The Mississippi Jury Verdict Reporter

The Most Current and Complete Summary of Mississippi Jury Verdicts

September 2020 **Statewide Jury Verdict Coverage** **11 MSJVR 9**

In This Issue

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 the southern region, including Memphis and New Orleans, are also covered.

Auto Negligence/UIM - **The plaintiff suffered a thoracic compression fracture as well as both cervical and lumbar disc injuries (future surgeries are recommended) after a significant rear-end crash – he proceeded at trial against the tortfeasor (who had just a $25,000 policy limit) and also against two UIM carriers who participated at trial but were not identified – deliberating on a Saturday in Mississippi's first civil trial after the Covid-19 shutdown, the jury awarded the plaintiff $1.292 million (including $500,000 in general damages) that exceeded the underlying limits but was within the limits of the primary UIM carrier (State Farm) and thus did not implicate the secondary umbrella UIM carrier (PURE)**

Brandner v. Golconda Holdings, 17-435
Plaintiff: David Pitre, *Silbert Pitre & Friedman*, Gulfport and Brehm T. Bell, Bay St. Louis
Defense: Kathryn B. Platt and Nathan L. Burrow, *Galloway Johnson Tompkins Burr & Smith*, Gulfport for Golconda
Donald C. Dornan, *Dornan Law Office*, Gulfport for State Farm
Robert L. Shannon and Logan M. Owens, *Carlton Fields*, Atlanta, GA and James L. Banks, IV, *Forman Watkins & Krutz*, Jackson for PURE
Verdict: $1,292,909 for plaintiff
Court: **Hancock**
Judge: Lisa Dodson
Date: 8-22-20

Michael Brandner, then age 63 and the owner of a medical sales company, was driving to work early on the morning (it was 4:30 a.m.) of 4-13-17. He traveled in Bay St. Louis on Hwy 90 at Washington Street. Brandner was stopped at a red light. Interestingly Brandner's son, Michael Brandner, Jr., is a personal injury lawyer in Metairie, LA who is known for his marketing slogan, "In a Wreck? Need a Check?"

A moment later Brandner was rear-ended by a van owned by Golconda Holdings. Golconda is a small Mississippi firm that is involved in international shipping. It is owned by Melinda Lykins.

Just after the wreck Brandner saw a person step from the van. That person then ran away. However in that instant Brandner was able to see him. The driver was later apprehended and Brandner picked him out of a police lineup. Brandner identified Trevor Lykins who is the son of Melinda. Trevor for his part denied he was the driver and explained he'd left town a few hours earlier at midnight for a family vacation in Tennessee. Brandner by contrast was sure it was Lykins.

In any event there was a rear-end crash and it was a hard hit. Brandner suffered several injuries. The most acute and significant one was a T10-11 compression fracture. He has also since treated for cervical and lumbar disc injuries.

The treatment for Brandner's cervical and lumbar disc injuries has included injection treatments. He also later underwent two thoracic surgeries. Despite these interventions there was proof that Brandner will require future repair surgeries and

David Pitre for the plaintiff

other treatment. The incurred medicals were $375,000 and Brandner's future care was valued at from $800,000 to $1.2 million. The special damages were quantified by two experts, Larry Stokes, Life Care Plan and John Theriot, CPA.

Brandner targeted several defendants in this lawsuit. The first two were Lykins and Golconda. He argued that Lykins was either an employee or agent of Golconda and cited that in the days before the wreck, Lykins had run errands in the van for his mother. Brandner also cited that even if he wasn't an employee, Golconda had negligently entrusted the van to Lykins.

Lykins for his part as described above first denied he was even driving the van. In fact Golconda later reported the van stolen. Alternatively even if it was Lykins in the van, he wasn't an employee, Golconda citing he never drew a paycheck nor did he even have permission that day to drive the van. Golconda moved for summary judgment on that basis. Judge Dodson granted the motion as to vicarious liability but denied it regarding negligent entrustment.

The policy limits of Golconda were just $25,000. Thus Brandner targeted two UIM carriers. The first (the primary) was State Farm whose coverage kicked in above the $25,000 and was limited to a ceiling of $1.35 million. A second UIM carrier that provided an umbrella policy with $1,000,000 more in coverage, Privilege Underwriting Reciprocal Exchange (PURE) kicked in above State Farm's ceiling.

