RE. 86-90]** Further, Bartley-Rice's attorneys did not raise the issue of the trial court's reformation of the jury's verdict in her post-trial motion, which has since been abandoned in favor of this appeal. **[R. 458-460/RE. 44-46]**

The issue regarding the trial court's reformation of the jury's verdict is presented for the first time on appeal and is therefore procedurally barred.

IV. Counsel for Bartley-Rice not only failed to object but actually agreed with the trial court's reformation of the verdict

Glaringly absent from Bartley-Rice's brief is a crucial piece of information regarding the issues before this Court.

Not only did Bartley-Rice not object at any time to the jury's verdict either before or after such was read; Bartley-Rice's attorney actually **AGREED** on the record with the trial court's reformation of the jury verdict.

When the jury announced it had reached a verdict, the trial court advised counsel for all parties about the jury's decision. The trial judge spoke to counsel for all parties outside the presence of the jury and stated:

> "What the jury did , they completed the special verdict form and then they wrote out a verdict. And it's not really contradictory, it ends up being the same thing. So I'm wondering, do you all want me to send them back ?" **[T. 188/RE. 86]**

Counsel for Bartley-Rice was aware at that point that the jury had filled out both the Special Verdict Form and a handwritten verdict.

Counsel for Bartley-Rice could have objected to the verdict form, moved for a mistrial and/or requested that the trial court send the jury back for additional deliberations. Bartley-Rice's attorney instead chose to agree to the trial court's reformation of the jury verdict and to take a

chance regarding the substance of the jury's verdict by agreeing that the jury should not be sent back and the trial judge should conform the verdict.

Counsel for Haymon suggested that the trial court conform the verdict as follows:

> "I would just make it conform by your orders. Make it confirm (sic) to–I don't think they should redo it again, if it's the same thing." **[T. 188/RE. 86]**

Rather than objecting to that suggestion counsel for Bartley-Rice endorsed it and stated:

> "I don't have a problem, if it's consistent, I don't have a problem with it. If it works out to about the same thing." **[T. 188/RE. 86]**

The trial court then advised clearly that "The end result is the same". **[T. 188/RE. 86]** Bartley-Rice's counsel responded (agreeing with counsel for Appellee Haymon) with: "Okay". **[T. 188/RE. 86]**

Clearly, counsel for Bartley-Rice had specific knowledge of what the jury had done. Further, Bartley-Rice's attorneys had options for redress as to the jury's verdict to include sending the jury back and declaring mistrial. Bartley-Rice, by and through the actions and statements of her counsel, consented to "roll the dice" on the jury's verdict and specifically allow the jury's verdict to be conformed by Judge Lewis.

A party cannot refrain from making an objection, believing the answer may be favorable and then when such turns out to be unfavorable, seek to raise error. *Bounds v. State*, 688 So.2d 13462 (Miss.1997). Bartley-Rice's representatives, with knowledge of the verdict's form, should not be granted the ability to wait and see if a verdict is favorable to her before objecting to the form. In the present case, counsel for Bartley-Rice had specific knowledge as provided by the trial judge, regarding the verdict rendered by the jury and agreed to allow such to stand per the trial judge's conformation.

V. The trial court specifically offered to have the jury go back and reform the verdict

Bartley-Rice argues in her brief that the trial court was in error because it did not require the jury to go back and reform the verdict. **[Appellant's brief at p. 7]** This alleged assignment of error is particularly disingenuous based on the fact that the trial court specifically offered this relief to counsel for all parties including Bartley-Rice and Bartley-Rice's attorneys chose not to take part in this relief. **[T. 188/RE. 86]** Instead, counsel for Bartley-Rice specifically agreed to have the jury verdict be conformed by Judge Lewis.

The present situation is totally different from those cases wherein trial courts were held to be required to send the jury back for more deliberations, in that counsel for Bartley-Rice affirmatively consented to the trial judge reforming the verdict. **[T. 188/RE. 86]** The trial court at bar should not be forced to direct the jury to return for more deliberations when all parties, after having been advised by the trial court of the form of the jury's verdict, consented to allowing the court to reform the verdict. It is not the job or duty of the trial court to save a party from her counsel's own decision and agreement.

