



TO THE BAG

REMEMOIRIZATION

To the *Bag*:

In rereading my mini-memoir (Norman Dorsen, *The Supreme Court and Its Justices Fifty Years Ago*, in 2008 GREEN BAG ALM. 47), I caught a mistake. In the very first paragraph (p. 47), I say that Justice Brennan died in 1992, when in fact he died in 1997. More importantly, I regret that I did not say anything about my fellow law clerks, who were a wonderful bunch. Unlike the clerks in many other years, we got along famously whatever our personal views on the cases or the philosophies of our respective justices.

Norman Dorsen
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PEREMPTORY CALLS

To the *Bag*:

I suggest that Professor Pizzi is far too generous with the trial judge in *Shane v. Commonwealth*, 243 S.W. 3d 336 (Ky. 2008), in suggesting that the failure to strike Juror 138 for cause, thereby requiring the defendant to use a peremptory challenge to excuse an obviously ineligible juror (the juror would have given more weight to a police officer witness' testimony than an ordinary witness), was effectively harmless error. William T. Pizzi, "Makeup Calls" in *Sports & Courts*, 11 GREEN BAG 2D 333, 338. He ignores what the Kentucky Supreme Court said about the error:

To the Bag

The language to the trial court is mandatory. RCr 9.40 gives a defendant eight peremptory challenges plus one if alternates are seated. This Court, in its rule-making capacity, has recognized that this is beyond question a valuable right going to the defendant's peace of mind and the public's view of fairness. It is fundamentally inconsistent for the Court to give with one hand and take away with the other, a position that does not invite public trust in the integrity of the judicial system.

I suggest, to use another sports analogy, what the Kentucky Supreme Court said was that the trial judge's error was so egregious as to call for a forfeiture rather than the sophisticated analysis necessary to an assessment of whether or not "the error may have been balanced out by other rulings."

Avern Cohn
U.S. District Judge

SUBSTANTIAL EVIDENCE

To the *Bag*:

It seems pretty obvious to me that "clear and convincing" clocks in at about 65%, give or take a point or two. See *Playing the Percentages*, 11 GREEN BAG 2D 281.

Rather less obvious, but much more entertaining, is U.S. District Judge Lynwood Smith's exasperation with the Alabama legislature in *Hayes v. Luckey*, 33 F. Supp. 2d 987 (M.D. Ala. 1997). In that diversity case, Judge Smith was faced with determining just what the Alabama legislature intended by requiring, in medical malpractice cases, that before a jury could find for the plaintiff, it "shall be reasonably satisfied by substantial evidence, that the health care provider failed to comply with the standard of care and that such failure probably caused the injury or death in question." After noting – presumably with tongue in cheek – the "infinite wisdom" of the state legislature, Judge Smith opined that the statute he was required to construe took "one large step beyond nonsense into the realm of mischief," because, contrary to the expressed legislative intent "to make it *harder* for a plaintiff to recover damages for medi-

To the Bag

cal malpractice,” the words the legislature actually chose, “substantial evidence,” denote a *lower* standard of proof than the standard it replaced, proof by a preponderance of the evidence. *Id.* at 993-94.

While he knew what the legislature was trying to do, Judge Smith felt himself obligated to follow the words with which it had attempted, unsuccessfully, to express its intent:

Indeed, if all standards used to gauge the sufficiency and persuasive effect of evidence are viewed as but segments of a continuum, then the hierarchical scale of values may look something like this:

Unequivocal Evidence
Beyond a Reasonable Doubt
Clear and Convincing Evidence
Preponderance of the Evidence
Greater Weight of the Evidence
Sufficient Evidence to “Reasonably Satisfy” the Jury
SUBSTANTIAL EVIDENCE
Any Evidence
Scintilla of Evidence
No Evidence

This, then, is a most curious situation. Perhaps the Alabama Legislature, like Humpty Dumpty in the allegory drawn by Lewis Carroll in *Through the Looking-Glass*, believed it could make the term, “substantial evidence,” mean something entirely different from its accepted construction.

