IN THE COURT OF APPEALS 10/15/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00752 COA

BILLY WAYNE WILLIAMS

APPELLANT

v.

LYNN LUPO BENUS

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. THOMAS

COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ROBERT H. TYLER

ATTORNEY FOR APPELLEE:

RICHARD B. TUBERTINI

NATURE OF THE CASE: CIVIL / PERSONAL INJURY

TRIAL COURT DISPOSITION: JUDGMENT FOR THE DEFENDANT

BEFORE BRIDGES, P.J., COLEMAN, AND PAYNE, JJ.

COLEMAN, J., FOR THE COURT:

At trial in the Harrison County Circuit Court, the Appellant, Billy Wayne Williams, sued the

Appellee, Lynn Lupo Benus, for personal injuries he allegedly suffered to his knee while doing some repair work in Benus' apartment. Williams claimed that Benus' negligence was the proximate cause of an injury to his knee. Williams further claimed that surgery was required to repair the damage to his knee. Benus denied that she caused the injuries to Williams' knee. After the jury heard both sides of the case, they returned a ten-to-two verdict for the Defendant, Lynn Lupo Benus. Williams appeals from the trial court's denial of his Motion for Judgment Notwithstanding the Verdict or in the alternative, for a New Trial. We affirm the trial court's judgment for the Defendant, Lynn Lupo Benus.

I. FACTS

Billy Wayne Williams is co-owner of Vieux Marche Antiques, an antique furniture business in Biloxi, Mississippi. Lynn Lupo Benus purchased an antique bed from Williams in December of 1990, which he delivered to Benus in March or April of 1991 at her business-apartment in Biloxi. In July 1991, Benus' bed began to squeak whenever she turned as she lay in it. She called Williams to ask him to come to her apartment to silence the squeaking bed. On August 15, 1991, Williams went to Benus' apartment to repair the antique bed. Williams' and Benus' versions of what happened inside Benus' apartment while Williams worked to silence the squeak are irreconcilable.

A. **Williams' Version**

Williams testified that when he arrived at Benus' apartment on August 15, 1991, he examined the bed and decided that he could repair it. However, in order to fix it, Williams found it necessary to remove the bed linens, mattress, and box-springs from the antique bed frame. Williams told Benus that the mattress set was too heavy for him to lift, and he asked if she would please assist him. Benus obliged, and the two of them moved the mattress and box-springs off the frame of the bed. With the mattress set removed, Williams began to replace the screws in the bed rails. Benus was in and out of the bedroom, taking phone calls for her business, and "doing little household things while I was working on the bed." When he finished making the repairs, Williams showed Benus what he had done to make sure the job was to her satisfaction.

We quote from Williams' testimony to describe his version of what happened after he had completed repairing the bed:

> Well, we -- we slid the box spring across the floor. We stood it on top of the rail here. Ms. Benus was at the foot of the bed; I was at the head of the bed. But I told her, I said: I have to go to the other side. We have to lay it in the rails. Balance your end. I will walk around. That was fine. I let go of my end. She had the box spring. As I started to walk around the bed, I got to the middle of the footboard, the telephone was ringing. The next thing she said was: Oh, that's long distance from New York. As I turned around the corner of the bed, I am going around, she got excited and she dropped the box springs then. I didn't have time to grab it because it was already coming down on the rail, and that is when it struck me on the inside of my left knee.

After counsel for Benus had completed his cross-examination of Williams, the trial judge examined

Williams to determine if Benus had remained in the room until after the box-springs had fallen and struck his left knee. Williams was adamant that Benus did not leave the room to answer the telephone until after the box-springs had fallen and struck his knee. The telephone was in another room.

B. The Benus Version

Williams came to her apartment on August 15, 1991, to repair the antique bed. Benus testified that she only helped Williams remove the linens from the bed. Benus said she offered to get the busboy she knew from a restaurant nearby to help, but Williams alone removed the mattress and the box-spring from the frame of the antique bed. Benus claimed that she had a bad back and was thus unable to move anything like a mattress. While Williams repaired the bed, the telephone rang, and Benus answered it and talked for a while. After her conversation, she returned to the bedroom, where she and Williams discussed the bed.

