# IN THE COURT OF APPEALS 10/01/96

# OF THE

# STATE OF MISSISSIPPI

**NO. 94-CA-00637 COA**

**RANDALL FAWCETT**

**APPELLANT**

**v.**

**SARAH H. MCLAURIN**

**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. GRAVES, JR

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

WILLIAM P. FEATHERSTON, JR.

ATTORNEYS FOR APPELLEE:

J. TUCKER MITCHELL

BRADLEY P. JONES

NATURE OF THE CASE: DAMAGES FOR PERSONAL INJURY-COLLATERAL SOURCE RULE

TRIAL COURT DISPOSITION: JUDGMENT FOR APPELLANT IN THE AMOUNT OF $5, 000.00 IN DAMAGES

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

COLEMAN, J., FOR THE COURT:

This case involves Randall Fawcett's claim for damages for personal injuries which he suffered in a three-vehicle accident on Old Canton Road in the City of Jackson on November 27, 1992. Although the jury returned a verdict for Fawcett in the amount of $5,000.00, he has appealed to protest the trial court's allowing McLaurin to introduce into evidence his medical insurance policy. Fawcett argues that its introduction violated the collateral source rule. Because this Court finds that the Mississippi Supreme Court has resolved this issue favorably to Fawcett in *McCary v. Caperton,* 601 So. 2d 866 (Miss. 1992), it reverses and remands this case for a new trial.

**Facts and course of litigation**

On November 27, 1993, on Old Canton Road in the City of Jackson, Sarah H. McLaurin failed to stop in time to avoid colliding with the rear of a 1986 Mercury Grand Marquis automobile which Edith Perry was driving. The force of that impact propelled Perry's car into the rear of a Toyota extra-cab pick-up which Fawcett owned and was driving. According to Fawcett's testimony at trial, his truck had stopped in what he described as "construction traffic" on Old Canton Road, when the rear of his truck was struck just as he had resumed forward movement after the car in front of him had begun to move forward.

Fawcett sued McLaurin in the Hinds County Circuit Court. Before trial he and McLaurin stipulated that McLaurin was negligent in the operation of her car, so the issues at trial were whether McLaurin's negligence was a proximate cause of Fawcett's injuries and the remuneration for damages, if any, which McLaurin must pay Fawcett. As we noted, the jury returned a verdict in favor of Fawcett for $5,000.00, and the trial court entered judgement in favor of Fawcett against McLaurin for that amount. As we also noted, Fawcett has appealed to present but one issue for this Court's resolution. For the reasons which we set forth in this opinion, the collateral source rule requires that we reverse and remand this case to the trial court.

**II. Issue and the law**

In his brief, Fawcett composes the one issue on which he appeals as follows:

> Whether the trial court committed reversible error by allowing introduction of Appellant's medical insurance policy in violation of the collateral source rule?

In her brief, McLaurin recasts Fawcett's issue as follows:

> Whether the trial court properly allowed evidence of [Fawcett's] medical insurance policy where [Fawcett] and/or his counsel "opened the door" to such evidence by placing directly into issue [his] ability to pay for surgery?

**A. Evidentiary background of issue**

We review the testimony in the trial which begot this issue. On direct examination, Fawcett's counsel asked his client and his client answered:

> Q. Have you been back to see Dr. Frenz since?

A. No, sir. When I saw Dr. Frenz, he recommended surgery. I haven't even paid for my MRI yet. He wanted me to have a myelogram the next day. I said, "Doc, I can't pay for a myelogram. I can't pay for surgery."

Q. Do you intend to have surgery to correct your neck problem?

A. Yes, I do.

In response to Fawcett's testimony that he could not pay either for the myelogram or for the surgery, McLaurin's counsel pursued the following cross-examination of Fawcett:

Q. Mr. Fawcett, I'm going to hand you a document that your attorney produced and I want you to take a look at it. Have you seen that before?

