

IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2016-CA-00727-COA

**SHANNON WESTFALL
AND JOHN WESTFALL**

APPELLANTS

VS.

**RANDY GOGGINS AND
CARNES FRAMES, INC.**

APPELLEES

**On Appeal from the Circuit Court of Pontotoc County, Mississippi
Civil Action No. 13-187P(PO)**

**RESPONSE TO DEFENDANTS-APPELLEES' MOTION FOR REHEARING BY
PLAINTIFFS-APPELLANTS, SHANNON WESTFALL AND JOHN WESTFALL**

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APPELLEES' MOTION FOR REHEARING**

Shannon Westfall and John Westfall (collectively "the Westfalls" or "Plaintiffs-Appellants") respond to the Motion for Rehearing of Randy Goggins and Carnes Frames, Inc. (collectively "Goggins and Carnes" or "Defendants-Appellees"), as follows:

The Defendants-Appellees' Motion for Rehearing pursuant to Rule 40 of the *Mississippi Rules of Appellate Procedure* does not show that the Court misunderstood the facts of the case nor that this Court misapplied applicable case law to the facts of the case. Instead, the Defendants-Appellees essentially rehash the same arguments which were made previously by them. Nevertheless, Shannon Westfall and John Westfall choose to respond for argument's sake. The Plaintiffs-Appellants urge the Court to deny the Motion for Rehearing on the basis that it does not satisfy the requirements of Rule 40 of the *Mississippi Rules of Appellate Procedure*.

A. REQUIREMENTS FOR A MOTION FOR REHEARING

On October 10, 2017, this Court reversed the Pontotoc County Circuit Court's prior dismissal of the Plaintiffs-Appellants' personal injury lawsuit on the basis of an alleged discovery violation by Shannon Westfall. This Court's decision to reverse the Pontotoc County Circuit Court is supported by the record evidence, Mississippi case law and the *Mississippi Rules of Civil Procedure*.

A party who desires to challenge the decision of the Mississippi Court of Appeals must state with particularity the points of law or facts, which in the opinion of that party, the Mississippi Court of Appeals has overlooked or misapprehended. Specifically, when rehearing is sought, Rule 40 of the *Mississippi Rules of Appellate Procedure* mandates:

The motion shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misapprehended and shall contain such argument in support of the motion as movant desire to present. The motion for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain; the motion for rehearing is not intended to afford an opportunity for a mere repetition of the argument already considered by the court.

Mississippi Rule Appellate Procedure 40(a).

Accordingly, the Goggins and Carnes must provide this Court with specific errors of law that this Court made or they must show a fact or facts that this Court overlooked or misapprehended and which, if not overlooked or misapprehended, would have been outcome determinative. Meaning, the supposedly overlooked or misapprehended fact or facts would change this Court's decision.

To the extent that the Defendants-Appellees have engaged in a diatribe suggesting that this Court's decision, at best, encourages plaintiffs, as opposed to defendants, to lie without fear of penalization and/or, at worst, supports suborning future perjury by parties, the Plaintiffs-Appellants submit that the attack upon the Court's decision in that regard does not comport with the requirements of Rule 40 of the *Mississippi Rules of Appellate Procedure* and should, therefore, be totally ignored and stricken.

B. THE COURT'S DECISION IS SUPPORTED BY THE LAW AND THE FACTS

1. Alleged Intentional and Deceitful Misrepresentations of Pre-Existing Medical Issues

Goggins and Carnes first assert that this Court erred in finding that the Trial Court abused its discretion in concluding that Shannon Westfall's misrepresentations regarding pre-existing medical issues with both of her shoulders were intentional and deceitful. (*See* Motion for Rehearing, p. 3). This Court reviewed the record and considered several important facts in determining that Shannon Westfall's inaccurate responses regarding her medical history were neither intentional nor deceitful.

a) Disclosure of pre-accident shoulder problems:

First and foremost, the Court recognized that Shannon Westfall had never had a torn rotator cuff pre-accident; however, it was without question that the accident caused her to suffer a torn rotator cuff. (*See* Opinion, at ¶ 16). This is significant because there is nothing to suggest that anything other than the accident, including pre-accident shoulder pain, contributed to the torn rotator cuff. Goggins and Carnes contend that the distinction between shoulder injuries and rotator cuff tears matters not, but they are mistaken.