During their conversation, the telephone rang again, and Benus left the bedroom to answer the telephone and to converse with the second caller. While she was talking with the second caller, Williams finished the repair and, as she testified, Benus saw that Williams "was gathering up some tools." Benus hung up the phone and spoke to Williams as he left her apartment. Benus testified, "I was not in the room with him when he injured himself, if he injured himself in that room." She also stated that Williams never mentioned anything about hurting himself in the apartment as he left after he had completed repairing the bed.

C. Williams' injuries

Williams went to the doctor eight days after the alleged incident, and he was eventually diagnosed with torn cartilage in his left knee that required surgery to repair it. The injury to Williams left knee was well documented, and his medical bills amounted to over ten thousand dollars. However, Benus testified that she did not know Williams had injured his knee until he called her in the latter part of September to ask if she had insurance on the apartment or if the apartment-owner had any insurance. He then explained the injuries he received while he was in her apartment repairing the bed. According to Benus, Williams asserted that Benus should be liable for his injuries and damages.

II. ISSUES AND THE LAW

In his brief, Williams presents the following issues for this Court's analysis and resolution:

> ISSUE 1:
>
> Is it proper for a party's attorney to argue, in a case where the credibility of that party is critical to the outcome, that the party's inaccurate response, under oath, to an interrogatory was the fault and responsibility of the party's attorney and not the party?
>
> ISSUE 2:
>
> Did the trial court commit error in refusing to allow Plaintiff's counsel to cross-examine the Defendant on her statement to the Plaintiff, prior to lawsuit, that she had no insurance

coverage when she did and her inaccurate response to an interrogatory seeking the identification of any insurance agreement?

ISSUE 3:

Did the trial court commit error in requiring, *sua sponte*, an unauthenticated and edited transcript of a telephone conversation between the Plaintiff and Defendant, secretly recorded by the Defendant, to be read to the jury, where the existence of the unauthenticated transcript was not disclosed until eleven (11) days prior to trial where the Defendant had previously denied, under oath, that such statement existed?

This Court reviews and resolves these issues in the order in which Williams presented them in his brief to determine whether the lower court erred so as to require a reversal and remand of the trial court's judgment in favor of Benus

ISSUE 1:

Is it proper for a party's attorney to argue, in a case where the credibility of that party is critical to the outcome, that the party's inaccurate response, under oath, to an interrogatory was the fault and responsibility of the party's attorney and not the party?

Among the interrogatories which Williams submitted to Benus for her answers was Interrogatory Number 8, which read as follows:

Identify all persons from whom you or your representatives have taken written or recorded statements regarding the litigation in question.

In February, 1993, Benus answered Williams' Interrogatory Number 8 by stating under her oath that she had no recorded statement. In fact, Benus had recorded a telephone conversation with Williams which she had initiated in the latter part of September, 1991.

Williams cross-examined Benus about why her answer to his Interrogatory No. 8 had been that she had no recorded statement as follows:

Q. Do you recall that you were called to your lawyer's office to answer some written questions?

A. Yes -- no. I had to answer some written questions. I believe Mr. Tubertini handled those over the phone. I'm not sure.

. . . .

> Q. Do you recall answering under oath that you had no recorded statement in February of 1993?
>
> A. I had no recorded statement, no. There was no legal statement made.
>
> Q. You recorded Mr. Williams?
>
> A. That's not -- that's not a statement. That's a conversation.
>
> Q. And so that's your explanation as to why you did not tell me about it?
>
> A. My attorney spoke with you; I haven't.
>
> Q. I'm sorry, Ms. Benus. You signed these answers under oath. The fact is you --
>
> A. And it says "statement."
>
> Q. Ma'am?
>
> A. It says "statement."
>
> Q. And that's not a statement, in your opinion?
>
> A. No, it isn't.
>
> Q. Did you tell your attorney that you had recorded that conversation?
>
> A. Yes, I did.

