

The Mississippi Jury Verdict Reporter

The Most Current and Complete Summary of Mississippi Jury Verdicts

November 2010

Statewide Jury Verdict Coverage

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Introducing the

Mississippi Jury Verdict Reporter

The nation's most innovative jury verdict publisher has come to Mississippi - for 15 years, we've done original, on-the-ground and in-the-courthouse research on verdict results in Alabama, Tennessee, Kentucky, Indiana and Louisiana. This month we introduce the newest addition to our line-up, *The Mississippi Jury Verdict Reporter*.

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Let's get to the verdicts.

Civil Jury Verdicts

Timely coverage of civil jury verdicts in Mississippi including court, division, presiding judge, parties, case number, attorneys and results. Notable results from Memphis, TN are also covered.

Swimming Pool Negligence - Parents left their children (age 8 and 9) alone at a motel while the father drove the mother to work, the father warning the children to stay out of the motel pool – the children didn't and both nearly drowned – while resuscitated, both children suffered a brain injury – in this lawsuit, the plaintiff alleged negligence by the motel in failing to lock the gate to the swimming pool the night before
Sproles v. La Quinta Inn, 08-495

Plaintiff: J. Ashley Ogden, *Ogden & Associates*, Jackson

Defense: J. Leray McNamara and

Monte L. Barton, *Copeland Cook Taylor & Bush*, Ridgeland and E. Charlene Stimley Priester, *Priester Law Firm*, Jackson

Verdict: \$5,614,378 for plaintiffs assessed 85% to the defendant

Court: **Hinds**

Judge: Winston Kidd

Date: 8-4-10

It was early on the morning of 7-30-07 and Jessica Sproles, age 8, and her brother, Robert, age 9, were living with their parents at a La Quinta Inn (a motel) in Jackson. The father (Robert, Sr.) needed to take their mother to work. The children were permitted to stay behind. Before leaving just before 7:00 in the morning, the father warned the children to stay out of the hotel pool.

Left alone in the hotel room, the children disregarded the admonition. Jessica fell in the pool. She could not swim. Robert jumped in the pool to help. Both children began to drown. Motel guests heard the commotion and rushed to the pool. Both children were pulled from

the water and resuscitated. This near drowning event left Jessica and Robert with permanent brain injuries.

In this lawsuit, the children alleged negligence by La Quinta in an elegantly simple way. Namely, the pool (which opened at 9:00 a.m.) had been left open the night before. A night clerk would later explain he simply forgot to lock the gate.

Then only because the gate was open were the children able to enter and suffer calamity. [There was also proof that there had been a fatal drowning involving a child at the pool two years earlier.] A safety expert for the plaintiff was Tom Ebro, Lutz, FL.

Each of the child plaintiffs presented a significant claim for their life care plans (\$13 million each) associated with a mild cognitive brain injury. Interestingly, their father presented his own bystander claim for emotional distress. He had returned to the pool just as his children were pulled from it and suffered damages associated with observing their near drowning.

La Quinta defended (1) that there was no duty to lock the pool during off hours, and (2) that fault rested with the father for having left his children alone at the motel. Damages were also diminished, IME experts suggesting there was no diminution in the plaintiff's cognitive problems that existed before this incident. The defense also noted that the children are in school and functioning.

La Quinta further distinguished the prior drowning incident in 2005. That child was a teenager (age 16) who could swim and apparently suffered a seizure or asthmatic attack that caused the drowning.

This case was tried over eight days in Jackson. The jury's verdict was mixed on fault. It was assessed 85% to La Quinta, the remainder to the father. Then to damages, Jessica took medicals of \$93,525 and \$3.5 million for future care. Her suffering was \$75,000 – she took \$200,000 for lost wages. Jessica's raw verdict totaled \$3,868,525.

Her brother took medicals of \$45,852

plus \$1.5 million for future care. His suffering was \$25,000, the jury adding \$75,000 for lost wages. His award totaled \$1,645,852. The father took \$100,000 more for bystander damages, the raw family verdict totaling \$5,614,378. After a reduction for comparative fault (15%), the plaintiffs took a total of \$4,772,221. [Ed. Note - As the vast sum of the awards to plaintiffs represented economic damages, statutory caps are not applicable.]

La Quinta has since moved for JNOV relief. It has argued that the parents knew of the danger and disregarded it. The plaintiffs too have sought JNOV relief – they have argued there was no basis to impose comparative fault, that is, there was no evidence the parents were the “sole cause” of these events. Although the defendant has since deposited the amount of the judgment with the court, the motions were pending when the MSJVR reviewed the record.

Gender Discrimination - A male beverage manager at a Tunica casino was fired for violating HIPAA in letting it be known that a co-worker was off work with tuberculosis – the male manager alleged the firing represented gender discrimination, a female co-worker suffering no discipline when she did the same thing – a federal jury awarded the plaintiff \$1,000,000 in punitive damages

Doss v. Sam's Town Casino, 2:08-227
Plaintiff: Jim D. Waide, III and Ronnie Lee Woodruff, *Waide & Associates*,
Tupelo

Defense: Karen Gwinn Clay, *Watkins Ludlam Winter Stennis*, Jackson
Verdict: \$1,250,000 for plaintiff
Court: **Federal - Greenville**
Judge: W. Allen Pepper
Date: 8-11-10

Glenn Doss was hired in April of 2007 by Sam's Town Casino in Tunica as a beverage manager. He did well in his job over the next seven months. The trouble started in late November when a cocktail waitress (Julie Eckhardt) called in sick. Taken to the hospital, she was

given a preliminary diagnosis of the dread disease, tuberculosis.

Eckhardt was desperate to let bigwigs at the casino know of her condition. She had trouble reaching HR and found Doss at home. [Doss had gone home ill.] Doss then instituted efforts to let senior management know of Eckhardt's condition. That included informing a supervisor and a co-manager of Eckhardt's condition. Word quickly got around the casino to everyone of Eckhardt's condition. [As it turned out, she in fact did not have tuberculosis.]

In any event, management at the casino made a decision to terminate Doss for exercising bad judgment in violating HIPAA by revealing confidential medical information. As that decision was being made, Doss's employment record was further scrutinized and attendance problems were noted. He was terminated a day later on 11-29-07. From the perspective of Sam's Town, that should have been the end of the matter.

Doss by contrast believed he was a victim of gender discrimination. He cited proof that a co-manager (Kathy Pritchett) also revealed Eckhardt's condition and yet she suffered no discipline. In fact, she was later promoted to Doss's spot. If Doss prevailed in this federal lawsuit, he sought both compensatory and punitive damages.

The casino defended that gender had nothing to do with its decision. It explained that Pritchett was a dual-duty employee, working mostly as a cocktail waitress and filling in on weekends as a beverage manager. Because her role was subordinate and out of the normal chain of command, her treatment was different – the casino argued Doss should have known better than to let this information get out. Sam's Town suggested Doss could have handled the matter better by calling a 24-hour human resources hotline.

Doss countered that he hadn't violated HIPAA and that Eckhardt had wanted him to let management know of her condition. Then to his handling of the matter, he cited company policy, “SOS”, which

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DeSoto County - Dump truck versus car - fatality - \$30,000,000 verdict
Hinds County - Medical Malpractice/Death - \$1,128,050
Hinds County - Premises Liability - \$1,500,000
Panola County - Auto Negligence - Defense verdict
Federal Court - Jackson - Truck Negligence (Death) - Defense verdict
Federal Court - Gulfport - Copyright Infringement (Casino show) - \$41,649
Humphreys County - Sex Discrimination - \$150,000
Lauderdale County - Truck Negligence (Death) - Defense verdict
Jasper County - Products Liability (Ford Explorer) - \$132.5 million

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stands for "see it, own it and solve it." Doss thought he did just that, his employer firing him on trumped up HIPAA charges and then changing its story (to cite attendance problems) when this became clear.