Counsel for Bartley-Rice cannot have it both ways. The attorneys for Bartley-Rice needed to either take the relief that was offered by the trial court or live with the consequences of declining said relief.

VI. The jury's intent was clear and the trial court's reformation of the verdict was proper

Regardless of Bartley-Rice's attorney's agreement with the trial court not sending the jury back, the trial court was not required to send the jury back under the present situation as the jury's intent was clear.

Miss. Code Ann. § 11-7-159 states "[i]f the verdict is informal or defective, the court may direct it to be reformed at the bar."

The Mississippi Supreme Court acknowledged a trial judge's ability to reform a jury

verdict to reflect a jury's intent in the case of *Hobbs Automotive, Inc. v. Dorsey.* In *Hobbs Automotive,* the Court upheld the trial judge's reformation of a verdict where the intent of the jury was clear. 914 So.2d 148 (Miss.2005). The Court in *Hobbs Automotive* noted that the trial court commented that the intent of the jury was clear despite the fact that the jury delivered "a kind of special verdict." 914 So.2d at 152.

In upholding the reformed verdict in *Hobbs Automotive,* the Mississippi Supreme Court noted that the "better" approach would have been for the trial court to have reviewed the verdict form in the presence of the attorneys, note that the verdict did not conform to the specific instructions and order the jury to return to the jury room to write a verdict that followed the exact language of the instructions. *Id.* at 152.

In the present case, the trial judge not only reviewed the form of the verdict with the attorneys prior to such being read, but also gave all counsel for all parties the option of sending the jury back to deliberate. It cannot be stated enough that counsel for *all* parties instead agreed to allow the trial judge to conform the verdict.

Furthermore, like the Court in *Hobbs Automotive,* the trial court in the present case determined that the two verdicts were "not really contradictory" and that the result of the two verdicts "ends up being the same thing." **[T. 188/ RE. 86]**

Unlike in *Hobbs Automotive,* the trial court in the present situation could not have sent the jury back with instructions to comply with the instructions presented to them. The jury in the present case followed the instructions (the substance of which are not properly at issue in this appeal) which were given to them.

The 2006 Mississippi Supreme Court decision in *White v. Stewman* is analogous to the present case. In *White,* the Court reversed and remanded the trial court's set aside of a jury verdict

as defective. 932 So.2d 27 (Miss.2006).

In *White*, the jury filled out a jury verdict form containing three questions. *White,* 932 So.2d at 30. The first two questions dealt with the amount of plaintiff's damage and the allocation of fault respectively. *Id.* The third question gave the jury an option to find in favor of defendant by using the form "We, the jury find for the defendants." *Id.*

In *White*, despite the trial court having instructed the jury to fill out the verdict form, the jury did not answer the first two questions. *Id.* at 30-31. The jury instead returned a handwritten verdict which stated "we, the jury find for the defendants". *Id.* at 30.

In its decision in *White* the Mississippi Supreme Court quoted *Miss. Code § 11-7-157* stating that "no special form of the verdict is required and where there has been a substantial compliance with the requirements of the law in rendering a verdict, a judgment shall not be arrested or reversed for mere want of form." *Id.* at 37.

The *White* Court further stated that the test of whether a verdict is sufficient as to form "is whether or not it is an intelligent answer to the issues submitted to the jury and expressed so that the intent of the jury can be understood by the Court." *Id.* quoting *Sentinel Industrial Contracting Corp. v. Kimmins Industrial Service Corp.*, 743 So.2d 954, 969 (Miss.1999)(quoting *Henson Ford, Inc. v. Crews*, 249 Miss. 45, 160 So.2d 81 (1964)); and citing *Mizell v. Cauthen*, 251 Miss. 418, 429, 169 So.2d 814, 818 (1964). The Mississippi Supreme Court in *White* further quoted the language of *Miss. Code. Ann. § 11-7-159* to make the point that "if the verdict is informal and defective, the Court may direct it to be reformed at the bar.