Williams' counsel's cross-examination of Benus which we have just quoted constituted Benus' attempt to explain what appeared to be a previously inconsistent answer to Williams' Interrogatory Number 8. Benus thought that a recorded telephone conversation was not a "statement" as that word was used in the interrogatory. Moreover, she had told her lawyer about her having recorded the telephone conversation with Williams, and according to Benus, her lawyer "handled those [answers] over the phone."

The trial court gave Instruction No. C-1 which included the following sentence:

> Arguments, statements and remarks of counsel are intended to help you to understand the evidence and apply the law, but are not evidence. If any arguments, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark.

Neither Williams' nor Benus' counsel objected to the trial court's giving Instruction No. C-1.

During his closing argument Benus' counsel attempted to explain the inconsistency between his client's negative answer to Williams' Interrogatory Number 8 and her having recorded her telephonic conversation with Williams as follows:

> If you tell a lie, you get tripped up. Where did Lynn Benus get tripped up? If you want to blame somebody for answering this technical question "No," or "None" about a recorded statement, blame her lawyer. She didn't type this. My secretary did. And I asked Lynn to sign it because I thought it to be the truth.

Williams' counsel objected to this argument in the following language: "I object to that. It was signed under oath by the witness." The trial judge overruled Williams objection, and Benus' counsel continued, "Blame her lawyer. Don't blame Lynn. She didn't get tripped up on anything." In his rebuttal closing argument, Williams' counsel retorted to Benus' "blame the lawyer" argument as follows:

> That's why a tape recording is not fair. That's why guilty people tape, because they have the upper hand. And when they don't get the upper hand, they hide it. And that's why she didn't tell the truth in that answer to [this] interrogatory. You're not here to blame the lawyer. Somebody else can blame them. She signed her name. She said it was true. She knew it wasn't. Plain and simple. Look at the question, look at the answer and look at what she swore to.

Williams argues that "[w]here false standards are placed before the jury in closing argument, the trial court has a duty to correct the error." He cites *Danner v. Mid-State Paving Co.*, 252 Miss. 776, 173 So. 2d 608 (1965), to support his argument. In *Danner*, the Mississippi Supreme Court condemned the "Golden Rule" argument by which the jurors are exhorted to decide the case as though it were their case. He then argues:

> [I]t would appear obvious that an argument by counsel that a sworn answer to an interrogatory was not an admission of the executing party is inaccurate, improper, and sets forth a false standard. Otherwise [Mississippi Rule of Civil Procedure] 33 would not require parties to sign interrogatories under oath nor would Rule 33(b) allow answers to interrogatories to be admissible as evidence.

Williams then correctly notes that the Mississippi Supreme Court established that answers to interrogatories are admissible as nonbinding evidentiary admissions in *BFGoodrich v. Taylor*, 509 So. 2d 895 (Miss. 1987). Williams argues that "[t]his Court should not hesitate to condemn an attorney for arguing to a jury that sworn answers are not the responsibility of the swearing party." He continues: "[t]o hold otherwise would completely eviscerate the signing under oath requirement of Rule 33." Williams concludes his argument on this issue by citing *Daniels v. Beeson*, 312 So. 2d 441

(Miss. 1975), in which the Mississippi Supreme Court held that counsel's statement made to the jury regarding the failure of the defendant's wife to testify was so prejudicial as it related to the issue of liability in that case that a reversal and new trial were warranted. *Id.* at 444. In *Daniels*, the supreme court opined:

> The evidence as to who was at fault in the altercation and whether appellant was acting in self-defense was in sharp conflict and would have supported a verdict for either party. Under these circumstances, the remark of appellee's attorney that the plaintiff had produced every witness available to him and that defendant had failed to produce his own wife as a witness in his behalf became critical. The effect of counsel's statement was that if the wife had been called to testify, her testimony would have been unfavorable to her husband and would have supported the version of the incident as related by the appellee. We are, therefore, of the opinion that the remark, under these circumstances, was so prejudicial as to demand a reversal.

Id. Williams compares the stark contrast of the testimony of the witnesses for opposing parties in *Daniels* with the stark contrast of his testimony with the testimony of Benus to persuade this Court that it must apply *Daniels* to this issue to decide it favorably to him.