This case was tried before a federal jury in Greenville. The verdict was for Doss on the gender discrimination claim. He took compensatory damages of \$250,000 plus \$1,000,000 more in punitives. Several weeks post-trial no judgment had been entered. Presumably, Doss's award will be limited to the \$300,000 statutory cap on such actions.

Medical Malpractice - The plaintiff suffered complications following an exploratory laparotomy where her ureter was injured, including the loss of a kidney – the plaintiff blamed her doctor for performing the surgery in the first place as it was unnecessary especially in light of her prior surgical history
Saint v. Grimm, 05-286

Plaintiff: D. Briggs Smith and Jason Nabers, *Smith Phillips Mitchell Scott & Rutherford*, Batesville and John Cocke, *Merkel & Cocke*, Clarksdale
 Defense: Tommie Williams and Tommie G. Williams, Jr., *Upshaw Williams Biggers & Beckham*, Greenwood

Verdict: Defense verdict on liability
 Court: **DeSoto**
 Judge: Jimmy McClure
 Date: 4-1-10

Shirley Saint, then age 64 and of Nesbit, was complaining of abdominal pain. A surgeon, Dr. Leander Grimm of Southaven and Memphis, TN, performed an exploratory laparotomy on Saint – he

suspected a bowel blockage. The surgery was conducted at DeSoto Baptist. During the surgery, Saint resected a portion of Saint's sigmoid colon.

Unknown to Grimm (and Saint too), Grimm had apparently stapled Saint's ureter during the surgery. Thereafter she endured a long course of complications that began with a vesicocolic fistula, urine spilling into her rectum. This cascade of complications resulted in Saint losing her kidney – she also relies on a permanent colostomy.

Saint sued Grimm and alleged negligence by him in undertaking the surgery at all. That is, she didn't have a blockage and was simply suffering from diverticulitis, a condition for which surgery was not indicated.

Saint also cited that besides the procedure not being necessary, it was especially not indicated for her because of her prior history of abdominal surgeries, having undergone both an appendectomy and a hysterectomy. Plaintiff's liability expert was Dr. James Shamblin, Surgery, Tuscaloosa, AL.

Saint's incurred medical expenses were \$176,769. Beyond her claim for damages, Saint's husband (Thomas), presented a derivative consortium claim. Saint had also pursued a credentialing claim against the hospital citing evidence of prior malpractice claims against Grimm.

Grimm defended the case on several fronts, including arguing that (1) the surgery was indicated, (2) he did not injure her ureter, and (3) Saint's poor outcome represented a surgical complication, not malpractice. His expert was Dr. Charles Pigott, Surgery, Tupelo.

This case concluded on the first day of April. The verdict was for Grimm on liability and Saint took nothing. A defense judgment closed the case.

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Construction Negligence - A Target employee took shoes down from a wall just as the wall was being destabilized as part of a construction project – the wall fell on the employee and she sustained a lumbar disc injury

Durr v. MBS Construction, 3:07-455

Plaintiff: J. Ashley Ogden, James W. Smith, Jr. and Wendy M. Yuan, *Ogden & Associates*, Jackson

Defense: Gregg L. Spyridon and John M. Herke, *Spyridon Palermo & Dornan*, Metairie, LA and John G. Corlew, *Corlew Munford & Smith*, Jackson

Verdict: \$2,950,000 for plaintiff less 30% comparative fault

Court: **Federal - Jackson**

Judge: Tom S. Lee

Date: 5-24-10

Megan Durr worked at a Target retail store in Jackson, MS on 8-26-06. A construction project was underway to expand the store. As a part of that project, a wall was being removed. It was Durr's job to remove merchandise (shoes) that had been placed on the wall.

At the same time that Durr worked taking down the shoes, a contractor on the project, MBS Construction, was destabilizing the wall by removing its anchors. The wall (standing fourteen feet high) suddenly collapsed upon Durr. She sustained a low-back disc injury and later underwent a double fusion surgery at L4-5 and L5-S1.

In this lawsuit, Durr sued MBS Construction and alleged negligence in weakening the wall while Target employees were still working on it – importantly, Durr denied receiving notice the wall was destabilized. MBS Construction denied fault and pointed to the duties of Target to protect Durr. It also diminished the claimed injury.

The jury's verdict was mixed on fault. That fault was assessed 70% to MBS Construction, the remainder to Target. Then to damages, Durr took medicals of \$350,000 plus \$100,000 more for lost wages. Her pain and suffering was valued at \$2.5 million, the raw verdict totaling \$2,950,000.

In the court's judgment, the suffering

damages were reduced to \$1,000,000 by the Mississippi state law cap. That reduced sum was reduced again by the 30% comparative fault of Durr's employer, the final judgment against MBS Construction totaling \$1.015 million.

Medical Malpractice - An infant was delivered stillborn, his demise being linked to a placental abruption – his parents blamed their treating Ob-Gyn for failing to manage the risk of this condition and perform a pre-emptive c-section

Haynes v. Kot, 07-217

Plaintiff: Isaac K. Byrd and Suzanne Keys, *Byrd & Associates*, Jackson

Defense: R. Robert Ramsay, *Ramsay & Hammond*, Hattiesburg

Verdict: Defense verdict on liability

Court: **Forrest**

Judge: Robert Helfrich

Date: 8-28-10

Chiquita Haynes was in the midst of her first pregnancy in the summer of 2006. Her treating Ob-Gyn was Dr. Libby Kot. Haynes' son, Cole, was delivered at Forrest General Hospital on 9-12-06. The infant was stillborn. His death was linked to a placental abruption.

Haynes and her husband, Allen, sued Kot and alleged error by her in mismanaging the pregnancy. It was the plaintiff's theory that it was a high-risk pregnancy as evidenced by her high blood pressure and abnormal foot swelling. Had Kot so considered the pregnancy, Haynes would have been hospitalized for closer monitoring or Kot could have performed a pre-emptive c-section.

Plaintiff's liability expert was Dr. David Chatman, Ob-Gyn, Chicago, IL. Chatman focused on purported error by Kot in failing to provide greater surveillance of this pregnancy. If the plaintiffs prevailed, they sought medicals, loss of society and loss of companionship.

Kot defended that plaintiff's condition during the pregnancy was not alarming. Then to the placental abruption, it was

described as sudden and neither predictable nor preventable. There was also evidence that Haynes has since lost two other pregnancies, the defense developing a theory that she is more susceptible to this condition. [Haynes countered that the later pregnancies were much different, each ending much earlier in the gestation process.] Defense experts were Dr. John Morrison, Ob-Gyn, Jackson and Dr. Paul Rice, Ob-Gyn, Jackson.

The jury's verdict was for the doctor on liability and the plaintiffs took nothing. A defense judgment was entered.