A. Yes.

Q. Will you agree with me that's a policy of insurance?

A. Yes.

Q. And that's a policy of insurance that your wife took out, a health insurance policy?

A. Yes.

Q. And will you agree with me that under that policy of insurance that insurance company will pay toward surgery and hospital care?

A. Well, I wouldn't necessarily agree with you because I don't think they have ever paid a claim I've put in with them yet.

MR. MITCHELL: Your Honor, at this point we would ask that this be admitted into evidence.

THE COURT: Any objection?

MR. FEATHERSTON: Our only objection is that it is a collateral source, Your Honor.

THE COURT: Overruled. It's admitted. Let it be marked.

After the noon recess before the trial resumed, the trial judge explained his admitting Fawcett's medical insurance policy into evidence as follows:

THE COURT: I would just like the record to reflect that prior to

> the recess for lunch, the Court determined that it was appropriate for the Defendant to delve into the issue of the Plaintiff's having a medical insurance policy which may offer some protection or benefits for the type of surgery which the Plaintiff claims he needs as a result of the examination and prognosis of Dr. Frenz. I want to make it very clear that the Court is fully aware of the collateral source rule and that the Court would have otherwise excluded any testimony or any evidence relative to insurance payments. However, the Court was persuaded that it is appropriate to offer such evidence and to allow the Defendant to offer such evidence inasmuch as the Plaintiff had indicated that the reason he had not had the surgery was that he was unable to pay for said surgery. I simply wanted the record to reflect the reasoning for the Court's ruling inasmuch as the discussion in that connection occurred off the record and at the bench. Is there anything further before we bring the jury in?

MR. FEATHERSTON: No, sir.

The following information which the Court has gleaned from the record may become relevant to its consideration of this issue. The National Association for the Self-Employed issued Fawcett's medical insurance policy, which PFL Insurance Company underwrote. Among the benefits which this policy provided were: (1) surgical benefits of 3,000.00, (2) room and board benefits of $150.00 per day, and (3) a benefit of 80% of $3,000.00 for other miscellaneous inpatient expense hospital charges.

The first physician whom Fawcett consulted after the accident was Dr. John Turner. Next he consulted Dr. John Neill, a neurosurgeon; and finally he consulted Dr. John Frenz, another neurosurgeon. In his deposition, Dr. Neill testified that surgery was unwarranted in Fawcett's case, but that his fees for performing a diskectomy such as Dr. Frenz thought necessary to treat Fawcett, were $2,700 for performing the diskectomy and $300 for obtaining the bone graft, for a total of $3, 000. Dr. Neill estimated that the typical cost for a hospital stay would be between $5,000 and $10, 000. On the other hand, Dr. Frenz testified that his fees for the surgery would run between $4,500 and $5,000, and that the other necessary expenses such as for anesthesiology and hospitalization would run another four or five thousand dollars. Dr. Frenz's total estimate for Fawcett's surgery and hospitalization exceeded $10,000.

**B. Consideration of the "collateral source rule"**

As early as 1951 the Mississippi Supreme Court acknowledged the collateral source rule by applying it to hold that the trial court erred when it allowed a defendant to cross-examine the plaintiff about the amount of money he received for his injury under the workers' compensation law in *Coker v. Five-Two Taxi Service*, 211 Miss. 820, 52 So.2d 356, 357 (1951). The supreme court explained:

> We are of the opinion that this evidence was incompetent. 25 C.J.S., Damages, Sec. 99,

> states: ‘Compensation or indemnity for the loss received by plaintiff from a collateral source, wholly independent of the wrongdoer, as from insurance, cannot be set up by the latter in mitigation or reduction of damages, and, by some authorities, this rule also applies to payment of salary or expenses.
>
> "The wrongdoer is not entitled to have the damages to which he is liable reduced by proving that plaintiff has received or will receive compensation or indemnity for the loss from a collateral source, wholly independent of him. Under this general rule, insurance in behalf of the injured person cannot be set up by the wrongdoer in mitigation of the loss."