However, Williams' argument on this issue ignores a witness's prerogative to explain a previous inconsistent statement. In *Cooper v. State*, 18 So. 2d 453, 454 (Miss. 1944), a jury convicted R. C. Cooper, Sr., of manslaughter of Hosea Stutts. Cooper's wife had told the police officers when they arrived at the scene of the homicide that she had killed Stutts, not her husband. *Id.* at 454. At Cooper's trial, Mrs. Cooper's testimony showed clearly that her husband's slaying of Stutts was justifiable homicide. *Id.* On cross-examination by the district attorney, Mrs. Cooper admitted that she had told the police that she had killed Stutts. *Id.* On re-direct examination, Cooper's counsel attempted to show that Cooper's wife had told the police that she killed Stutts because her husband had high blood pressure and a bad heart. *Id.* The State objected to re-direct examination on this matter, and the Court sustained the State's objection. *Id.*

The Mississippi Supreme Court reversed and remanded Cooper's conviction of manslaughter because the trial judge erred when it refused to allow Mrs. Cooper to explain her earlier inconsistent statement that she -- and not her husband -- had killed Stutts. The supreme court opined: "There are numerous authorities for the proposition that a witness who has made contradictory statements as to material facts should be permitted to explain such contradictions." *Id.*; *see also* Mississippi Rule of Evidence 613(b) which provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

M.R.E. 613(b).

The Mississippi Supreme Court has held, "[I]t is well settled in Mississippi that attorneys are afforded considerable latitude in their closing arguments." *Ball v. Sloan*, 569 So. 2d 1177, 1179 (Miss. 1990). Recently, the Mississippi Supreme Court reviewed the issue of an improper closing argument in *James W. Sessums Timber Co. v. McDaniel*, 635 So. 2d 875, 882 (Miss. 1994). In its review of that issue, the supreme court opined:

> While an attorney making a closing argument may not make remarks which are unfairly calculated to arouse passion or prejudice, and while we do not condone appeals to sectional prejudices of the jury, the control of such argument is left largely to the discretion of the trial judge, who is in a much better position to observe and determine what is improper.
>
> A careful reading of the record in this case confirms no abuse of discretion by the trial judge on this assigned issue. The trial court instructed the jury that any argument or statement of counsel was not evidence, and that if a statement or argument had no basis in the evidence then the jury should disregard it.

Id.

In the case *sub judice* we reiterate our finding that Benus attempted to explain her previously inconsistent answer to Williams' Interrogatory No. 8 by testifying that she did not think that Williams' conversation with her over the telephone was a "statement" within the meaning of that word as it was used in Williams' Interrogatory No. 8 and that she had told her lawyer, who "handled those [answers] over the phone," about her conversation with Williams. We conclude that Benus' counsel's argument, which we previously quoted, was supported by his client's testimony in the record and was justified as his explanation during his closing argument about why she had initially answered the interrogatory by denying that she had a recorded statement from Williams. Thus we affirm the trial court's overruling Williams' objection to Benus' counsel's argument that his client's inconsistent answer to the interrogatory was his fault -- and not his client's.

> **ISSUE 2:**
>
> Did the trial court commit error in refusing to allow Plaintiff's counsel to cross-examine the Defendant on her statement to the Plaintiff, prior to lawsuit, that she had no insurance coverage when she did and her inaccurate response to an interrogatory seeking the identification of any insurance agreement?

Williams had propounded to Benus the following Interrogatory No. 4:

> State whether or not you or Magnolia Tours, Inc., had any insurance coverage on the premises at 111 Rue Magnolia, where this accident occurred on August 15, 1991, and if so, identify the insurance carrier, policy number and type of coverage.

On August 28, 1992, Benus answered under oath "No" to Williams' Interrogatory No. 4. When Williams deposed Benus, his counsel asked her, "Did you tell [Williams] there was no insurance?" Benus replied to that answer, "No. I knew I had no insurance on the apartment. I told him that when he first called and asked." Before the trial began, Benus supplemented her answer to Williams' Interrogatory No. 4. to admit that she had liability insurance on the business apartment through coverage on her home which was located in Pascagoula. According to Benus' counsel, the basis for that coverage was that Benus' business apartment was a "temporary residence."