Fraudulent Misrepresentation - Two lawyers that prosecuted an asbestos settlement for several hundred railroad workers were sued by the railroad when it was learned (after the settlements were paid) that two of the plaintiffs had presented misleading information about their prior asbestos claim information – the lawyers defended that they hadn't known of the false statements

Illinois Central Railroad v. Guy et al, 5:06-160

Plaintiff: Daniel J. Mulholland and Tanya D. Ellis, *Forman Perry Watkins Krutz & Tardy*, Jackson

Defense: John G. Corlew and Kathy K. Smith, *Corlew Munford & Smith*, Jackson for Guy and Brock

Wayne Dowdy, Magnolia for Harried and Turner

Verdict: \$420,000 for plaintiffs against Guy and Brock; Defense verdict for Harried and Turner

Federal: **Federal - Natchez**

Judge: David C. Bramlette, III

Date: 3-11-10

William Guy and Thomas Brock, lawyers in the McComb firm of *Guy and Brock*, prosecuted civil tort cases for a group of several hundred railroad workers that claimed asbestos-related injuries against Illinois Central Railroad. A settlement was reached in August of 2002, the railroad agreeing to make payments to plaintiffs after they

submitted to a pulmonary questionnaire.

Among the plaintiffs that submitted questionnaires were rail workers, William Harried and William Turner. Harried's settlement was \$90,000 – Turner took \$120,000. At the time they completed their questionnaires, the two checked that they had not participated in an earlier 1995 asbestos settlement. In fact they had and this was unknown to Illinois Central.

Sometime later the railroad learned they had participated and sued Harried and Turner for fraud. In deposition the two men (one of whom is semi-literate) explained their lawyers had handled everything. Illinois Central amended its lawsuit to name Guy and Brock.

Thus as the case advanced to trial, the railroad sued the clients and the lawyers both for fraudulent inducement. The theory was simple – but for the false promise, Illinois Central would not have paid the claim. An additional good faith and fair dealing count was pressed against the lawyers. If the railroad prevailed, it sought an award of compensatory and punitive damages.

The two workers defended the case that they had told their lawyers the truth and relied on them to handle the matter. The lawyers by contrast defended that their clients had checked “no” regarding prior litigation and thus they had no knowledge this statement was false. They also noted that there were many cases (nearly 400) and of all those cases, there was only a problem in these two.

Guy and Brock also argued (unsuccessfully to the trial court) that the claims were barred by the statute of limitations. They cited proof Illinois Central knew of their potential involvement for nearly four years before they brought suit.

The verdict was mixed at trial. The railroad lost against the two individual workers (Harried and Turner) on the fraudulent inducement count. By contrast, this jury found against both the lawyers.

The jury further found a breach of a duty of good faith and fair dealing

against Guy and Brock. [This claim was not presented against the workers.]

Finally to damages, the jury awarded Illinois Central \$90,000 on the claim of Harried and \$120,000 regarding Turner. [That sum was equal to the settlement.] The jury also imposed punitives of \$210,000 against the lawyers. A judgment was entered against Guy and Brock that included pre-judgment interest.

The defendants have since moved for JNOV relief arguing among other things that the verdict was inconsistent. It asked: How could Harried and Turner be exonerated and their lawyers found at fault? Illinois Central answered in its reply that the jury concluded the lawyers were the bad actors, the workers simply doing what their lawyers told them to do. In late September, the motions were still pending.

Negligent Security - A college basketball player at Mississippi Valley State was paralyzed at a nightclub after being shot by a security guard – the security guard had fired wildly (discharging nine shots) at a purported gunman, the hoopster being struck inadvertently in the barrage

Archie v. Club Focus et al, 04-48

Plaintiff: Carlos E. Moore, *Moore Law Firm*, Grenada

Defense: *Pro se*

Verdict: \$12,000,002 for plaintiff

Court: **Leflore**

Judge: Richard A. Smith

Date: 2-9-10

Michael Archie was a student at Mississippi Valley State University in Itta Bena. He also played on the basketball team. On the night of 1-28-03 after a game against Prairie View State, Archie joined other students at a local nightclub, Club Focus. Operated by Rose Brown, Club Focus is just across the street from campus.

There was trouble at Club Focus that night and its security guard, Johnny King of King Security, intervened to protect patrons. That included firing at a patron (who may have had a gun) and wildly

discharging some nine bullets. Archie was struck in the back by a stray bullet and was left paralyzed from the waist down.

In this lawsuit, Archie sued Brown and King regarding the shooting. He cited proof that there was a long history of misconduct at Club Focus, including violence, unruly behavior, gambling and public nudity.

A default judgment was entered against Brown. King answered and defended. He did not appear at trial. The case then went to trial on damages.

Archie prevailed and took a general award of \$12,000,000 in compensatory damages. The jury also imposed a single dollar more (against each defendant) in punitive damages. The verdict totaled \$12,000,002. A consistent judgment was entered.

The jury had also written a separate note on its verdict form: We think the justice system failed in allowing this business to remain open considering the prior incidents. The note from the jury aside, it is not believed that any portion of this verdict will be collected.

Civil Rights - The plaintiff was arrested for DUI and lodged in a holding cell at Jackson Police headquarters – a rogue jailer attacked the plaintiff and broke bones in his face – in this lawsuit, the plaintiff targeted three other jailers (non-participants in the beating) who stood by and failed to intervene to protect him

Singleton v. City of Jackson, 3:06-79

Plaintiff: Jeanine M. Carafello and M. Judith Barnett, Jackson

Defense: Pieter Teeuwissen, Jackson and Anthony R. Simon, Jackson

Verdict: \$64,035 for plaintiff

Court: **Federal - Jackson**

Judge: Henry T. Wingate

Date: 9-10-10

Maryland Singleton, then age 30, was arrested on DUI charges on 2-11-05. His blood alcohol level was measured at .13. Singleton was taken to Jackson Police headquarters where he was placed in a

holding cell. After jailers learned that Singleton still had his cell phone, a jailer (Larry Davis) entered the cell to retrieve it.

By all accounts in that process, Davis attacked Singleton and punched him in the face. [The attack was not provoked.] Singleton was badly hurt and sustained fractures to his cheekbone, jaw bone and nose. He also had ten stitches to his face.

The jail performed an investigation into the beating and reviewed a videotape of it. A decision was made to fire Davis. That would end Davis's involvement in the matter as his whereabouts could not be determined.

In this federal lawsuit, Singleton sued three other jailers who were present at the time of the beating but did not participate in it. They were Tony Collins, Billy Slaughter and Cornelius Johnson. Singleton advanced a "bystander liability" theory, such that the three defendants had a duty to protect him from excessive force. Plaintiff's lawyer told the jury that while the defendants may be good fathers, sons and husbands, on this day "they weren't good men."

The defendants replied that Singleton had been unruly and used coarse language before the beating. Then to their conduct, they described upon seeing the beating, they did intervene and pulled Davis from him. [Plaintiff had contradicted this version that the three jailers stood by and did nothing.]

The jury's verdict was for Singleton against all three defendants on the bystander theory. He was awarded medicals of \$14,035 plus \$50,000 more for pain and suffering. Disfigurement was rejected. The verdict totaled \$63,035 and a consistent judgment was entered.

Dental Malpractice - The plaintiff, age 22, died of a pulmonary edema after a procedure to remove her wisdom teeth – her estate alleged error by her dentist in performing the surgery especially in light of her history of premature congestive heart failure – a directed verdict was granted, the court finding plaintiff's causation proof was "speculative"

Barrow v. May, 07-1212

Plaintiff: William W. Fulgham,

Fulgham Law Firm, Flowood

Defense: John T. Banahan and Jessica

B. McNeal, *Schroeder Castigliola &*

Banahan, Pascagoula

Verdict: Directed verdict

Court: **Hinds**

Judge: W. Swan Yerger

Date: 7-23-10

Latisha Barrow, age 22, underwent a procedure to have her wisdom teeth removed on 7-14-06. It was performed by a dentist, Dr. Revel May, at his office. The procedure seemed uneventful except that Barrow was especially anxious about it.

She was released and went home. Within a day she was found unconscious by her mother. Barrow was rushed to the hospital and could not be revived. Her death was linked to an acute pulmonary edema.