*Id.*

In two subsequent cases, *Central Bank of Mississippi v. Butler*, 517 So. 2d 507 (Miss. 1987), and *Preferred Risk Mutual Insurance Co. v. Courtney*, 393 So. 2d 1328 (Miss. 1981), the Mississippi Supreme Court reaffirmed and applied the collateral source rule. In *Central Bank of Mississippi v. Butler*, the supreme court again announced:

> Mississippi has adopted and follows the "collateral source rule." Under this rule, a defendant tortfeasor is not entitled to have damages for which he is liable reduced by reason of the fact that the plaintiff has received compensation for his injury by and through a totally independent source, separate and apart from the defendant tortfeasor.

*Central Bank of Mississippi*, 517 So. 2d at 511-12. Without more, Fawcett would appear to prevail on his one issue; but not to be out-done, McLaurin argues that Fawcett’s medical insurance policy was nevertheless admissible to impeach his testimony that he could not afford the diskectomy which Dr. Frenz opined was necessary. McLaurin maintains that the trial court did not ignore the collateral source rule when it admitted Fawcett’s medical insurance policy, but, instead, determined that by his testifying that he could not afford the diskectomy, Fawcett had waived his objection to the admissibility of the evidence of the medical insurance policy. In other words, when Fawcett testified that he could not afford the surgery, he "opened the door" for collateral or otherwise damaging evidence to come in on cross-examination.

McLaurin initiates her argument on the evidentiary "open door policy" by citing a series of criminal cases in which the Mississippi Supreme Court held that "evidence, even if otherwise inadmissible, can be properly presented where the defendant has ‘opened the door.’" *Crenshaw v. State*, 520 So. 2d 131, 133 (Miss. 1988). McLaurin also cites several civil cases in which the Mississippi Supreme Court has held that the trial court committed no error when it admitted otherwise inadmissible evidence because a party had opened the door to its admissibility by questioning a witness or party about an otherwise inadmissible fact or situation. *See, e. g.*, *Walker v. Lamberson*, 243 So. 2d 410, 411 (1971 Miss. ) (Because plaintiff had testified in her pre-trial deposition about her apprehension that certain medical doctors were trying to put her under stress for the purpose of committing her to a mental institution, it was not error for the defense counsel to elicit that same information from her on cross-examination, especially since the evidence was relevant as her medical history); *Vance v.*

*Hervey*, 253 Miss. 751, 179 So. 2d 1, 2 (1965) (It was not error for the trial court to allow defendant's counsel to question plaintiff about workers' compensation benefits he had received for an earlier injury to his right knee since plaintiff's physician had testified on direct examination about the severity of the earlier injury and that in his physician's opinion, plaintiff's recovery from the earlier injury to his right knee had been complete); *Chilcutt v. Keating*, 220 Miss. 545, 71 So. 2d 472, 475 (1954) (The trial court did not err when it refused to grant a mistrial after plaintiff testified on direct examination that defendant's "insurance man" had visited her in the hospital after the accident, to which defendant objected and the trial court sustained the objection, because, when the defendant was asked by plaintiff's counsel on cross-examination if she had called the police, she an swered, "No sir, I notified my insurance agent").

*Vick v. Cochran*, 316 So. 2d 242 (Miss. 1975), seems to be McLaurin's most persuasive precedent on which to rest her argument that the trial court properly allowed evidence of Fawcett's medical insurance policy since Fawcett and/or his counsel "opened the door" to such evidence by placing directly into issue his ability to pay for surgery. In *Vick*, the appellee, John Cochran, sued the driver and owner of a truck in which he was a passenger for personal injuries which he had received in an accident. *Id.* at 244. The plaintiff offered the testimony of a physician to afford the jury his opinions about the nature and extent of his injuries. *Id.* at 249. As Cochran qualified this physician, he asked him if he had ever been arrested or charged with any use of narcotics or alcohol since 1953, to which the doctor replied, "No, sir." *Id.* at 250. The trial judge did not allow the jury to hear cross-examination of this doctor to show that in fact he had been indicted by a grand jury on a narcotics charge. *Id.* The Mississippi Supreme Court reversed the trial court's judgment for Cochran for $40, 000 because the trial court refused to allow the defendant to cross-examine the doctor about that indictment. *Id.* at 251. About the trial court's error in refusing to allow the defendant's counsel to cross-examine Cochran's physician on his denial that he had not been arrested or charged with any use of narcotics or alcohol since 1953, the supreme court wrote:

> In addition to the general rule of liberality allowed on cross-examination, sanction has never been accorded to a rule that would allow a witness to make false statements on direct examination secure in the knowledge that they could not be called in question on cross-examination. Where a false statement is given on direct examination which is relevant and material to the inquiry, the falsity of the statement may be shown on cross-examination. In this case the answers were given in the course of establishing the professional character and experience of the witness. The issue was deliberately injected by plaintiff as to whether, since his earlier conviction of dealing in narcotics, he had ever been 'charged' again. He should not, with impunity, be permitted to answer falsely 'no.'

*Id.* at 250-51. In the case *sub judice*, Fawcett would use the collateral source rule as a dike to turn the tide of impeachment of his testimony that he could not afford the surgery by the introduction of his medical insurance policy.

Some courts have discerned the duality of the collateral source rule as a rule of both damages and evidence. *See Gormley v. GTE Products Corp.*, 587 So. 2d 455, 457 (Fla. 1991) (The collateral source rule functions as both a rule of damages and a rule of evidence. As a rule of damages, it

permits an injured party to recover full compensatory damages from a tortfeasor irrespective of the payment of any element of those damages by a source independent of the tortfeasor. As a rule of evidence, it prohibits the introduction of any evidence of payments from collateral sources, upon proper objection).

Other jurisdictions have not permitted the collateral source rule to frustrate the admission of evidence that claimant had received other compensation or indemnification for damages if the evidence was admitted solely to impeach the testimony of the claimant. In *Barrera v. E. I. Du Pont De Nemours and Co.*, 653 F.2d 915, 921 (5th Cir. 1981), the claimant, Barrera, was asked whether he should make some effort at establishing a small business. *Id*. at 921. He answered "[W]ith what? I don't even have a penny in my pocket." *Id* at 920. The defendant sought to impeach his answer with the stipulated fact that Barrera was receiving over $1,000 per month in compensation and Social Security benefits. *Id.* The defendant stated that the offer of his other income was for impeachment purposes only and not to establish a collateral source. *Id.* The district court stated: "That would be doing indirectly what you can't do directly," and sustained Barrera's objection to the defendant's offer of evidence. *Id.* The United States Court of Appeals for the Fifth Circuit held that the district court erred by sustaining Barrera's objection in the following language:

> This too was erroneous; all manner of matter otherwise inadmissible may, in a proper case, come in for impeachment purposes. The evidence, properly offered and clearly relevant for impeachment purposes, was improperly excluded simply because, under the collateral source rule, it would have been inadmissible as direct evidence.

*Id.* at 921-22. In *Baystate Moving Systems, Inc. v. Bowman*, 590 A.2d 462, 464-65 (Conn. App. Ct. 1991), the Appellate Court of Connecticut dealt with a claimant who testified on direct examination concerning the gravity of his financial situation in 1985. *Id.* at 464. The court held that the trial court did not err when it allowed the defendant to cross-examine the claimant about his receipt of workers' compensation benefits, and explained:

> Ordinarily, the fact that the plaintiff has received benefits from a third party would be irrelevant and inadmissible under the collateral source rule Here, however, testimony that would otherwise have been irrelevant and inadmissible under the collateral source rule became relevant because of the plaintiff's prior statements. The plaintiff testified on direct examination concerning the gravity of his financial situation in 1985. Evidence that he had received substantial workers' compensation benefits during this period is certainly relevant to the issue of the plaintiff's credibility.