Goggins and Carnes cite *Lockhart v. Stirling Properties, Inc.*, 170 So. 3d 1235 (Miss. Ct. App. 2015) as support for their contention. In *Lockhart*, the plaintiff's case was dismissed not for simply failing to indicate a pre-existing injury, but also for failing to respond to discovery requests in a timely manner, failing to identify treating physicians, failing to disclose prescription medications and failing to disclose a history of anxiety predating the accident. *Id.* at 1238. In fact, unlike Shannon Westfall who acknowledged that she had suffered shoulder pain pre-

accident, the plaintiff in *Lockhart* actually denied having any shoulder problems pre-accident. There is simply no comparison between Shannon Westfall's case and the repeated "misrepresentations and nondisclosures" in *Lockhart*. *Id.* at 1239. Shannon Westfall did disclose a prior shoulder problem. Furthermore, the injury suffered by Shannon Westfall in the accident was much more severe than the pre-accident problems. There has been no causal connection between the pre-accident problems and injuries arising from the accident. As such, the relevancy of the pre-accident shoulder problems for Shannon Westfall differ from those of the plaintiff in *Lockhart*.

Goggins and Carnes also cite *Conklin v. Boyd Gaming Corp.*, 75 So. 3d 589 (Miss. Ct. App. 2011) for support. In *Conklin* the plaintiff lied about exhibiting the same exact symptoms pre-accident for which he was alleging were caused by the accident and he also lied about having any problems with his leg pre-accident. *Id.* at 593. The trial court found not only that the plaintiff provided false answers, but also that his actions had prejudiced the defendant's trial preparation and "completely changed the posture of the litigation." *Id.* at 598. Again, there is no comparison between Shannon Westfall's actions and that of the plaintiff in *Conklin*. Shannon Westfall had never had a torn rotator cuff before the accident. There is no proof in the record that any shoulder problems she had before the accident in anyway contributed to her having her rotator cuff torn in the accident, requiring surgery. Additionally, unlike the facts of *Conklin*, Shannon Westfall did identify prior shoulder problems in her case. Unlike *Conklin*, there has been no finding, or even a scintilla of proof presented, that Goggins and Carnes were prejudiced or the litigation was altered.

b) Inaccurate medical records:

Despite the best efforts of Goggins and Carnes to argue otherwise, the fact that Shannon Westfall's medical records were inaccurate was an important consideration for this Court. For reason that if the medical records were inaccurate then Shannon Westfall's prior testimony too was inaccurate. On the other hand, the correction to the medical records supported Shannon Westfall's assertion that she had not lied about undergoing prior rotator cuff surgery.

c) Distinction between *Scoggins v. Ellzey Beverages, Inc.* and this case:

Goggins and Carnes argue that this Court's distinction between Shannon Westfall's responses concerning pre-accident injuries and those of the plaintiff in *Scoggins v. Ellzey Beverages, Inc.*, 743 So. 2d 990 (Miss. 1999) are incorrect. To the contrary, in *Scoggins*, the plaintiff alleged that she suffered injuries to her foot, leg and back as a result of an accident at a grocery store. *Id.* at 991. During discovery the plaintiff repeatedly said that she had never sustained injuries to those portions of her body save one instance approximately forty years earlier. *Id.* The defendant therein later discovered that the plaintiff had been treated for injuries to her left leg, back, hip, and spine on thirty-five different occasions pre-accident. She also had a surgical procedure performed on her back some three years before the accident and suffered pain in her foot around the same time. Following this discovery and pertinent motions filed by the defendant, the trial court conducted an evidentiary hearing a little over one month preceding trial. *Id.* at 992. The trial court found the plaintiff's sterling recollection of all things unrelated to her medical history compared to her lack of memory of extensive medical history pertaining to the same areas she claimed were caused by the accident, was not credible. *Id.* at 993. In addition to this finding, the trial court recognized that considering trial was so near there would be financial hardship placed on the defendant in conducting further discovery, if the case was continued.