Her estate prosecuted this malpractice lawsuit against May and alleged error by him in performing the surgery at his office. The plaintiff cited that Barrow had a long history of congestive heart failure and at the time of the dental surgery, she was on a waiting list for a heart transplant.

Thus her death (the pulmonary edema) was linked to the temporary overload of her system in terms of stress. Had the surgery been performed at a hospital, the plaintiff's theory went, she likely would have been revived.

Plaintiff's liability expert was Dr. Orrett Ogle, Oral Surgery, Brooklyn, NY. Causation evidence came from a cardiologist, Dr. Robert Stark, Greenwich, CT, who explained that Barrow was at a hospital, the edema

would have been avoided by the administration of oxygen and other therapies.

The plaintiff had also pursued a claim against University of Mississippi Medical Center. That theory was predicated on clearing Barrow for this surgery in the first place based on her complex history. The hospital settled before trial.

May (who saw Barrow upon referral) defended that his care was proper. He also developed proof that regardless of where the oral surgery was performed, the result would have been the same. His experts were Dr. Willie Hill, Dentist, Madison and Dr. Raymond Fonesca, Oral Surgery, Chandler, NC.

At the close of the plaintiff's proof, Judge Yerger granted the defendant's motion for a directed verdict. Yerger cited that proof from plaintiff's causation expert (Stark) was speculative.

The estate subsequently moved for a new trial and alleged the defendant's *Daubert* motion had created a procedural trap at trial. The motion was denied and the estate has since appealed.

Excessive Force - Arrested and jailed on a DUI charge, the plaintiff alleged she was beaten by jailers when she tapped on the cell window to request to make a phone call

Carrubba v. Harrison County Jail, 1:07-1238

Plaintiff: Patrick R. Buchanan and

Mark V. Watts, *Brown Buchanan*, Biloxi

Defense: James L. Davis, III and Ian

A. Brendel, *Law Office of Jim Davis*,

Gulfport

Tim C. Holleman, *Boyce Holleman &*

Associates, Gulfport and Haley N.

Broom, *Dukes Dukes Keating & Faneca*,

Gulfport for Harrison County Jail

Verdict: Defense verdict on liability

Court: **Federal - Gulfport**

Judge: Louis Guirola, Jr.

Date: 8-26-10

After running a red light on 6-17-06, Marguerite Carrubba was arrested and charged with DUI. She was lodged in the Harrison County Jail. Carrubba

made repeated requests from her cell to make a telephone call – those requests came in the form of tapping on her cell window.

This apparently aggravated jail officials who then placed her in handcuffs. A short time later Carrubba slipped from the handcuffs and began her tapping on the window. Two jailers, Karle Stolze and William Priest, re-entered the jail cell and attempted to handcuff Carrubba again.

Carrubba would recall that in so doing, she was slammed to the cell floor face-down. In this lawsuit, Carrubba alleged excessive force by the two jailers and that a custom existed within the county jail to mistreat prisoners.

The jailers defended the case that Carrubba was drunk and disorderly. She was making such a commotion in tapping on the window and shouting obscenities that the officers feared a “cascade of disruption” within the jail if Carrubba was not brought under control. Then to the handcuffing incident, the defendants denied excessive force was used.

The verdict was for the individual defendants (after forty-five minutes of deliberation) on the excessive force counts and having so found, the jury then did not go on to consider the custom claim against the jail. A defense judgment was entered.

Saddle Negligence - After purchasing a new horse saddle (it cost \$1,382), the plaintiff tried it out – the saddle failed and the plaintiff was thrown from his horse, sustaining a serious knee injury in the process

Sullivan v. Cowboy Corner, 07-386

Plaintiff: D. Briggs Smith and Jason Nabers, *Smith Phillips Mitchell Scott & Rutherford*, Batesville

Defense: Jonathan S. Masters, *Holcomb Dunbar*, Oxford

Verdict: Defense verdict on liability

Court: **Panola**

Judge: Jimmy McClure

Date: 10-6-09

Randall Sullivan, then age 71, purchased a horse saddle on 7-18-06

from Cowboy Corner in Southaven, MS. He paid \$1,382 for the saddle which was manufactured by Tucker Saddlery of Yokum, TX. Cowboy Corner adjusted the rigging on the saddle so that it was “western” style.

Two days later Sullivan used the saddle for the first time. He saddled his horse and took a ride around the corral. Suddenly the billet strap broke on the saddle and Sullivan was thrown. Beyond cuts and bruises, he sustained a serious injury knee injury. It was later surgically repaired, his medical bills totaling \$28,596.

Sullivan instituted this tort lawsuit against Cowboy Corner alleging negligence by it in modifying the saddle. Particularly, the rear billets of the saddle were removed. He also presented a products claim against Tucker Saddlery. An expert, Steve Siegel, Buellton, CA, explained the saddle failed because inferior leather was used. Plaintiff’s wife also presented a derivative consortium claim.

Tucker Saddlery defended the case to the eve of trial and then settled with the plaintiff. It was represented by W.O. Lockett, Jr. of the *Lockett Tyner Law Firm* in Clarksdale.

The remaining defendant, Cowboy Corner, replied that there was no defect with the saddle nor was its rigging improper. In fact it had been rigged “western” style as Sullivan requested. The defense blamed the mishap on Sullivan for having used the saddle improperly.

The jury’s verdict was for Cowboy Corner on liability and Sullivan took nothing. A defense judgment followed this two-day trial and there was no appeal.

Sexual Harassment - A fingerprint technician for a school district alleged she was harassed by the district’s safety director

Carter v. Jackson (MS) Public School District, 3:07-393

Plaintiff: Louise Harrell, Jackson

Defense: Gail W. Lowery and JoAnn Stephens, Jackson for Jackson Public Schools

Alison T. Vance and Paul G. Ardelean, *Butler Snow O’Mara Stevens & Cannada*, Ridgeland for Coleman

Verdict: Defense verdict on liability

Court: **Federal - Jackson**

Judge: Henry T. Wingate

Date: 8-6-10

Sonia Carter worked in graphic arts for many years for the Jackson (MS) Public School District. In 2000 she switched to the district’s safety division where she became a fingerprint technician. In that role, she handled the fingerprinting of personnel and volunteers. Her new boss (the district’s safety director) in 2002 was John Coleman – he was a retired policeman.

Over the next three years, Carter alleged she was subjected to an ongoing hostile sexual environment. She would recall Coleman regularly made sexual remarks, including expressing a fetish for fat women – thus she heard every obscene permutation that described that fetish. Finally when Carter complained about the abuse, she was simply transferred to another division in a lower-paying position.

Carter then sued the school district and Coleman individually alleging a hostile sexual environment had been created and then she suffered retaliation when she complained. Coleman for his part denied it all. Similarly, the school district was suspicious, noting Carter said nothing about the harassment (for three years) until after she had been disciplined for poor performance.

The verdict was for the school district on both sexual harassment and retaliation counts. Similarly, Coleman prevailed on the individual counts against him. A few days post-trial, no judgment had been

entered.

Parking Lot Negligence - A policeman pulled into a parking lot of a gas station to put air in his tires – an instant later a man in a pick-up backed up and into the policeman’s cruiser

Robinson v. Ryan et al, 3:07-74

Plaintiff: D. Reid Wamble, Holly Springs and Michael D. Cooke, Iuka

Defense: Brian A. Hinton, *Anderson Crawley & Burke*, Ridgeland

Verdict: Defense verdict on liability

Court: **Federal - Oxford**

Judge: Michael P. Mills

Date: 7-22-10

Danny Robinson was working as a police officer on 1-20-05 for Sherman, MS. He pulled his cruiser into Wild Bill’s Truck Stop just off Hwy 9 in Sherman to put air in his tires. Robinson would recall pulling some six to ten feet behind a pick-up truck. Certainly, Robinson believed, the pick-up had room to back up and exit the parking lot.