However even if Brandner did not prevail on the claims against Lykins and Golconda (which would then implicate UIM coverage), he could still take damages against the insurers on a UM claim. The insurers moved to bifurcate liability and damages. The motion was denied. They also sought to proceed silently and not be identified to the jury. Judge Dodson granted that motion and thus while State Farm and PURE fully participated at trial, openings, closings, witness examination, the whole nine yards, they were not identified to the jury. The court permitted Brandner four peremptory strikes, the defendants sharing four strikes.

The defense of the case focused on minimizing the claimed injury. An IME expert hired by State Farm, Dr. John Davis, Neurosurgery, Flowood, believed that Brandner had suffered two injuries, (1) the thoracic compression fracture which he thought healed in a few months, and (2) a temporary soft-tissue injury. Davis explained that the remaining complaints were related to degenerative conditions. Thus the future surgeries and ongoing treatment as claimed by Brandner were not linked to this collision. Davis was paid more than $50,000 for his opinions in this case. Having earned an average of $500,000 a year for the last four years as an expert (almost always for defense interests), the plaintiff referred to Davis in closing as the "two million dollar man."

State Farm also hired an expert in medical billing, Nancy Michalski, RN, Los Angeles, CA. Her testimony would have gone to what she thought was the reasonable value of Brandner's medical bills which was far less than amounts billed by his medical providers. She also thought Brandner and his lawyer ran up the bill via a medical funding company. A prolific expert, having testified more than 500 times in the last 20 years and generally for the defense, her testimony was excluded by a *Daubert* motion made by Brandner.

This case was tried for five days and concluded on a Saturday night. On most days the trial went until 6:30 p.m. or later. The jury's deliberations lasted two hours.

The jury first found for Brandner that Lykins was driving the van and that Golconda had negligently entrusted it to him. Even if Brandner had lost against Golconda, his damages would still have proceeded against the two insurers.

The jury then moved to those damages. Brandner took medicals of $300,000 and $492,909 more for in the future. His general damages were an even $500,000. The verdict totaled $1,292,909.

At the time of this report no judgment had been entered. Presumably it would be for Brandner taking the $25,000 limits of Golconda. The remainder would be assessed to State Farm as the verdict did not exceed its $1.35 million ceiling. There was no exposure for PURE by the verdict and it fully prevailed.

It is interesting that just on the eve

The Hancock County Courtroom

of trial, Attorneys Shannon and Owens (Shannon self-described as a National Trial Lawyer), representing PURE, parachuted in at the last minute. PURE until that rescue had been represented in the litigation by A.J. Krouse and Carl E. Hellmers, III of *Frilot, LLC*, New Orleans, LA. Beyond the litigation (it was hard fought and there were numerous issues) as well as the result of the trial, is the issue of how the trial was conducted. It is the first civil trial to be heard in Mississippi since the Covid-19 shutdown.

One thing that helped the process is that the courtroom in Hancock County is large and grand, having been renovated after Katrina. Voir dire was conducted with a venire of 32 jurors who were well spaced. Ultimately the court seated a total of 15 jurors giving a cushion of three alternates.

Everyone in the courthouse was masked at all times including attorneys unless they were engaged in argument at the podium or were examining witnesses. Sterile masks were readily available and hand sanitizer was abundant.

During voir dire technology was used to avoid the typical huddle. Each party had an iPad with a headset that permitted a dialogue with the judge. It is described that Judge Dodson (she wore gloves and a mask during the trial) ran a tight ship and was quick to admonish litigants who strayed from the safety protocol.

I am aware of, besides this trial, the following civil cases that have been tried post-Covid:
London, Kentucky in June – civil rights case in federal court.
Mobile, Alabama in June - commercial case in federal court
Dayton, Ohio in July - medical malpractice case in state court.