Likewise, there would have been prejudice incurred by the defendant because of subsequent medical procedures undergone by the plaintiff that would complicate the separation of medical expenses between the injuries allegedly caused by the accident from those not related to the accident. *Id.* at 994. Importantly though, the *Scoggins* Court recognized that "dismissal with prejudice is a sanction that should be imposed only in those rare instances where the conduct of a party is so egregious that no other sanction will meet the demands of justice." *Id.* at 997.

As addressed previously, prior to the subject accident, Shannon Westfall had never experienced a torn rotator cuff. Her prior injuries were, at best, bruises. There is no proof that the prior bruising contributed in the least bit to a torn rotator cuff. In *Scoggins*, the injuries allegedly suffered in the accident were the same injuries for which she had been extensively treated, including having undergone surgical procedures to correct, for a period of twenty years. Equally as important, the defendant in *Scoggins* would have suffered great prejudice in the form of financial hardship, a delay of trial and the possible inability to differentiate certain relevant medical costs from irrelevant medical costs. To put it plainly and simply, the *Scoggins's* facts are not present in Shannon Westfall's case.

d) Medical authorization:

It is true that providing a medical authorization may not be a cure-all for outright lying, as noted in past cases; however, the facts of Shannon Westfall's case and those of *Conklin*, *Lockhart* and *Ashmore v. Mississippi Authority on Educational Television*, 148 So. 3d 977 (Miss. 2014) turn on more than just providing a medical authorization. The import of Shannon Westfall's providing a medical authorization is that she timely provided a medical authorization and that she truthfully disclosed all of her medical providers; Hence, she made no attempt to "hide the ball."

Comparatively, *Conklin* involved a plaintiff who lied about exhibiting the same exact symptoms pre-accident for which he was alleging were caused by the accident and he lied about having any problems with his leg pre-accident. *Id.* at 593. Additionally, there was a finding of prejudice to the defendant. In *Lockhart*, the plaintiff failed to acknowledge a pre-accident injury to the body part at-issue, failed to respond to discovery requests in a timely manner, failed to identify treating physicians, failed to disclose prescription medications and failed to disclose a history of anxiety predating the accident. *Id.* at 1238. In *Ashmore*, both plaintiffs lied extensively regarding matters inquired about during discovery. For instance, there was false testimony by the husband about prior surgeries and injuries to body parts at-issue and about his disability. Further, the wife concealed the fact that she was seeking similar damages in another case just as she was in *Ashmore*. These lies were found to be intentional and willful and were considered, when combined with the potential prejudice to the defendant, enough to warrant dismissal.

So while it may be true that the production of medical authorizations in *Conklin*, *Lockhart* and *Ashmore* did not prevent those cases from being dismissed, it is also true that the egregiousness of the parties' respective conduct in those cases far exceeded the conduct of Shannon Westfall in this case.

2. No Less Drastic Sanctions

Goggins and Carnes complain that this Court's reversal of the dismissal by the trial court eviscerates the strength of Rule 37 of the *Mississippi Rules of Civil Procedure* on account of dismissal being, in the Goggins and Carnes' opinions, the only appropriate sanction. Goggins and Carnes actually insist that *Conklin*, *Lockhart* and *Scoggins* should have been reversed based on the Court's decision in the case *sub judice*. The problem with Goggins and Carnes' argument is that they are comparing apples with oranges. As each has been previously distinguished herein

from Shannon Westfall's case, the facts of *Conklin*, *Lockhart* and *Scoggins* are wholly inapposite to Shannon Westfall's case.