The decision in *White* noted that questions 1 and 2 of the verdict form were rendered meaningless by the jury's verdict stating "We, the jury find for the defendants". The Court in *White* further noted that plaintiff had failed to object to the form of the verdict. *Id.*

A similar situation is present in the instant case. While the jury did complete the Special Verdict Form, relating to the parties, they were required by the trial court to do so and further required to enter percentages that would equal 100%. **[T. 187/RE. 85]** and **[R.442-442/RE. 37-38]** The jury was left with no other choice than to allocate the percentages a best they could to equal 100%. The fact that the jury did not award Bartley-Rice any damages in either verdict, and assigned the highest percentage to her in the Special Verdict Form is particularly significant when ascertaining the jury's intent. **[R.456/RE.42]**

When read in conjunction with the jury's handwritten verdict which was read after the Special Verdict Form, it is clear that the jury's filling out of the Special Verdict Form is rendered meaningless by the jury's definitive, unanimous statement indicated in the handwritten verdict.

When the jury's intent can be determined by the trial court then there is no requirement to send the jury back. In the present case the jury's intent was determined by the trial judge and confirmed through various sources including the words actually written and spelled out by the jury foreperson:

> "We the jury conclude that the accident was unavoidable in any event and return a verdict for the defendants, Idalan Haymon and Judy Austin and the amount of damages is zero"
>
> **[T. 189-90/RE. 87-88]** and **[R. 457/RE. 43]**

No clearer statement could have been made by the jury. The jury presumably reviewed the unavoidable accident instruction and wrote a verdict for the Haymon and Austin pursuant to such, despite the fact that, unlike the Special Verdict Form the jury was not required to do so.

The jury's intent is further evidenced by the finding by the trial judge that the two verdicts' end result was the same. **[T. 188/RE. 86]**. All that is required is that the intent of the jury can be understood by the trial court. *Sentinel Industrial Contracting Corp.* 743 So.2d at 969. That element has been satisfied in the present case.

The jury's intent was disclosed directly from the jury when the jury foreperson confirmed , in the presence of the entire jury, before the verdicts were read that the two verdicts were meant to represent the same thing.**[T. 189/RE. 87]**. Each juror confirmed unanimously that the verdict as read by the Court was his or her verdict. **[T. 190/RE. 191]**. The jury's intent was known and shared by all twelve jurors and the trial judge.

The filling out of the Special Verdict Form, rather than an indication of confusion, is actually an indicator of an attentive and conscientious jury as such was required of the jury by the trial court. The drafting of a handwritten verdict returning a verdict for the defendants is a clear indicator of the intent of the jury.

In reality, every juror knew what the intent of the verdict was, as did the judge, and Haymon would endeavor to say that counsel for all parties did as well.

VII. Authority cited by Bartley-Rice in support of her argument regarding the trial court not requiring the jury to continue deliberations is distinguishable from the present case

The case of *Saucier v. Walker* is cited by Bartley-Rice for the contention that "where the form of the verdict is ambiguous, confusing and improper, the trial court on its own initiative should order the jury to return to the jury room to reform and reword their verdict so that the verdict is in proper form". **[Appellant's brief at p. 8]**

The *Saucier* opinion which was handed down in 1967 deals with a jury verdict in a suit based on joint negligence of several tort-feasors. *Saucier v. Walker*, 203 So.2d 299 (Miss.1967).

The jury in *Saucier* rendered a separate verdict for money damages against each defendant which was not proper under the laws of Mississippi in 1967. *Saucier* 203 So.2d at 302. The Court in *Saucier* ruled that the form of the verdict was ambiguous, confusing and improper. *Id* at 303. The *Saucier* court further held that "the attorney for Appellant should have requested that the jury

be returned to the jury room to reword their verdict and bring it back in proper form." *Id.* The *Saucier* opinion also states that in the absence of a request from Appellant attorney, the trial court should have ordered the jury to reform and reword their verdict to bring it to proper form. *Id.*

The differences between the situation in *Saucier* and the present case are clear. Initially, the *Saucier* verdict was obviously not in the proper form under the laws of the State of Mississippi in 1967. In the present case it is undisputed that the jury presented their verdict in the proper form pursuant to the instructions they were given by the trial judge. No objection relevant to this appeal was made by counsel for any party to the instructions as submitted to the jury.