“When *I* use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean – neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean different things.”

“The question is,” said Humpty Dumpty, “which is to be the master – that’s all.”

To the Bag

Conclusion

Our federal system nevertheless compels this court to apply Alabama substantive law in a diversity action, no matter how ludicrous it may seem. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

Accordingly, this court will deny plaintiff's requested charge and instruct the jury substantially as asked by defendant. While the words spoken may sound to the ears of a common-law lawyer like some nonsensical gibberish from Alice in Wonderland, in this area of Alabama law Humpty Dumpty mulishly mastered all the King's horses.

Id. at 994-95 (citations and brackets omitted). Comity and comedy in one fell swoop is a pretty neat trick.

Remarkably, or not, the Alabama legislature does not seem to have amended the statute at issue in *Hayes*.

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OTHER FUNDS

To the Bag:

The charming suggestion (Ross E. Davies, *The Judiciary Fund*, 11 GREEN BAG 2D 357) that the Bar assess itself, in the manner of The Taney Fund, to relieve the plight of families of impoverished federal judges overlooks an important precedent, that supplied by Maryland Joint Resolution 60 of 1822 "In favor of Luther Martin":

Resolved, That each and every practitioner of law in this state, shall be, and he is hereby compelled, from and after the passage of this resolution, to obtain from the clerk of the county court in which he may practise, a license to authorise him so to practise, for which he shall pay annually on or before the first day of June, the sum of five dollars; which said sum is to be deposited by the clerk of the county court, from which he may procure such license, in the treasury of the western shore, or eastern shore, as the case may be, subject to the order of Thomas Kell and William

To the Bag

H. Winder, Esqr's, who are hereby appointed trustees for the appropriation of the proceeds raised by virtue of this resolution, to the use of the said Luther Martin; *Provided*, that nothing herein contained shall be taken to compel a practitioner of law to obtain a license in more than one court, to be annually renewed under penalty of being suspended from the bar at which he may practise. *And provided*, That this resolution shall cease to be valied [sic] at the death of the said Luther Martin.

The resolution was repealed two years later, by which time the inebriated Martin had found refuge outside Maryland in the New York home of his former client, Aaron Burr. Our current federal judges are in any case insufficiently Anti-Federalist to inspire such sympathy from state legislatures.

You are rather unkind to the efforts to spare Taney's daughters "the terrible burden of working for a living." In the summer of 1863, in a letter cited in Carl Swisher's volume in the *Holmes Devise History of the Supreme Court* (p. 965 n.18), the Chief Justice wrote that he and his daughter Ellen were such invalids that they were "fit for no place but home and feel that we ought not to sadden the homes of our friends by bringing to them our daily aches and pains." In July 1865, Baltimore's former Mayor George William Brown "advanced \$500 for Judge Taney's daughters, as we learned they are very much in want." Brown to F.W.Brune, July 20, 1865, Brune-Randall Papers, Maryland Historical Society; see G. Liebmann, *George William Brown*, in *SIX LOST LEADERS* (Transaction Books, 2004), 18 n.120. Sophia Taney's son, as you say, "would have been 16 by [1871] and old enough to provide some aid to his mother" but he was only 10, and dependent on her, in 1865, while Ellen, by her father's statement was an invalid.

Other Supreme Court widows have been the beneficiaries of similar appeals to the Bar, including Eliza Miller (see Michael Ross, *Melancholy Justice: Samuel Freeman Miller and the Supreme Court During the Gilded Age*, 33 J. SUP. CT. HIST. 134 (2008)) and, at a later time, Marion Frankfurter. They, like the Taney daughters, did not enjoy the benefit of widows' and survivors' pensions and social security

To the Bag

and they too should not be reproached for not spending their old age crashing through glass ceilings.

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