*Id.* at 464-65.

Notwithstanding all of the foregoing discussion of the manner in which the Mississippi Supreme Court has dealt with similar issues of admitting otherwise inadmissible evidence solely to impeach a witness and of the manner in which other jurisdictions have dealt with the one issue in the case *sub judice*, we conclude that *McCary v. Caperton*, 601 So. 2d 866 (Miss. 1992) must determine our

resolution of this issue. In *McCary*, the defendant, H. W. Caperton, through his counsel, questioned the plaintiff, Jettie A. McCarty as follows:

> Q: Ms. McCary, Mr. Weir asked you about your hospital bill and he asked you if it's been paid and you said it has not?

A: Yes, sir.

> Q: In fact though you have insurance with your employer that would cover that hospital bill or a portion of it. Is that not correct?

Plaintiff's counsel objected to this question, but the trial judge overruled the objection.

> A: Yes, sir.
>
> Q: But you have chosen not to file for that insurance and instead to tell the jury that it's not paid. Is that not correct?
>
> A: Well, the bill is not paid.
>
> Q: Now, you said that you were off work for ten weeks; that you lost four hundred and one dollars a week; four thousand and ten dollars is what you were out?
>
> A: Yes, sir.
>
> Q: Now, that's misleading the Jury because you actually got sick pay, didn't you?
>
> A: It was around that.
>
> Q: You got sick pay for those ten weeks, didn't you?
>
> A: Yes, sir.
>
> Q: How much did you get each week?

Again, Plaintiff's counsel objected to this question, but the trial judge once more overruled the objection.

> A: A hundred and forty a week.

*Id.* at 868. We have quoted the foregoing testimony in detail to demonstrate its similarity -- but not identity -- to the interrogation of Fawcett in the case *sub judice*. The quoted testimony is also relevant to the distinctions between it and the testimony in the case *sub judice* which McLaurin draws in her brief and which we will relate before we resolve this issue.

On appeal, Caperton argued that the evidence was not offered for the purpose of reducing the amount of the award that the jury would return, if any, but was instead offered for the express purpose of showing that McCary was engaged in a scam; that she was trying to collect for injuries

she never suffered. *Id*. at 868-69. The Mississippi Supreme Court responded to Caperton's argument as follows:

> We have never recognized such an exception to the collateral source rule, and we refrain from doing so here. It is true that the rule as stated in [*Central Bank of Mississippi v. Butler*] does not squarely fit this case. McCary did not "receive" compensation from an independent source since she never filed an insurance claim. However, *Ward v. Mitchell*, 216 Miss. 379, 62 So.2d 388 (1953), states that the collateral source rule applies not only where a claimant has already received compensation from an independent source but also where the potential for such compensation exists. We hold that the trial court committed reversible error in allowing the defendant to introduce evidence of McCary's insurance coverage or benefits of sick leave.

*Id.* at 869.

McLaurin strives mightily to distinguish the above quoted holding in *McCary* from the facts in the case *sub judice*. She stresses that in *McCary*, Caperton "violated the collateral source rule by showing that medical bills already incurred may have been paid by a collateral source even though Plaintiff did not testify that she could not afford to pay bills." (Emphasis that of McLaurin's counsel). McLaurin argues that McCary did not testify that she could not pay the bills as did Fawcett; thus McCary's testimony was not false and thus not impeachable by showing that she had insurance to pay them. McLaurin next emphasizes that Caperton's counsel went much further than the nonpayment of hospital bills by questioning McCary about receiving sick pay even though she continued to claim the full amount of her lost wages. McLaurin concedes that this questioning about her sick pay violated the collateral source rule.