Further, the court in *Saucier* noted that the trial judge was under a 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. *Id.* That argument swings both ways. The jury's intent in its verdict was clear in the present case and the trial, including the time and expense for all involved, should not now be nullified based on the verdict rendered in the present case, when the jury's intent was expressed.

Another distinction between *Saucier* and the present case is the fact that the *Saucier* court noted that absent a request from the Appellant, the Court should have ordered the jury to put their verdict in the proper form. *Id.*

In the present case the trial court went above and beyond waiting for a request and specifically asked counsel for Bartley-Rice whether the jury should be sent back to the jury room, and further advised counsel for all parties that the jury had filled out the special verdict form and handwrote a verdict. Counsel for Bartley-Rice actively declined to have the jury sent back.

Lastly, the Court in *Saucier* apparently did not make any efforts to determine the jury's intent. In the present case the trial court specifically determined the jury's intent by reviewing the

verdict, by questioning the jury foreperson and by polling the jury after the verdict was read.

Harrison v. Smith is cited by Bartley-Rice for the contention that "where a jury returns a verdict that is defective and improper, the Court has the duty to require the jury to reconsider and amend or change its verdict." **[Appellant's brief at p. 8]**

The situation presented in *Harrison* is a far cry from the situation at bar. In *Harrison,* the jury was provided with a comparative negligence instruction and instead of using such the jury returned a handwritten verdict as follows:

> "We, the jury, find both plaintiff and defendant negligent to a degree with no damages assessed with a vote of 11 to 1". *Harrison v. Smith*, 379 So.2d 517, 518 (Miss.2005)

The differences in the above verdict and the one rendered in the present case are clear. The *Harrison* verdict assigned no percentage of negligence to the parties. The *Harrison* verdict further did not contain a definitive statement by the jury like the present case where the jury specifically wrote that the accident was unavoidable in any event and specially rendered a verdict for the defendants.

One can see that the present case does not involve a vague and indecipherable verdict as in the *Harrison* case.

Unlike in *Harrison*, in the present case the instructions given to the jury were followed by the jury. The most glaring distinction is that in the *Harrison* case the trial judge took it upon himself to render a verdict for defendants on the above verdict without any further examination or input from the parties or the jury. *Id* at 518.

That sits in stark contrast to the present case where Judge Lewis specifically asked the jury if their intent was to mean the same thing with the two verdicts. **[T.189-191/RE. 87-89]**

Bartley-Rice further cites *Miss. Code Ann. § 11-7-61* for the premises that 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. **[Appellant's brief at p. 8]**

In the present case, the verdict rendered by the jury was specifically responsive to the issues presented to it including the fact that the accident was unavoidable in any event. The jury filled out the jury instructions presented to them the best they could to accurately reflect their ultimate determination that the accident was unavoidable in any event and further found for the defendants/appellees in a handwritten verdict to make sure their intent was known.

The *Baham* case cited by Bartley-Rice is a 2005 Court of Appeals decision that involved an automobile accident. *Baham v. Sullivan*, 924 So.2d 580 (Miss.Ct.App. 2005). In *Baham*, the jury was instructed by the trial court to return a verdict for either Baham or Sullivan. Instead the jury returned the following verdict:

> "We the jury determine John W. Sullivan to be 10 percent at fault, if any.
>
> We the jury determine the absent driver the third vehicle to be at 90 percent at fault, if any ....." See *Baham* 924 So.2d at 582.

The *Baham* Court analyzed this issue in response to a JNOV motion or for new trial that was filed by Sullivan and denied by the trial court. As an initial distinction, such a motion on the grounds alleged by Bartley-Rice with regard to the jury's verdict was not filed in the instant case.

The Court in *Baham* noted that the language "if any" in the verdict caused the verdict to be non-responsive to the jury instructions presented to the jury. *Id.*

The Baham situation is clearly distinguishable from the present case, in that rather than be non-responsive to the jury instructions, the present jury followed the instructions it was given. Further, the inclusion of the vague and contingent term "if any" at the end of the findings as was present in the *Baham* verdict is distinguishable from the instant jury's definitive statement

contained in it's handwritten verdict.