An instant later Rodger Ryan, the operator of the pick-up and working for Intervect USA, exited Wild Bill’s and started to leave. He started to back up and never saw Robinson or his cruiser. Ryan’s pick-up struck the police car and knocked Robinson (who was standing in the car door) back into his vehicle.

That impact left Robinson with a serious and debilitating injury to his right arm. An eggshell plaintiff of sorts, Robinson already had a disabled left arm related to a boyhood accident. While he had coped with one good arm and done well in law enforcement, the loss of use of his right arm ended his police career. Plaintiff’s medicals were \$55,369 and he sought lost wages of \$565,927.

In this lawsuit, Robinson sought damages from Ryan related to this crash. Ryan defended the case that when he exited Wild Bill’s, Robinson’s cruiser was not present – Robinson literally pulled in behind him between the time Ryan exited and got in the pick-up. The defense also suggested that rather than being six to ten feet behind him, it was

actually closer to just three feet.

The court’s instructions asked if Ryan was liable for negligence that contributed to the plaintiff’s damages. The answer by this Oxford jury was no and Robinson took nothing. Even though damages were now moot, the jury continued and wrote “zero” in the verdict form. A defense judgment was entered.

Robinson has since moved for a new trial citing that as a matter of law, Ryan was at fault for backing into his police car – it was not a case where no one was to blame, that is, Ryan’s pick-up didn’t back up on its own. When the record was reviewed, the motion was pending.

Nursing Home Negligence - An elderly nursing home resident (age 74 and recovering from a hip fracture) fell and broke his hip again – the nursing home was blamed for failing to institute a fall protection protocol

Lee v. McComb Nursing &

Rehabilitation Center, 07-16

Plaintiff: W. Eric Stacener and W.

Andrew Neely, *Hawkins Stacener & Gibson*, Jackson

Defense: W. Davis Frye and Bradley Smith, *Baker Donelson*, Jackson

Verdict: \$25,000 for plaintiff

Court: **Pike**

Judge: Michael M. Taylor

Date: 7-1-10

Robert Lee, age 76, sustained a fall in December of 2004 and broke his hip. He was admitted on 1-25-05 to McComb Nursing and Rehabilitation Center. Five days later Lee rose from his bed and fell. His hip was immediately in pain – a day later a portable x-ray revealed a fracture. It was surgically set.

Lee subsequently pursued this negligence lawsuit against the nursing home. He alleged it erred in failing to institute a fall protection protocol. This was especially significant in light of his frail and confused condition. Lee died before the case could be tried and his estate advanced thereafter.

The nursing home defended the case that there was a fall plan, noting rails were placed on his bed in a low position.

Damages were also diminished, there being evidence that Lee’s osteoporosis contributed to his injury.

The jury in Magnolia answered for the plaintiff that the nursing home had breached the standard of care. The plaintiff was awarded medicals of \$20,000 plus \$5,000 more for pain and suffering. The verdict totaled \$25,000. A consistent judgment was entered.

The estate has moved for a new trial and/or additur, arguing the award was inadequate. This is especially so in light of Lee’s incurred medicals of \$29,975 and substantial evidence of pain and suffering. The nursing home replied that simply being dissatisfied with an award did not mean it was inadequate. The motion was pending when the MSJVR reviewed the record. The nursing home too has appealed that there was no evidence it violated the standard of care.

Negligent Security - The plaintiff was robbed at gunpoint while visiting her sister at a gated apartment community – the plaintiff blamed the apartment complex for inadequate security

Seaton v. Crossings Apartments, 09-632

Plaintiff: Precious T. Martin, Sr. and Gerald A. Mumford, *Martin &*

Associates, Jackson

Defense: James D. Holland, *Page Kruger & Holland*, Jackson

Verdict: \$900,000 for plaintiff

Court: **Hinds**

Judge: Malcolm S. Harrison

Date: 8-20-10

Ollie Seaton spent most of 5-29-09 fishing with her sister, Mildred Stamps. At 1:30 in the morning, they returned to the Crossing Apartments where Mildred lived. It is a gated community.

Having entered the complex, Seaton and her sister were robbed at gunpoint of their purses. While not physically injured, both women have since complained of significant emotional distress.

This lawsuit followed, the sisters suing Heritage Properties (which managed the complex) and Ridgeland Land Company

(which owned it), arguing a negligent security theory. Experts for the plaintiff advancing the claim were Willie Mack, Security Expert, Jackson and William Clay, Criminology, Weston, WV. Plaintiff's expert on the emotional injury was Wood Hiatt, Neuropsychiatry, Ridgeland.

The defendants replied to the case and denied fault. They described the attack as unforeseeable. The plaintiff's own care was also implicated. The defendants further diminished damages.

The apartment complex defendants also raised a procedural defense. Upon moving into the apartment complex, Stamps signed a lease and that lease contained an arbitration provision for the resolution of tort claims. The court sided with the defense on this question and Stamps' case was severed. The jury then would only decide Seaton's claim.

As the jury deliberated the case, it had two questions. The first was: We agree on liability, but can't come to an agreement on damages. Apparently they did agree as a verdict was returned. The second question concerned Stamps: Why is Ollie the only plaintiff.

To the verdict, it was mixed on fault, the jury assessing it equally to Heritage Properties and Ridgewood Land. None was assigned to the plaintiff. Then to damages, Seaton took \$374,200 for future medical care and \$525,800 for emotional distress. The verdict totaled \$900,000. A consistent judgment was entered.

The defendants have since moved for a new trial citing juror misconduct. Namely a former neighbor (some ten years) of the plaintiff (Verressia) sat on the jury and this was not disclosed. The apartment complex also cited error in that, (1) damages were excessive, and (2) there was no apportionment of fault to the assailants.

Auto Negligence - The plaintiff was rear-ended on the interstate and complained of soft-tissue neck and back pain as well as a mild brain injury – the defendant replied that the plaintiff was stopped in the traveled portion of the highway

Booker v. Moore, 5:08-309

Plaintiff: Carlos E. Moore and Tangala L. Hollis, *Moore Law Firm*, Grenada

Defense: Steven C. Cookston and Charles C. Auerswald, *Upshaw Williams Biggers & Beckham*, Greenwood

Verdict: Defense verdict on liability

Court: **Federal - Natchez**

Judge: David C. Bramlette, III

Date: 6-21-10

Stanley Booker was operating a tractor-trailer on 12-24-06 on I-55 in the middle of the night. He would recall being rear-ended by a pick-up driven by Marcus Moore. The impact sent Booker's truck off the roadway where it rolled over on its side.

A trooper arrived on the scene and found Booker on the ground covered with a blanket. He was taken to the ER and treated for soft-tissue symptoms and a mild brain injury. [The impact briefly knocked him out.]

Booker subsequently sued Moore in Yazoo County alleging his negligence caused injury. Moore removed the case to federal court and raised fact disputes. Namely at the time of the crash, he described that Booker was stopped in the traveled portion of the highway.

He also pointed to the suggestion that Booker was drunk. The investigating trooper so believed, especially as Booker refused a sobriety test. Booker countered that he wasn't drunk and there was no proof of it. He also denied his truck was stopped. A federal jury in Natchez would resolve these fact disputes.