Notwithstanding these and other distinctions which McLaurin urges it to consider, this Court finds that the similarities of Caperton's cross-examination of McCary in response to her answers on direct examination are greater than these distinctions. *McCary* afforded the supreme court an opportunity to deal with the evidentiary facet of the collateral source rule by holding that "collateral source" evidence could be used solely for impeachment purposes; but that court in a unanimous opinion on that particular issue declined to do so. When the Mississippi Supreme Court writes that "[w]e have never recognized such an exception to the collateral source rule" and that "[w]e hold that the trial court committed reversible error in allowing the defendant to introduce evidence of *McCary's insurance coverage* or benefits of sick leave" (emphasis added), this Court must read and obey that mandate. This Court must read and obey regardless of the relevancy of the collateral source evidence to the impeachment of a party or his witness. Because the Mississippi Supreme Court held in *McCary* that there is no exception to the collateral source rule, even for the purpose of impeachment of a party as a matter of evidence, this Court must reverse the judgment of the trial court, which admitted Fawcett's medical insurance policy to impeach his testimony that he could not afford the future spinal surgery, a violation of the collateral source rule, and remand for a new trial.

**THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND REMANDED. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, KING, AND PAYNE, JJ., CONCUR. MCMILLIN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY SOUTHWICK, J.**

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McMILLIN, J., DISSENTING:

I respectfully dissent. I would hold that the evidence of insurance was admissible on the issue of the true reason the plaintiff had, as of trial, not had the surgery that he claimed was essential to his recovery. I think this was a legitimate issue for the jury's consideration since there was some dispute as to whether or not the surgery was necessary or desired by the plaintiff. If the jury concluded on the proof that the plaintiff had no intention of receiving the surgery in any event, then it would have been improper to consider the estimated surgery costs as an element of his damages.

The plaintiff's testimony indicated to the jury that the only reason he had not had the surgery was his inability to pay for it. Evidence that he, in fact, had the capacity to pay but had elected not to do so would appear to me to be probative on the issue. For example, if the plaintiff testified affirmatively that he could not afford the surgery, then I think evidence that he was independently wealthy would be admissible, although, without this issue, such proof would be irrelevant. The fact that the potential

source of payment in this case implicated the collateral source rule does not, in my opinion, render the evidence inadmissible. It simply limits the purpose for which the jury can properly consider it. If a plaintiff desires to keep such evidence out, it must be done through a crafting of his theory of the case to avoid putting such matters in issue rather than by putting the matter in issue and then attempting to avoid countering evidence by hiding behind an otherwise-applicable exclusionary rule.

I would submit that the matter should have properly been handled by the application of Mississippi Rule of Evidence 105, which states that "[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly." M.R.E. 105 (emphasis supplied). I believe that a proper instruction could have easily been drafted that would have informed the jury of the limited purpose for which it could consider the existence of insurance and clearly informed it that, if it concluded that the surgery was a proper element of the plaintiff's damages, it was not to diminish its verdict by any amount based upon the existence of this insurance. The duty to request such an instruction was on the plaintiff, and his failure to do so cannot now constitute the basis for reversible error on the proposition that the jury may have considered the evidence for improper purposes, *i.e.*, to diminish damages that they might otherwise would have awarded for the cost of surgery.

The *McCary v. Caperton* case appears to be distinguishable to me. *See McCary v. Caperton*, 601 So. 2d 866 (Miss. 1992). According to the opinion in *McCary*, the only reason advanced by the defense for admitting evidence of collateral sources of income was "for the express purpose of showing that McCary was engaged in a scam; that she was trying to collect for injuries she never suffered." *Id* at 868-69. Such a proposition is illogical on its face. Proof that *McCary* had other insurance or that she received sick pay is not probative on the issue of whether she was actually injured. Thus, such evidence was inadmissible under the collateral source rule and was not admissible for some other limited purpose under Rule 105, since it offered nothing probative on the issue asserted by the defense.

I would affirm the trial court judgment.

**SOUTHWICK, J., JOINS THIS DISSENT.**