Most critically, in *Baham* the appeal was not even based on the issues for which it is cited by Bartley-Rice. *Id* at 582.No information was given in the *Baham* decision regarding what, if any further action the *Baham* trial court took when it was advised of the form of the jury's verdict.

It cannot be stated enough that in the present case the trial judge informed the parties of the form of the verdict, asked the parties if she should send the jury back, questioned the jury foreperson regarding the intent of the jury's verdict and polled the jury to confirm the verdict. The rock solid evidence of the jury's intent in the present situation takes this case out of the purview of those cases holding a judge should send the jury back.

Bartley-Rice cites *Miss. Unif. Rules of Cir. & Cty. Ct. Prac. 3.10* for the premise that such requires that the judge direct jurors to reconsider the verdict where the verdict is so defective that the Court cannot determine the intent of the jury. The key phrase in that rule is "determine the intent of the jury". As stated herein on multiple occasions, the trial judge specifically held that she could determine the intent of the jury based on her review of the verdict(s) her questions to the jury foreperson and the polling of the jury.

The *Universal C.T.T. Credit Corp. v. Turner* case is cited by Bartley Rice for the statement that the trial court is under the duty to see that loss of time and the expense of the trial should not[1] be nullified. **[Appellant's brief at p. 8]** and 56 So.2d 800, 803 (Miss.1952). Haymon agrees that the two years of litigation costs and time and expense including the three days worth of trial should not be nullified by the form of the jury's verdict in the present case where the procedure regarding the reformation was agreed to and the intent of the jury specifically confirmed.

The *Loyacano* decision is cited by Bartley-Rice as evidence of juror confusion. The

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[1] This word is missing from Bartley-Rice's quote of the case

Loyacono decision has not been released for publication in the permanent law reports and is subject to revision or withdrawal. See *Loyacono v. Travelers Ins. Co.*, 2013 WL 811975 (Miss.2013). The *Loyacono* decision is distinguishable from the present case as it involves a circuit court's refusal to grant a new trial. *Id.*

As stated numerous times herein, a motion for new trial assigning error based on the instructions submitted to the jury, the jury's completion of the Special Verdict Form and handwritten verdict and the trial court's reformation of such has never been filed.

In *Loyacono* the jury returned a verdict in favor of plaintiff Loyacono but awarded zero damages. *Id* at p. 1. The *Loyacono* case as opposed to the present situation dealt with a scenario where evidence of liability and damages were un-refuted. *Id* at p. 3.

The trial court in *Loyacono* granted a directed verdict in favor of Loyacono on liability but refused a corresponding jury instruction. *Id* ¶ 14. Instead, the court drafted a jury instruction which improperly submitted the issue of causation to the jury. *Id.*

The *Loyacono* case involves a situation where the substantive instructions given to the jury were being called into question. Such is not properly before this Court in the present case. No objection to the instructions given by the trial court in the present case was made by any party on any of the grounds referenced in Bartley-Rice's appeal.

In addition, *Loyacono* is cited by Bartley-Rice in support of her argument that juror confusion was at issue in the present verdict. There can be no confusion where the jury's intent was determined in the various way previously mentioned herein. Any confusion was shared by the entire jury and the trial judge.

Bartley-Rice also cites the *First Bank* case and again argues regarding alleged confusion of the jury. **[Appellant's brief at p. 10]** The *First Bank* case is immediately distinguishable from the

present case because the Mississippi Supreme Court in *First Bank* was reviewing the denial of post-trial motions filed by the aggrieved party in an attempt to rectify the conflicting verdicts. *First Bank of Southwest Mississippi v. Bidwell*, 501 So.2d 363, 364 (Miss.1987). There are no such motions at issue in the present case. Bartley-Rice has never, prior to the filing of this appeal, brought the issue of the jury verdict's alleged conflict before the trial court.

The *First Bank* case is also distinguishable from the present case in that in *First Bank*, liability was not at issue, only damages had to be determined by the jury. *Id* at 364. The present case involved the determination of negligence, or lack thereof on the part of the drivers at issue, including the issue of whether or not the accident was unavoidable in any event.

In addition, the Court in *First Bank* makes a determination that the verdict's intent could not be determined. *Id* at 366. This is in direct contradiction to the present case wherein the jury's intent was disclosed via a variety of sources.