Case Documents:
Court Order on Identity of Insurers
The Jury Verdict

Medical Malpractice - A

neurologist made a diagnosis of Multiple Sclerosis in 2011 and the plaintiff underwent a grueling course of treatment for years as well as living with the dread of having the progressive disease – finally a group of doctors began to question the neurologist's MS diagnosis pattern and he separated from the hospital – the plaintiff was then examined again and it was determined she never had MS in the first place – she sued the hospital and alleged malpractice regarding the diagnosis error – the hospital defended that the MS diagnosis is subjective and difficult

Tingle v. Singing River Health System, 17-200
Plaintiff: Timothy C. Holleman and Hollis T. Holleman, *Boyce Holleman*, Gulfport and Walter C. Morrison, IV, Ridgeland and Brittany R. Wolf-Freedman, New Orleans, both of *Gainsburgh Benjamin David Meunier & Warshauer*
Defense: Brett K. Williams and A. Kelly Sessoms, III, *Dogan & Wilkinson*, Pascagoula and Joseph R. Scheiderer, *Dentons, LLP*, Kansas City, MO
Verdict: $499,169 for plaintiff (Bench verdict)
Court: **Jackson**
Judge: James D. Bell (Senior Status)
Date: 7-2-20

Christine Tingle, then age 49, suffered from dizziness and other

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Mississippi Jury Verdict Reporter

Case Style _____

Jurisdiction _____ Case Number _____

Trial Judge _____ Date Verdict _____

Verdict _____

For plaintiff _____ (Name, City, Firm)

For defense _____ (Name, City, Firm)

Fact Summary _____

_____

Injury/Damages_____

Submitted by: _____

_____

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symptoms in 2011. She saw a doctor who referred her to Dr. Terry Millette, a neurologist. Millette ordered a brain MRI and diagnosed Tingle with Multiple Sclerosis (MS). It was a dread diagnosis.

It is noteworthy that at the time the diagnosis was made in August of 2011, Millette was in private practice. A few months later in October of 2011 he went on staff at Singing River Health System.

Then working as a hospital employee, Millette began Tingle on a course of MS treatment. It's grueling and involves the use of a drug known as Tysabri. It is administered by infusion. Tingle would undergo some 53 treatments with Tysabri. The drug has complications and not uncommonly those complications are very serious – thus there is anxiety associated simply with taking the drug.

Tingle continued on her course of MS care into 2016 with Millette. At this time several doctors at Singing River began to question Millette's MS diagnosis pattern. They believed he was improperly diagnosing patients with MS. The hospital began an investigation and it ended with the hospital separating Millette from its

staff.

Tingle was then seen by another neurologist and the initial MS diagnosis reconsidered. It became clear upon further examination that Tingle didn't have MS and she never had. Millete's 2011 diagnosis was a mistake and Tingle's resulting five years of treatment had been unnecessary. Fortunately for Millette she did not suffer the dreaded Tysabri's complications.

In this lawsuit Tingle sued the hospital and Millette regarding the diagnosis error. The claim against Millette was resolved in July of 2019. It is not clear if it was a settlement or a dismissal, the record describing it as a "release."

The case (pursuant to the Mississippi Tort Claims Act) proceeded to a bench trial against Singing River, a state entity. The plaintiff developed proof that Millette (as a hospital employee) made an initial diagnosis error and then diagnosis momentum prevailed. That is the initial error was never questioned and Tingle underwent a course of unnecessary care.

The plaintiff also developed that in any event, Millette's course of MS treatment was wrong. Tingle's damages represented both enduring the unnecessary treatment, but more importantly the anxiety, dread and fear of living with a disease that would one day leave her incapacitated. Beyond Tingle's primary claim, her husband presented a consortium claim. Tingle's experts were Dr. Robert Lisak, Neurology, Detroit, MI, Dr. Stephen Krieger, Neurology, New York, NY and Dr. Robert Ginat, Radiology, Chicago, IL.

Singing River defended on several fronts noting among other things that the alleged diagnosis error occurred *before* Millette joined the staff. It further defended that while the diagnosis was wrong, it was not malpractice. How so? An MS diagnosis is always challenging, complex and subjective.

Singing River also explained that in any event Tingle suffered minimal damages. During the course of her MS treatment, she maintained a robust and healthy lifestyle. The defense expert was Dr. Robert Gross, Neurology, Aurora, CO.

This case was tried for four days before Judge Bell sitting in senior status. At the conclusion of the proof, Bell issued his findings of fact and verdict from the bench. He did not reduce the specific findings to a writing.