The jury's verdict was for Moore on liability, it answering that he wasn't "guilty of negligence" that contributed to the accident. That ended the deliberations and the jury did not reach the plaintiff's duties, apportionment or damages. A defense judgment was entered.

Gender and Race Discrimination - Three female VA radiologists alleged they suffered discrimination because of their gender and race

McIntyre v. Veterans Administration, 3:08-148

Plaintiff: Dennis L. Horn, *Horn & Payne*, Madison

Defense: Angela G. Williams and Mitzi G. Payne, *Assistant U.S. Attorneys*, Jackson

Verdict: \$65,634 for Hatten
\$72,551 for McIntyre
\$45,566 for Finnegan

Court: **Federal - Jackson**

Judge: Tom S. Lee

Date: 8-10-10

Brigid McIntyre, who is American, Linda Finnegan (Malay-Chinese) and Margaret Hatten (American), were all employed as radiologists at the VA Hospital in Jackson. They alleged a pattern of gender, race and national origin discrimination prevailed in the radiology department.

Namely, the discrimination worked in favor of Indian male radiologists and against the plaintiffs. That was evinced in the quality and quantity of work assigned (this related to pay) as well as scrutiny of their work and breaks. Indian male radiologists were not similarly scrutinized. Then when the plaintiffs complained, they suffered retaliation.

The three plaintiffs sued the VA and presented assorted discrimination and retaliation counts. If prevailing, they sought backpay and other compensatory damages. The VA denied all the allegations. [Interestingly in this rather ordinary case, many key documents (summary judgment motions and others) were sealed by the court.]

The jury's verdict was for the plaintiffs on all counts except as noted: (1) gender discrimination, (2) race discrimination, (3) national origin discrimination, and (4) retaliation (Hatten only, rejected as to McIntyre and Finnegan).

Then to damages, Hatten took backpay of \$65,634. Finnegan took \$45,566 for the same category – McIntyre's award of

backpay was \$72,551. As to each plaintiff, compensatory damages were rejected. A consistent judgment was entered for the plaintiffs and they have since sought an award of attorney fees.

Age Discrimination - A long-time cashier at Wal-Mart alleged she was fired because of her age – her employer countered it was because she had been caught selling tobacco to a minor as a part of a government anti-smoking sting

Coker v. Wal-Mart, 2:07-238

Plaintiff: Jim D. Waide, III and Luther C. Fisher, IV, *Waide & Associates*, Tupelo

Defense: Vikki J. Taylor, *Watkins Ludlam Winter & Stennis*, Jackson

Verdict: \$150,000 for plaintiff

Federal: **Federal - Oxford**

Judge: Neal B. Biggers

Date: 12-9-09

Minnie Coker, age 55, worked for fourteen years as a cashier at the Wal-Mart in Winona, MS. She was fired on 1-19-05 after it was discovered she had sold tobacco to a minor. The sale was a part of an undercover sting arranged by the Mississippi Attorney General. Wal-Mart cited in firing Coker its strict adherence to a policy not to sell to minors. It required cashiers to ask for identification if the customer looks younger than 27.

Coker thought this explanation was a pretext to mask age discrimination. She cited proof that in 2000, two younger workers committed the same offense (selling tobacco to minors) and neither were fired. To this sale in particular, Coker thought the undercover purchaser looked older because he had a partial beard. Wal-Mart replied that while it was true, the younger workers were not fired in 2000, however by 2005, its policies had become much stricter. Coker countered that although Wal-Mart said it became stricter, in fact its written policies had not changed at all.

The court's instructions asked if Coker was discharged because of her age. The jury said yes and awarded her \$150,000

in compensatory damages – the jury made an additional finding that Wal-Mart's conduct was willful. A consistent judgment was entered and Coker has since sought attorney fees and liquidated damages.

Auto Negligence - The plaintiff complained of both a soft-tissue strain and a bulging disc following a chain reaction rear-end wreck

Hilburn v. Sartour, 05-182

Plaintiff: J. Christopher Klotz, *Klotz Law Firm*, Pensacola, FL

Defense: C. Paige Herring, *Scott Sullivan Streetman & Fox*, Ridgeland

Verdict: \$16,000 for plaintiff

Court: **Rankin**

Judge: William E. Chapman, III

Date: 12-17-09

Alan Hilburn traveled on 2-13-05 in a Jeep Wrangler on Hwy 25. An instant later he was involved in a chain reaction rear-end crash. Rodney Sartour (the defendant herein) struck Thomas Lofton, who was then pushed forward into Hilburn. Sartour's fault would be no issue.

Hilburn has since treated for two injuries. The first was a soft-tissue strain. The second represented the aggravation of a pre-existing disc injury. That is, he underwent a disc surgery in 2003 but by the time of this second wreck, his condition was much improved.

Hilburn's proof developed that a new C3-4 disc bulge was created. It was later surgically repaired by Dr. Adam Lewis, Neurosurgery, Jackson. Plaintiff's medicals totaled \$56,129.

In this lawsuit he sought damages from Sartour associated with this wreck. Sartour defended on damages that Hilburn sustained only a temporary strain injury at most. He further argued the claimed disc injury was unrelated.

Fault having been admitted, the jury considered damages only. Hilburn took \$16,000 for the strain injury, but nothing for the bulging disc. A consistent judgment was entered.

Hilburn moved for JNOV relief and

argued the verdict was contrary to the evidence regarding the surgery. He suggested additur of some \$81,000 to account for the additional medicals and his pain and suffering. Sartour replied that the disc injury claim was rejected by the jury. The motion was denied and the judgment has been satisfied.

Auto Negligence - The plaintiff suffered assorted injuries in a significant school bus versus vehicle crash, the plaintiff's vehicle flipping and landing on its side

Bolden v. QRT, Inc. et al, 3:08-540

Plaintiff: Jay M. Kilpatrick, *Young Williams*, Jackson

Defense: C. Maison Heidelberg and Ginny Y. Kennedy, *Heidelberg Harmon*, Ridgeland

Verdict: \$265,000 for plaintiffs

Federal: **Federal - Jackson**

Judge: Henry T. Wingate

Date: 5-12-10

Billy Billings was working as a contract driver on 8-2-05 for QRT, Inc. It was his job to transport school buses. Against this backdrop, Billings traveled in Jackson near Cowboy Maloney's Electric City. He pulled from Briarwood Drive onto West Frontage Road.

Billings did so into the path of the oncoming Artis Bolden. A significant and serious crash resulted, Bolden's car being broadsided. It flipped and landed on its side. The fault of QRT would not be a jury issue.

Bolden has since treated for complex and wide-ranging injuries to his shoulder, back and neck. Similarly, while he was previously disabled as determined by Social Security and underwent a fusion surgery, at the time of this crash, he was doing well. Beyond his claim for damages, his wife (Marilyn) presented a derivative consortium count.

The litigation started in Hinds Circuit Court. QRT removed to federal court and defended on damages. It cited the plaintiff's lengthy history of prior conditions and suggested his proof of new injuries was not credible. Plaintiff thought the discussion of his pre-existing

injuries was a red herring, that is, while he did have a history, he was doing well at the time of the wreck.

This case was tried on damages only. Bolden was awarded medicals of \$31,000. His non-economic damages were as follows: past suffering - \$66,000, future suffering - \$18,000, past physical limitations - \$30,000, future physical limitations - \$25,000 and \$25,000 more for loss of ability to enjoy life. His verdict totaled \$190,000 – his wife took \$75,000 more for her consortium interest, the verdict totaling \$265,000.

A consistent judgment was entered. QRT has since moved for JNOV relief citing the plaintiff's lengthy medical history. The motion was pending in late September when the record was reviewed by the MSJVR.