VIII. Bartley-Rice's argument regarding Miss. Rule Civil Procedure 49 (c) has been waived and is not properly before this Court.

In the middle of her brief, Bartley-Rice changes her argument mid-stream and instead of arguing that the Court should have required the jury to continue deliberations, she argues that the jury instructions including the verdict form that were submitted to the jury were improper.

[Appellant's brief at p. 10]

Bartley-Rice alleges in her brief that the Special Verdict Form and the handwritten verdict somehow violated *Mississippi Rule of Civil Procedure 49 (c)*, which deals with the form of the verdict.

Bartley-Rice cannot now raise an objection to the Special Verdict Form and or the handwritten verdict under the auspices of *Rule 49(c)*, because counsel for Bartley-Rice never objected on *Rule 49* grounds to either instruction during the jury instruction conference or when

the instructions were offered to the jury. **[T.151-192/RE.49-90]** Such a failure to object serves as a waiver as to *Rule 49* issues on appeal. *Missala Marine Services, Inc. v. Odom*, 861 So.2d 290 (Miss.Ct.App.2003). On appeal a party may not argue that an instruction was erroneous for a reason other than the reason assigned on objection to the instruction at trial. *Young v. Robinson*, 538 So.2d 781, 783 (Miss.1989).

In addition an objection on *Rule 49* was never addressed or asserted as a basis of alleged error in Bartley-Rice's post-trial motion. **[R.458-460/RE.44-46]**

Further, in the present case the trial court with the agreement of the parties and after being advised of the jury's intent, reformed the Special Verdict Form and the handwritten verdict. **[R. 454-457/RE. 39-43]** Therefore, the special verdict form and handwritten verdict at that point ceased to exist and were reformed into the Final Judgment that was entered. Therefore, any argument regarding the form of the jury instructions upon which the verdicts were formed has been waived and is moot or otherwise improper.

Substantively, Bartley-Rice's argument under *Rule 49(c)* fails. Appellant argues that the interrogatories contained in the Special Verdict Form were inconsistent with what Bartley-Rice terms the "general verdict form". Bartley Rice apparently argues that Instruction No. 12 the "unavoidable accident" instruction was somehow either an interrogatory or a general verdict form. Instruction No. 12 was clearly not either a form of the verdict instruction or interrogatory in that it did not instruct the jury to use any certain language in rendering their verdict, nor does Instruction No. 12 instruct the jury to write any verdict on a separate sheet of paper. Instruction No. 12 does not ask the jury to answer any question. Lastly *Rule 49(c)* addresses requirements of verdict forms which are proper to be used by the Court, whereas Instruction No. 12 was not offered by the trial court as a potential verdict form and therefore *Rule 49(c)* does not apply.

Instruction No. 12 was simply a jury instruction on the law, not a form of the verdict. The jury chose, on its own initiative, to write a handwritten verdict to ensure their intent was known.

IX. The jury's verdict was supported by the evidence and was not indicative of any bias, prejudice or passion by the jury

Bartley-Rice argues generally that the jury's verdict awarding zero damage "shocks the judicial conscience" and is indicative that the jury was influenced by bias, passion and/or prejudice[2]. **[Appellant's brief at p. 14]** Bartley-Rice presents absolutely no factual support with regard to what the alleged influence to the jury was.

Bartley-Rice's brief further ignores a controlling factor; in addition to awarding zero damages on the Special Verdict Form the jury returned a handwritten verdict for Haymon and Austin determining that the accident was unavoidable in any event. **[R. 457/RE. 43]** The jury's award of zero damages under both verdict forms was proper and is further evidence of the intent of the jury.

The jury was read an instruction stating clearly:

"The court instructs the jury that you have no right to compromise in your verdict between the question of liability and the amount of damages, that if you find that according to the law as given to you in the instructions of the Court, under the evidence in this case, that Idalan Haymon, is not liable, then the plaintiff is not entitled to recover any sum of money whatsoever from defendant Idalan Haymon and it is your sworn duty to so find by your verdict." **[R. 433/RE. 28]**

The jury clearly determined that the accident was unavoidable in any event and therefore no damages would have been due to Bartley-Rice.