Judge Irving recognized in his dissent that "each case turns on its own facts." (*See* Opinion, at ¶ 44 [Irving, P.J., dissenting].) The same holds true in the case of Shannon Westfall as it did in *Conklin*, *Lockhart* and *Scoggins*. All of these cases revolve around different facts. Therefore, the outcome of each was totally dependent on the pertinent facts for the particular case. In other words, Rule 37 is not a "one size fits all" solution as Goggins and Carnes would have this Court believe. Rather, it allows for a variety of remedies in situations where sanctions may be appropriate. Considering the facts of the case *sub judice*, dismissal was not an appropriate sanction.¹

Goggins and Carnes propose that dismissal should be the only sanction available under Rule 37 and, further, that it should be used commonly, as opposed to sparingly. Clearly, Goggins and Carnes miscomprehend the role of Rule 37 by ignoring the Supreme Court's cautionary instruction in *Pierce v. Heritage Properties, Inc.*, 688 So. 2d 1385 (Miss. 1991), wherein the Court made it clear that "dismissal is 'only appropriate in *the most extreme circumstances*.'" (*See* Opinion, at ¶ 21). This Court correctly recognized, in light of the facts of the case, that the Trial Court erred by dropping an atomic bomb on the Westfall's case.

3. Clarification of Judge Greenlee and Judge Westbrook's opinions

The Westfalls submit that there is no need for clarification of the opinions by Judge Greenlee and Judge Westbrook as they both concurred in part and in result with the Court's

¹ Interestingly, Goggins and Carnes posit that in cases where a plaintiff fails to recall a specific fact and is later confronted with proof of that fact's existence then the plaintiff's case should be dismissed. If true, this notion would eliminate the use of impeachment of witnesses via inconsistent statements. By the same token, hypothetically speaking, according to the logic posed by Goggins and Carnes, in any case where a defendant should fail to recall a specific fact and is later confronted with proof of that fact's existence then the plaintiff should be awarded a judgment against the defendant in the amount requested by the plaintiff. That is simply not the law in Mississippi, but it should be if Goggins and Carnes' converse argument is accepted.

Opinion. Because the Court did not remand the case with instructions for the trial court to consider lesser sanctions and because neither Judge Greenlee nor Judge Westbrook opined as to lesser sanctions to be considered, it is obvious that neither Judge Greenlee nor Judge Westbrook believed that Shannon Westfall's conduct warranted lesser sanctions.

**C. THE DEFENDANTS-APPELLEES FAILED TO MEET THEIR BURDEN
FOR A REHEARING**

Goggins and Carnes were required to state with particularity the points of law or facts which in their opinion this Court overlooked or misapprehended. Contrary to their assertions, this Court considered and understood all of the facts and relevant law. In considering and understanding the law and the facts, the Court felt a "definite and firm conviction" that the trial court made a clear error of judgment in this case. In cases where this Court finds that a trial court has made a clear error in judgment it is this Court's prerogative and duty to right the wrong.

Finally, to the extent that parts of Goggins and Carnes' motion for rehearing are disrespectful, the Plaintiffs-Appellants request that the same be stricken.

Based on the above and foregoing reasons, the Westfalls oppose the Motion for Rehearing filed by Goggins and Carnes and, further, move the Court to deny the Motion, *in toto*.

RESPECTFULLY SUBMITTED, this the 13th day of November, 2017.

**SHANNON WESFALL AND
JOHN WESTFALL, APPELLANTS**

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have on this date, served a true and correct copy of the above and foregoing *Shannon Westfall and John Westfall's Response to Appellees' Motion for Rehearing* via the Mississippi Supreme Court's (MEC) electronic filing system on the attorneys of record for the interested parties.

Edward J. Currie
Rebecca B. Cowan
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P.O. Box 750
Jackson, MS 39205-0750

I further certify that I have this day delivered, by U.S. Mail, postage prepaid, a true and correct copy of the foregoing document to the following:

Hon. Jim S. Pounds
Circuit Court of Pontotoc County, Mississippi
P.O. Box 316
Booneville, MS 38829

SO CERTIFIED, this the 13th day of November, 2017.

/S/ William O. Rutledge III _____
WILLIAM O. RUTLEDGE III