After the lunch recess and outside the presence of the jury, Williams' counsel sought permission from the trial court to cross-examine Benus on her answers to Interrogatory No. 4 and the previously quoted question which Williams' counsel posed to Benus when he deposed her. To support his cross-examination of Benus on the subjects of her negative answers to the questions about whether she had insurance on her apartment Williams' counsel explained to the trial judge:

> Understanding Mississippi law does not normally allow for the existence of liability insurance to come into play, especially under Rule 411, that the existence of liability insurance is not admissible to show the negligence of a party, but Rule 411 indicates that the existence of liability insurance may come in for other reasons.
>
> In this case, the other reason would be to impeach this witness and to put before the jury her feeble attempt to have Mr. Williams refrain from seeking compensation because there was no liability insurance in existence.

In response to Williams' and Benus' arguments on whether he should allow this cross-examination, the trial judge ruled:

> I think it potentially could affect -- it is arguably a credibility situation, but any probative value, I think, is far outweighed by prejudicial effect, and it is a questionable situation as to her.

On appeal, Williams asserts the same reasons to support his position on this issue that he argued to the trial court. *i. e.*, (1) to impeach the witness and (2) to show that Benus was attempting to discourage him from pursuing litigation against her.

For nearly a century the rule in Mississippi has been that no mention can be made of the fact that the defendant is insured. *Herrin v. Daly*, 80 Miss. 340, 31 So. 790 (1902). The reference to a defendant's liability insurance by plaintiff's counsel has been held to be so prejudicial that it entitled the defendant to a mistrial. In *Scott County Co-Op v. Brown*, 187 So. 2d 321, 325 (Miss. 1966), the Mississippi Supreme Court held that the defendant was entitled to a mistrial when plaintiff's counsel referred to the fact that the defendant had liability insurance.

Williams argues that the case of *Royal Oil Co. v. Wells*, 500 So. 2d 439 (Miss. 1986), shows "there

is no blanket prohibition against the mentioning of insurance where it is mentioned for a legitimate purpose other than for a finding on liability." In *Royal Oil,* the issue of agency was a hotly contested question of fact. *Id.* at 448. Royal Oil, the appellant, argued that when the plaintiff's counsel asked a defendant whether a corporate co-defendant was paying his attorney's fees, reversible error resulted under Mississippi Rule of Evidence 411. *Id.* The supreme court determined that where agency was an issue that might well determine the outcome of the case, it was not error to ask about the source of funds for payment of an attorney's fees. *Id.* Proof of agency is one of the exceptions in Rule 411 which allows the admission of evidence of liability insurance. Agency is of no consequence in the case *sub judice*. Thus, *Royal Oil* alone does not persuade this Court to reverse the judgment for Benus on this issue.

Mississippi Rule of Evidence 411 states that evidence of liability insurance is not admissible to prove that the defendant acted in a negligent manner. However, Rule 411 may permit the introduction of evidence of liability insurance for another purpose, *i. e.* to show, " proof of agency, ownership, or control, or bias or prejudice of a witness." M.R.E. 411. Williams' two reasons for cross-examining Benus can only fall within the category of showing Benus' bias or prejudice. In other words, Benus' denial that there was insurance to cover her liability as the occupant of the business apartment, with which denial she intended to discourage Williams' pursuing his claim in litigation, could demonstrate her bias or prejudice against Williams and thus her potential propensity for prevarication.

While Rule 402 of the Mississippi Rules of Evidence provides that "[a]ll relevant evidence is admissible, except as otherwise provided," Rule 403 allows for the exclusion of otherwise relevant evidence "if its probative value is subsequently outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." M.R.E. 403. As we earlier quoted from the record of the trial in this case, the trial judge denied Williams' counsel the opportunity to cross-examine Benus about her denial of the availability of liability insurance because he found that "[a]ny probative value [of the insurance coverage], I think, is far outweighed by prejudicial effect, ..."