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[2] Bartley-Rice argues only regarding the zero verdict and Bartley-Rice's alleged damages. No argument was made regarding the sufficiency of the verdict with regard to the facts presented with regard to liability and whether the accident was unavoidable.

The case law cited by Bartley-Rice in support of her argument is not applicable to the present case because as opposed to the cases cited by Bartley-Rice, liability in the present case was not established in favor of Bartley-Rice. This resulted in the award of zero damages.

CONCLUSION

In this case, the plaintiff/appellant Bartley-Rice selected the venue of the Circuit Court of Holmes County to try this case before a jury consisting of the citizens of that county. The only connection with Holmes County was the fact that the defendant/appellee, Idalan Haymon, was a resident of that county.

The case was tried over a three day period and after being properly instructed by the trial court, the jury retired to consider its verdict. A special verdict form was approved by the trial court which required that the percentages equal one hundred percent. Various options were also set forth in the instructions approved by the trial court and read by the trial judge to the jury. The intent of the jury was very clear and not only did the jury complete the special verdict form, but utilized a handwritten verdict.

Prior to the jury entering the courtroom, the trial judge requested a conference with all attorneys and as set forth in this brief, reviewed with the attorneys what had occurred with the jury verdict. Judge Lewis did not reveal the decision of the jury at that point, but clearly stated that from her review of the verdict the intent of the jury was clear. All attorneys agreed to let the trial judge reform the verdict and so stated on the record.

It is also significant to note that the trial judge, upon bringing the jury into the courtroom, inquired of the foreperson as to whether or not the special verdict form and handwritten verdict meant the same thing and the foreperson replied in the affirmative. Following that affirmation the trial judge read the two verdicts and asked each juror individually if it was their verdict and each

replied in the affirmative.

The unanimous verdict for the defendant was certainly clear, not only from the handwritten verdict, but from the special verdict form. In our opinion the intent of the jury is not subject to interpretation.

The verdict of a jury in a civil case is certainly sacred and should not be disturbed by this Court. On behalf of the defendant/appellee, Idalan Haymon, we respectfully request that the decision of the lower court and the verdict of the jury be affirmed.

Respectfully submitted,
IDALAN HAYMON, Appellee

By: /s/ J. Seth McCoy
J. SETH McCOY, MSB. No. 101577
WILLIAM M. DALEHITE, JR., MSB No. 5566
Attorneys for Appellee

OF COUNSEL:

STEEN DALEHITE & PACE, LLP
401 East Capitol Street, Suite 415
Post Office Box 900
Jackson, Mississippi 39205
Telephone: (601) 969-7054
Facsimile: (601) 353-3782

CERTIFICATE OF SERVICE

I, J. Seth McCoy, the undersigned counsel of record hereby certify that I have this day served a copy of these record excerpts via the Court's electronic filing system and/or U.S. Mail to the following:

Ms. Kathy Gillis, Clerk
Supreme Court of Mississippi
P. O. Box 249
Jackson, MS 39205-0249

Ms. Earline Wright-Hart
Holmes County Circuit Clerk
P. O. Box 718
Lexington, MS 39095-0718

Tylvester Goss, counsel for plaintiff/appellant
Goss & Williams, PLLC
1441 Lakeover Road
Jackson, MS 39213

Honorable Jannie M. Lewis
P.O. Box 149
Lexington, MS 39095-0149

Tiffany P. Grove, counsel for co-defendant/appellee Austin
Williford McAllister & Jacobus, LLP
303 Highland Park Cove, Suite A
Ridgeland, MS 39157-6059

William H. Creel, Jr., Esq., counsel for co-defendant/appellee State Farm
Currie Johnson Griffin Gaines & Myers
P. O. Box 750
Jackson, MS 39205-0705

This the 5th day of March, 2014.

By: /s/ J. Seth McCoy
J. Seth McCoy
William M. Dalehite, Jr.
STEEN DALEHITE & PACE, LLP
401 E. Capitol Street, Suite 415
Post Office Box 900
Jackson, MS 39205
COUNSEL FOR APPELLEE, IDALAN HAYMON