However the judgment indicates the court's verdict was for Tingle. He awarded her damages of $479,169 – there is no breakdown of that award by category, i.e., medical bills or general damages. Her husband took $20,000 more for his consortium interest. The verdict totaled $499,169 and was memorialized in the court's final judgment. Those damages were just $831 short of the statutory limit for an action brought pursuant to the tort claims act.

Singing River subsequently moved to vacate the judgment as the case had been settled. Judge Bell granted the motion. An order of dismissal has since been entered and the case is closed.

Case Documents:
The Pretrial Order
The Final Judgment

Employment Retaliation - An FAA engineer alleged he was denied a promotion because of his prior EEO activity in complaining about not receiving a different promotion

Shumate v. FAA, 3:18-68
Plaintiff: Dennis L. Horn, Shirley Payne and Leigh Horn, *Horn & Payne*, Madison
Defense: Jennifer L. Case and Tabitha Bandi, Jackson and Stephen R. Graben, Gulfport, all *Assistant U.S. Attorneys*
Verdict: Defense verdict on liability (Bench verdict)
Federal: **Jackson**
Judge: Halil S. Ozerden
Date: 8-12-20

David Shumate worked as an engineer for many years for the Federal Aviation Administration (FAA) at the Jackson Airport District Office. The FAA is a part of the Department of Transportation. Shumate applied in February of 2013 for the position of assistant manager at the Memphis office.

Shumate was among seven interviewed for the position. However he did not score well and was not finalist. Shumate, age 53, was not a selected. The FAA hired an applicant that was just 34 years old. Shumate filed an EEO complaint alleging age discrimination.

Shumate applied for the manager position in Jackson that same October. The FAA concluded he didn't submit the proper form and he was not considered. An applicant, age 50, was hired for the job. Shumate amended his initial EEO complaint to allege age discrimination regarding this decision.

Then moving forward to July of 2014, Shumate applied again for the assistant manager position in Memphis when it became open. He

was one of two initial qualified applicants. However the FAA opened back up the application process and ended up hiring an applicant who was 57 years old. Shumate amended his EEO complaint again to allege retaliation. That is the decision-maker Memphis knew of his existing EEO activity and that motivated the non-selection.

The EEOC ultimately elected not to act on Shumate's complaints and issued a right to sue. Shumate did that and presented four counts, (1) age discrimination regarding the initial 2-13 non-selection in Memphis, (2) age discrimination as to the 10-13 application in Jackson, (3) age discrimination as to the second Memphis application in July of 2014, and finally, (4) retaliation regarding the July 2014 application.

The government moved for summary judgment on all counts. Judge Ozerden granted it as to the first three age discrimination counts. On the first one, there was proof Shumate had not interviewed well. On the two other counts, the selected applicants were essentially the same age as Shumate and one was several years older.

However Judge Ozerden denied the motion as to retaliation. This was because Shumate had proof that the decision-maker in Memphis knew of the prior EEO activity and even testified he wouldn't want to work with Shumate because of it. The decision-maker replied that while that was true, it still didn't affect his ultimate decision.

The retaliation case (age discrimination having been defeated by summary judgment) was tried for two days before Judge Ozerden as a bench trial. He ruled from the bench in favor of the government on retaliation. While he issued his findings of fact orally, they were not reduced to a written order. A consistent judgment was entered and Shumate has since appealed both the summary judgment order and the bench verdict.

Case Documents:
Summary Judgment Order

A Notable Louisiana Verdict

Medical Malpractice - A neurosurgeon was planning to operate on a large herniated disc at T8-9 – he had trouble finding the right level and instead operated at the T7-8 level – thinking something was amiss, he stopped the surgery, admitted the mistake and rescheduled the surgery (at the right level) for a few days later – the plaintiff sued and alleged error in performing at the wrong level – the doctor defended that while he'd operated at the wrong level, this was not malpractice

Barre-Williams v. Ware, 16-10196
Plaintiff: Daniel W. Nodurft, Chalmette and Margaret E. Woodward, New Orleans
Defense: Don S. McKinney and Diana C. Surprenant, *Adams & Reese*, New Orleans
Verdict: $352,000 for plaintiff
Parish: **Orleans**
Judge: Ellen M. Hazeur
Date: 3-13-20

Inge Barre-Williams, age 43, and a deputy sheriff, underwent an abdominal scan of her liver. While the scan showed a benign liver condition, it also revealed a calcified disc at the T-9 level. More importantly that disc was compressing her spinal cord. A treating neurosurgeon, Dr. Manish Singh, recommended a repair surgery.