Negligent Retention - When the plaintiff went into a McDonald's to discuss her order and ask for a manager, the front clerk retrieved a hot spatula and attacked her

Parmenter v. McDonald's, 03-353

Plaintiff: Stewart Guernsey, Water Valley

Defense: Jay M. Atkins and Paul M. Blake, *Leitner Williams Dooley & Napolitan*, Memphis, TN

Verdict: Directed verdict

Court: **Marshall**

Judge: Henry L. Lackey

Date: 6-3-10

Kerri Parmenter, then age 27, went to the McDonald's in Holly Springs on 8-11-00. She traveled with her sister as they headed to register their children for school. To save time, Parmenter placed her order in the drive-thru. It was slow to come and Parmenter was told to pull forward.

After waiting a while longer, Parmenter entered the store to check on her order. She saw Kesha Jones at the counter and asked to see a manager. Jones was not pleased by this inquiry. Instead of getting a manager, Jones instead received a hot spatula.

Jones then began to beat Parmenter with the spatula. Parmenter has since

treated for bruising on her face and arms. She has also reported post-traumatic stress as reported by her treating doctor, Robert Cooper, Oxford.

In this lawsuit, Parmenter blamed not Jones for attack, but Jones's employer. She advanced a negligent retention and training theory. Quite simply, restaurant patrons should not be attacked with hot spatulas by order-takers. McDonald's defended that Jones had no history of violence – plaintiff countered that she had visible gang tattoos. McDonald's further argued Jones acted solely for her own purposes and not those of the restaurant.

Parmenter's sister, Dana, was also beaten. Dana entered a confidential settlement with McDonald's in 2005 for \$1,750. Only Parmenter's case would advance to the jury.

At the close of the proof, McDonald's moved for a directed verdict. Judge Lackey granted the motion and held that (1) the restaurant had no knowledge of Jones's violent propensities, (2) Jones had acted outside the scope of her employment, and (3) plaintiff's treating doctor (Cooper) was not qualified to diagnose post-traumatic stress and thus there were no damages. Parmenter has since appealed from the court's judgment.

Reverse Race Discrimination - A longtime attorney for a public hospital alleged he was fired because of his race – he pointed to proof that hospital board members wanted to replace him (he is white) with a black attorney that better represented the community's racial make-up

Dulin v. Greenwood LeFlore Hospital, 4:07-194

Plaintiff: Jim D. Waide, III, *Waide & Associates*, Tupelo

Defense: Susan F. Desmond, Gulfport and Karen G. Clay, Jackson, both of *Watkins Ludlam Winter & Stennis* and Willie J. Perkins, Sr., Greenwood

Verdict: Directed verdict

Federal: **Federal - Greenville**

Judge: Sharion Aycock

Date: 1-8-10

George Dulin, an attorney, served since 1982 as the general counsel for Greenwood LeFlore Hospital in Greenwood, MS. In that role, Dulin attended monthly meetings and provided general legal advice to the hospital. Dulin was dismissed in 2007. The hospital board alleged it had lost faith in his ability.

Dulin, who is white, disagreed and in this lawsuit he presented a reverse race discrimination claim. That is, the hospital dismissed him because of his race, preferring to replace him with a black candidate. He cited proof from a local newspaper where a board member was cited as saying an attorney should be hired that represented the community's majority black population. The hospital rebutted that proof and cited as above that it perceived Dulin as incompetent and as importantly, it had a right as the client to hire an attorney of its own selection.

The court granted the hospital's motion for directed verdict, concluding Dulin had failed to rebut the hospital's proffered legitimate reason to terminate. Dulin has since appealed.

Mississippi Supreme Court

A monthly summary of Mississippi Supreme Court opinions and oral arguments involving the review of jury verdict cases.

Supreme Court Opinion

Rebelwood Apartments v. English et al,
2009-CA-00561-SCT

Issued 9-23-2010

Appeal from Hinds Circuit Court

Trial Judge : Winston L. Kidd

Donna B. Jacobs, Joshua J. Wiener and Andrew N. Alexander, III, *Butler Snow*, Jackson **for appellant**

J. Ashley Ogden and James W. Smith, Jr., *Ogden & Associates*, Jackson and Precious T. Martin, Jackson **for appellee**

The Underlying Case

Crystal Coleman's lifeless body was found in the front seat of her car at the Rebelwood Apartments in Jackson. An autopsy revealed she died of a gunshot wound. An investigation linked her death to a friend, Cleveland Ellis, who admitted accidentally shooting her. Ellis would later indicate he shot Coleman at another location and returned her body to Rebelwood.

Coleman's estate sued Rebelwood and alleged negligent security, there being a history of crime at the complex – importantly, the estate developed fact disputes about where the shooting occurred. After a four-day trial, the estate was awarded \$3,000,000. Rebelwood appealed and cited the exclusion of police reports that would have indicated the shooting occurred elsewhere.

Opinion by Justice Randolph

The court wrote that the exclusion of the police report allowed plaintiff's security expert, Tyrone Lewis (also a Jackson Deputy Police Chief), to testify with impunity that the shooting occurred at Rebelwood and that there was no contrary proof. Randolph explained that

Judge Kidd should have known this statement by Lewis was not true, the jury then being left with a false impression. The trial court then had abused its discretion in failing to perform a trustworthiness analysis regarding the exclusion of the police report.

The court also reversed regarding economic proof (from Glenda Glover), holding a lost income stream should be limited to actual income, not speculation. Glover had utilized national-average incomes to calculate the economic loss – her projections had assumed that the decedent (just a high school graduate) would have become an RN. Randolph wrote that at the time of her death, there was only "meager" evidence to suggest an intent for the decedent to return to school.

Randolph also wrote it was important to remember in discussing economic loss that the purpose is not to "value" the person but instead to "replace what has been lost."

Carlson, Graves, Dickinson, Lamar & Pierce concurred.

Kitchens Concurrence in part and Dissent in part

He concurred except as to the issue of the economic proof – Kitchens wrote that this was a question for the jury to resolve, there being proof the decedent intended to go to college.

Chandler Concurrence in part and Dissent in Part

Chandler disagreed regarding the issue of the police report, holding its admission would result in double and triple hearsay.

Notable Memphis, TN Verdicts

Medical Malpractice - The plaintiff blamed her family doctor for a delay in diagnosing breast cancer – after a defense verdict at a 2003 trial and a reversal at the Tennessee Supreme Court, the plaintiff (an estate now) prevailed at a second 2010 trial – the trial judge has since set aside the verdict explaining that the injury to the plaintiff (the so-called diagnosis error) did not occur during the time the doctor treated her, the cancer only developing at a later time after the treatment had ended

Zakour v. UT Medical Group,
CT-002051-08

Plaintiff: Daniel A. Seward, Memphis
Defense: Michael L. Robb, John H.

Dotson and Margaret F. Cooper,
Thomason Hendrix Harvey Johnson & Mitchell, Memphis

Verdict: \$2,600,000 for plaintiff less
1% comparative fault

Court: **Memphis, TN**

Shelby Circuit Court

Judge: D.J. Alissandratos

Date: 3-26-10

Patti Zakour, then age 44, presented to a medical clinic operated in Covington, TN by UT Medical Group. The clinic is staffed by residents who are supervised by clinical faculty. Zakour complained of weight gain and fatigue – a resident, Nancy Rockstroh, evaluated Zakour and discovered a 1.5 cm mobile mass in Zakour's breast.