In *Tillis v. State*, 661 So. 2d 1139 (Miss. 1995), the Mississippi Supreme Court considered the admissibility of evidence for the purpose of impeaching a witness by showing the witness' bias against the appellant. That court held that the circuit court did not abuse its discretion by excluding, as too remote, evidence that principal prosecution witness was engaged in fight with defendant almost twenty years before defendant's arrest. *Id.* at 1139. In so holding, the supreme court referred to the following standard of review:

> This Court has held that the trial court is generally allowed wide discretion concerning the admission of evidence offered to suggest bias on the part of a witness against the defendant. This Court, when reviewing a trial court ruling on this issue, does so applying the standard of clear abuse of discretion. *Miskelley v. State,* 480 So.2d 1104, 1111-12 (Miss.1985).

Tillis, 661 So. 2d at 1142.

If we are to reverse the trial court's judgment for Benus, because the trial judge refused to allow Williams to cross-examine Benus on her denial that she had liability insurance, we first must ignore the almost-century-old prohibition against mentioning the defendant's having liability insurance in court. Then we must find that this cross-examination fell within the "bias and prejudice" provision of Mississippi Rule of Evidence 411. Lastly, we must hold that the trial judge "clear[ly] abuse[d his] discretion" in denying Williams the opportunity to cross-examine Benus. We elect instead to hold that in the light of *Herrin v. Daly, Scott County Co-Op v. Brown,* and Mississippi Rule of Evidence 411, the trial judge did not abuse his discretion in refusing to permit Williams to cross-examine Benus about her denial that she had liability insurance. We concur with his evaluation that "any probative value [of the cross-examination about the insurance coverage] . . . is far outweighed by prejudicial effect." Therefore, this Court affirms the trial court's decision on this issue and resolves this issue adversely to Williams.

ISSUE 3:

> Did the trial court commit error in requiring, *sua sponte*, an unauthenticated and edited transcript of a telephone conversation between the Plaintiff and Defendant, secretly recorded by the Defendant, to be read to the jury, where the existence of the unauthenticated transcript was not disclosed until eleven (11) days prior to trial where the Defendant had previously denied, under oath, that such statement existed?

We begin our review of this issue by observing that in his brief, Williams contends:

> It is respectfully submitted that this Court should reverse and remand for a new trial based on the improper closing argument and the trial court's preventing cross-examination of the Defendant on inconsistent statements on insurance. The issue concerning the admissibility of the audiotape or its contents is being raised so that it can be handled properly on retrial.

This Court has affirmed the trial judge's decisions which are the subjects of the issues on which Williams maintains we should reverse. Thus, there appears to be little reason to address this third issue. Nevertheless, because this issue also contains the potential for our reversing the trial court's judgment for Benus, we review and resolve it.

Williams notes that on March 1, 1993, he propounded a specific request for production of documents to Benus, but that contrary to Mississippi Rule of Civil Procedure 34(b), which required Benus to serve a written response to his request "within thirty days after the service of the written request," Benus did not respond to his request until nine months after she had been served with the request. However, Benus did provide Williams with a copy of the audio tape eleven days before the trial began. Benus provided the copy in response to Williams' motion to compel discovery.

Williams cites *Williams v. Dixie Electric Power Ass'n,* 514 So. 2d 332 (Miss. 1987) to support his position on this issue. In the *Dixie Electric* case, surveillance films which rebutted the plaintiff's evidence were offered and admitted into evidence by the defense on the day of trial. Williams had

made a written, pre-trial request for production of any and all pictures, still or moving, that Dixie Electric had relating to the subject matter. *Id.* at 335. Even though Dixie Electric did not respond to Williams' request for that production, the trial judge allowed the video tape to be admitted the day of trial. *Id*. The jury returned a verdict for the defendant, Dixie Electric. On appeal, the Mississippi Supreme Court reversed. The supreme court opined that since the defendant, "failed to comply with discovery rules in a meaningful way, the trial judge should not have admitted the films into evidence." *Id.* at 337.