Barre-Williams got a second opinion from Dr. Marcus Ware, also a neurosurgeon. The recommendation was the same. The surgery was scheduled for 2-10-14 at the T8-9 level.

Ware began the surgery and removed part of Barre-Williams' fifth rib to access the spine. He initially observed the disc had a small bulge. This surprised Ware because he was expecting a large disc herniation.

Ware aborted the surgery and got an MRI. The results indicated there was a problem. He had operated at the T7-8 level. This was despite his best efforts. He had counted up and down Barre-Williams' spine to identify the right level and relied on radiology input. He'd still done it at the wrong level.

Ware told Barre-Williams what had happened and called it an accident. They agreed to try again two days later. The surgery was repeated and this time Ware operated at the right level. Despite that surgical repair, Barre-Williams has since complained of pain that has led her to seek ongoing pain management care. It has also limited her career in law enforcement. An economist (Shael Wolfson), New Orleans, valued that loss at from $320,000 to $717,000.

Barre-Williams filed this lawsuit against Ware and alleged error by him in operating at the wrong level. She relied on a retained expert, Dr. Frank Castillion, Neurosurgery, Lubbock, TX. The theory was simple enough – Ware mistakenly operated at the wrong level. Barre-Williams also alleged an informed consent count as clearly she had not consented to a surgery at the wrong level of her spine.

The case was submitted to a

Medical Review Panel. The panel concluded there was no malpractice. One of the members of the panel, Dr. Bradley Bartholomew, later had a change of heart – he reconsidered the matter and concluded Ware had erred. Another member of the panel, Dr. Najeeb Thomas, stuck by his original opinion – he'd serve as Ware's expert at trial.

Ware's defense was that despite operating at the wrong level, he'd met the surgeon standard. How could that be? He explained localization in the thoracic spine can be extremely difficult and in this case he took every possible step to make a proper identification. Then when he had concerns he was at the wrong level, he aborted the surgery. Ware also defended that in any event he made the correct repair ultimately and that Barre-Williams's ongoing complaints were caused by unrelated lumbar disc disease and not this surgical misadventure. Moreover some nerve pain was to be expected after this surgery.

This case was tried over a week. The jury answered that Barre-Williams both "established the standard of care" and that Ware had violated it. The jury rejected an informed consent claim.

The jury then moved to damages. Barre-Williams took medicals of $19,000. Her lost wages, both past and future, were rejected. She took $251,000 for past pain and suffering and $75,000 for in the future. There was no award for loss of enjoyment of life. Her husband's consortium claim was rejected as was that of her son Ryan. The other son, Raymond, took $7,000.

The non-economic damages were $333,000, the verdict totaling $352,000. A consistent judgment was entered. It was assessed $100,000 to Ware and the remainder to the Patient's Compensation Fund.

Editor's Note

This is the first issue that we've published since Covid-19 shutdown jury trials and we paused in April of 2020. We have numbered this issue as 11 Ms JVR 9, denoting the ninth issue (September) of the eleventh edition. However there were not issues for 11 MsJVR 5-8, representing from May to September during which time we were paused.

Also please note that while there is a September issue, we may still be a month or two away from fully resuming a regular publishing schedule. In the Covid-era we are taking it a day, a week and a month at a time. We wanted to reiterate that we are VERY eager to return to covering jury trials. Moreover as a subscriber, we are advancing subscriptions forward for the number of months that we were paused. For instance if you're subscription were scheduled to end in February of 2021, it will now end in June of 2021 accounting for the four months that were paused. Finally if you try a case or have a bench trial, please let us know about it. Stay safe.

Shannon Ragland
Publisher

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The Mississippi Jury Verdict Reporter is published at 9462 Brownsboro Road, No. 133, Louisville, Kentucky 40241. Phone at 1-866-228-2447. Denise Miller, Publisher, Shannon Ragland, Editor and Aaron Spurling, Assistant Editor.

Annual subscriptions are $299.00 per year.

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