Rockstroh consulted with Dr. John Kelly, the supervising physician, and a plan was made to perform a diagnostic mammogram with an ultrasound. While Kelly never saw Zakour, he signed off on the plan. The mammogram was performed two days later and radiology indicated it was probably benign. A letter was sent the next day advising Zakour to follow in six months.

A month later (7-5-98), a second resident consulted at the clinic with Zakour. This resident (supervised by a second faculty member) advised that Zakour could either have a biopsy or

simply self-follow her condition. Zakour elected against a biopsy.

Time passed and Zakour did not return. The following March (1999), the clinic wrote to Zakour to remind her to come in. She did so on 3-14-99 and the condition of her breast had changed. The skin had the consistency of an orange (it had for some time) and the lump had grown. She was diagnosed with metastatic breast cancer. While aggressive treatment was recommended, Zakour opted for herbal and other homeopathic remedies.

Zakour pursued this lawsuit against Kelly's employer (the medical clinic) and alleged negligence in failing to make a timely diagnosis of breast cancer. It was her theory that the standard of care required that a needle biopsy be done to rule out cancer.

A simple mammogram was not enough, she argued, especially when the lump was already identified. Zakour's proof continued that if promptly identified, her condition could have been cured. Experts for Zakour (they also treated her) were Dr. James Shull, Surgical Oncology, Memphis and Dr. Robert Johnson, Oncology, Memphis. [The plaintiff's claim was pursued regarding Kelly's negligence alone as a clinic employee.]

The UT Medical Clinic defended that Kelly's treatment plan in 1998 was reasonable – it also implicated Zakour's own care in failing to return for treatment when the condition of her breast changed. Causation was also challenged, the defense arguing that in the absence of the biopsy, the cancer could not be properly staged in 1998. Defense experts were Dr. Owen Berkenstock, Family and Dr. Kurt Tauer, Oncology, both of Memphis.

This case first came to a jury trial in April of 2003. A defense verdict was returned for the medical group. This first trial was conducted in Tipton County before Judge Joe Walker. Zakour was living at the time – she died (leaving four children) in March of 2005, her estate pursuing an appeal. [This first trial was

conducted before the *Tennessee Jury Verdict Reporter* began publishing.]

The Tennessee Supreme Court reversed in January of 2007, Judge Lee citing a *Batson* error, the defendant improperly excluding black and female jurors. The matter was reassigned to Shelby County and advanced to trial before Judge Alissandratos.

That second trial concluded in the last week of March in 2010 – that was nearly twelve years after the initial treatment and a little more than five years after Zakour died. The verdict was mixed at trial. Fault was assessed 99% to Kelly finding he had violated the family practice standard in Covington – the remaining single percent of fault was assigned to Zakour. [The jury had first written 85-15 on the fault assessment, but marked that out and placed 99-1 on the verdict form.]

Then to damages, Zakour's estate took a general award of \$2.7 million. In the court's judgment (less comparative fault), the award was reduced to \$2,574,000.

The UT Medical Group moved to set aside the verdict and argued that as the proof of error was limited from 6-2-98 to 7-5-98 and that during that time, there was no proof of injury (the cancer did not become fulminant until a year later) and thus there was no causal connection. Judge Alissandratos was persuaded by that logic and set aside the verdict. The court further held alternatively that if that logic didn't hold up on appeal, he was further granting a motion for a new trial, the verdict being contrary (without explanation by the court) to the evidence.

Auto Negligence - An active travel agent (who traveled the world) complained of debilitating injuries after a rear-end wreck – the trial court later remitted the verdict by \$100,000

Oglesby v. Riggins, CT-1027-08

Plaintiff: Donald A. Donati and William B. Ryan, *Donati Law Firm*, Memphis and D. Briggs Smith, *Smith Phillips*

Mitchell & Scott, Batesville, MS

Defense: Garrett M. Estep, *Farris*

Bobango Branan, Memphis

Verdict: \$160,226 for plaintiff

Court: **Memphis, TN**

Shelby Circuit Court

Judge: D.J. Alissandratos

Date: 4-7-10

Jan Oglesby, then age 56 and a co-owner of a travel agency known as Gulliver's Travels, traveled on Colonial Avenue on 4-12-07. An instant later at the intersection of Spottswood Avenue, she was rear-ended by Edwin Riggins. It was a moderate collision. For his part, Riggins would later posture that Oglesby had stopped suddenly – Oglesby countered that she was stopped when struck.

However it happened there was a collision and Oglesby has since treated for soft-tissue neck pain and a shoulder impingement. The key element of Oglesby's claim turned on her vocational loss. Before the crash, she was active in operating the travel agency, escorting multiple trips a year to far-away destinations. Beyond her primary claim for damages, Oglesby's husband presented a derivative consortium claim.

Riggins defended the case on fault as noted above. He also diminished the claimed damages, noting that Oglesby had suffered no vocational loss. The travel company she co-owned continues to grow and increase revenues.

This Memphis jury (after three days of proof) found Riggins solely at fault for the wreck, rejecting the imposition of any fault to Oglesby. Then to damages, Oglesby took medicals of \$7,626 plus \$40,000 for lost wages. Those in the future were valued at \$60,000.

Oglesby's past suffering was valued at

\$30,000 and she took \$20,000 more for in the future. The jury rejected a category entitled loss of ability to enjoy life. The plaintiff's husband took \$3,000 more for his consortium interest, the verdict totaling \$160,626. A consistent judgment was entered.

Riggins moved for a new trial and/or remittitur and argued the wage damages were speculative. While the plaintiff had complained of lost sales, Riggins cited that in the year following the wreck, Oglesby traveled all over the world and her commissions remained the same. Oglesby countered that she is now making less – while she once took six escorted tours to foreign lands a year, she now does just three.

The trial court granted the motion and remitted the award by \$100,000. Alissandratos wrote that Oglesby's proof of wage loss was based on passion. Oglesby accepted the remittitur under protest.

Notable Mobile, AL Verdicts

Underinsured Motorist - A rear-end collision left a motorist with undisputed injuries to his neck and shoulder and disputed injuries to his lower back

Wilson v. Cincinnati Ins. Co., 05-2295
Plaintiff: Richard L. Watters, *Watters & Associates.*, Mobile

Defense: G. Randall Spear, *Richardson Spear Spear & Hamby, P.C.*, Mobile

Verdict: \$431,168 for plaintiff

Circuit: **Mobile, AL**

Mobile County

Judge: Robert H. Smith

Date: 1-26-10

On 3-1-04, a vehicle driven by Joseph Wilson stopped in traffic on Zeigler Boulevard between Zeigler Circle East and Cody Road in Mobile County. An instant later, Wilson was rear-ended by another vehicle driven by Milton Ellenberg.

Wilson suffered injuries to his neck and left shoulder in the collision. He also claimed an injury to his lower back.

He claimed these combined injuries left him with a permanent partial impairment of 7% to the body as a whole. The record does not describe the amount of his medical expenses.

Wilson filed suit against Ellenberg and blamed him for causing the collision. Wilson later amended his complaint to add his UIM carrier, Cincinnati Casualty Company, to the action. His identified experts included James Cowart, Vocational Rehabilitation, Mobile.

Ellenberg settled with Wilson for \$25,000 and was dismissed from the action. The litigation then proceeded on the UIM claim. Cincinnati Casualty defended and disputed whether Wilson's lower back injury had been caused by the accident.

A Mobile jury heard the evidence during a two-day trial before returning a verdict of \$431,168 for Wilson. The court reduced this amount by the \$25,000 settlement with Ellenberg and entered a judgment of \$406,168. Cincinnati Casualty's motion for new trial was denied. At the time the AJVR reviewed the record, an appeal was pending.

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