On the other hand, in *Eastover Bank for Savings v. Hall*, 587 So. 2d 266, 272 (Miss. 1991), the Mississippi Supreme Court held that the chancellor's decision to allow lay witnesses to testify, though their identity had first been revealed to debtor in interrogatory answer supplementation which was technically deficient and delivered to debtor only ten days before trial, was not error absent showing of prejudice. In its opinion the supreme court wrote:

> This Court has laid down no hard and fast rule as to what amounts to seasonable supplementation or amendment of answers. *See, e.g., Motorola Communications & Electronics v. Wilkerson*, 555 So.2d 713 (Miss.1989) (identification of expert ten days before trial did not amount to discovery violation); . . . .

Hall, 587 So. 2d. at 272. In view of the Mississippi Supreme Court's ruling in *Eastover Bank for Savings*, we conclude that Benus' serving Williams' counsel with a copy of the taped conversation between her and Williams eleven days before trial began is no reason to reverse the trial judge's admission of a portion of that conversation into evidence. Williams did not move for a continuance when the trial court decided to admit a portion of that conversation between him and Benus, and he does not maintain that he was prejudiced by only eleven days advance notice of the existence of this recording of the telephone conversation between Benus and him. To the contrary, at one point in the argument on this issue before the trial court, counsel for Williams stated, "Judge, I would love for the tape to be in."

Rule 801(d)(2) determines that the recorded statements which both Williams and Benus made during their telephone conversation were not hearsay. "The relevancy and admissibility of evidence are largely within the discretion of the trial court and reversal may be had only where that discretion has been abused." *Johnston v. State*, 567 So. 2d 237, 238 (Miss.1990). Both parties referred to the tape during their arguments, and the trial judge commented, "If we didn't put this into evidence now as much as it has [been] talked about, the first thing the jury is going to do is come out and wonder who is doing what, who is conniving right now."

The trial judge compared the transcript which Benus' counsel made of the recorded telephone conversation to the tape of the conversation, and he found the transcript to be accurate. However, the trial judge edited portions of the transcript because the conversation contained "matters . . . which reflect upon legal conclusions of whether or not the Defendant is liable and also legal conclusions of a lawyer by hearsay." The trial judge ascertained that the tape was relevant and allowed the evidence to be presented to the jury for their resolution of the issues in this case. We resolve this issue by holding that the trial judge acted within his proper discretion and within the boundaries of the applicable rules of evidence to allow the edited transcript of Benus' conversation with Williams over the telephone to

be read to the jury. Thus, we find against the Appellant on this issue.

III. Conclusion

Benus was entitled to explain the inconsistency between her answers to Interrogatory No. 8 and Williams' question during her deposition, which were that she had no recording of any statement which Williams had made, and her subsequent admission that, in fact, she had such a recorded statement. Her attorney's explanation that the mistake was his and his secretary's, and not Benus', which he made during closing argument, was consistent with Benus' testimony that her lawyer handled her answers to the interrogatories "over the telephone". Therefore, trial judge did not err when he overruled Williams' counsel's objection to that argument by Benus' counsel.

Neither did the trial judge err when he refused to allow Williams' counsel to cross-examine Benus about her denial that liability insurance covered her business apartment when Williams maintained Benus' negligently dropping the box-springs severely injured his knee. The trial judge's determination that "any probative value [of the cross-examination] . . . is far outweighed by prejudicial effect" was required by -- and consistent with -- Mississippi Rule of Evidence 403. His determination was consistent with the authorities that we have discussed and analyzed in that part of this opinion which dealt with that issue.

Perhaps our review and adjudication of Williams' third issue was unnecessary because Williams urged us to consider it as a matter of instructing the trial judge on how to handle the admission of the telephone conversation between Benus and him after this case had been reversed and remanded because of our resolution of either or both of the first two issues. We have nevertheless considered and resolved it as we have because as an assigned issue, it presented the potential for reversal and remand. As with the second issue, we held that the trial court's allowing portions of the conversation to be presented to the jury was within his discretion and was supported by the Mississippi Rules of Evidence and the Mississippi Supreme Court's interpretation and application of those rules in the cases which we cited in our review of Williams' third issue. Therefore, we affirm the trial court's judgement in favor of Benus.

THE JUDGMENT OF THE HARRISON COUNTY CIRCUIT COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT, BILLY WAYNE WILLIAMS.

FRAISER, C.J., THOMAS, P.J., BARBER, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.