NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 1276

MEREDITH SILMON AND JEFF SILMON

VS.

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, JOHN DOE, JANE DOE, ABC INSURANCE COMPANY, ROBERT D. HARKNESS, JR. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AND ALLSTATE INSURANCE COMPANY

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JUDGMENT RENDERED: FEBRUARY 8, 2008

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ON APPEAL FROM THE
NINETEENTH JUDICIAL DISTRICT COURT
DOCKET NUMBER 515043, DIVISION F
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

THE HONORABLE TIMOTHY E. KELLEY, JUDGE

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KEARNEY S. LOUGHLIN METAIRIE, LA	ATTORNEY FOR PLAINTIFFS/APPELLANTS MEREDITH SILMON AND JEFF SILMON
JOSEPH M. ROUSSEL VAN A. HEARD BATON ROUGE, LA	ATTORNEYS FOR DEFENDANT/APPELLEE STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT
GREGORY W. RONIGER METAIRIE, LA	ATTORNEY FOR DEFENDANTS/APPELLEES CALVIN SEVARIO, GULF INDUSTRIES, INC., AND JACK B. HARPER CONTRACTORS, INC.

BEFORE: GAIDRY, MCDONALD AND MCCLENDON, JJ

McClendon, J. Concurs and assigns reasons.

MCDONALD, J.

This case arises out of a rear-end collision that occurred around 10:50 a.m. on January 9, 2003 in the westbound lanes of Interstate Highway 10 near the Dalrymple Drive exit in Baton Rouge. Calvin Sevario, a Motorist Assistance Patrol (MAP) van driver, turned on his warning lights and stopped in the left lane to allow another MAP employee, Hosea Dyer, to remove a tree limb that was blocking the left lane. Julie Spriggs, driving directly behind the MAP van, maneuvered around it without incident by changing lanes. Ms. Spriggs's vehicle was followed by that of Meredith Silmon, who was maneuvering around the MAP van when her vehicle was hit in the rear by that of Robert D. Harkness, Jr., causing injury to Ms. Silmon.

Ms. Silmon and Jeff Silmon, her husband, filed suit naming as defendants their underinsured motorist carrier, Allstate Insurance Company; Robert D. Harkness, Jr. and his father, Robert D. Harkness, Sr., (the owner of the car) and their liability insurer, State Farm; Ms. Spriggs and her liability insurer, USAA; Mr. Sevario and his employer, Jack B. Harper Contractor, Inc., (owner of the MAP van and holder of the MAP contract from the State of Louisiana) and its liability insurer GHI Insurance Company; Gulf Industries, Inc. (the parent company of Jack B. Harper Contractor, Inc.) and its liability insurer, DEF Insurance Company; and the State of Louisiana, through the Department of Transportation and Development, alleged to be the respondeat superior employer of Mr. Sevario and the MAP program.

Allstate Insurance Company paid its policy limits to the plaintiffs and was dismissed from the suit. Thereafter, Ms. Spriggs and USAA were

dismissed by summary judgment, and the Harknesses and State Farm settled with the plaintiffs for their policy limits and were dismissed from the suit.

After a trial, the jury found that Robert D. Harkness, Jr. was 100% at fault for the accident and that the remaining defendants were free from fault. Plaintiffs filed a motion for new trial, which was denied, and thereafter appealed the judgment.

THE MOTION TO STRIKE

The defendants filed a motion to strike from the record the affidavit of juror Nabil Saad, which was attached to the plaintiffs' motion for new trial. In this affidavit, Mr. Saad purported to explain how the jury came to its verdict.

Louisiana Code of Evidence article 606 provides:

> **B. Inquiry into the validity of verdict or indictment.** Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, whether extraneous prejudicial information was improperly brought to the jury's attention. *Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.* (Emphasis added.)

Given the foregoing, the motion to strike is well-founded; thus we grant the motion to strike this affidavit from the record.

THE ASSIGNMENTS OF ERROR

Plaintiffs assign as error the trial court's admission of evidence of Mr. Sevario's character, the jury's decision to assign no fault to Mr. Sevario, and the jury's failure to grant damages for Mr. Silmon's loss of consortium and Mrs. Silmon's loss of enjoyment of life, mental pain and suffering, and

future medical expenses. Plaintiffs pray that the district court judgment be reversed and the case be remanded for a new trial.

A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantive rights. **Evans v. Lungrin**, 97-0541, 97-0577, (La. 2/6/98), 708 So.2d 731, 735.

We agree that it was a violation of La. C.E. art 404(A) to introduce evidence of Mr. Sevario's character generally at trial to prove that he acted in conformity therewith on a particular occasion. However, our review of the entire record shows that this evidence was only briefly mentioned at trial and was barely mentioned in the defense's closing argument. We find that this was harmless error that did not materially affect the outcome or deprive a party of substantive rights. Further, after a thorough review of the record, we find no manifest error in the jury's award of damages. Thus, the trial court judgment is affirmed and costs are assessed against the plaintiffs. This memorandum opinion is rendered in compliance with the Uniform Rules – Courts of Appeal, Rule 2-16.1.B.

AFFIRMED; MOTION TO STRIKE GRANTED.

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VERSUS

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McCLENDON, J., concurs and assigns reasons.

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. LSA-C.E. art. 103. The burden is on the party alleging such prejudice. **Wright v. Bennett**, 2004-1944, p. 7 (La.App. 1 Cir. 9/28/05), 924 So.2d 178, 183. To determine whether a party was prejudiced by a trial court's error in admitting certain evidence, one must compare the inadmissible evidence to the entire record. If the comparison reveals that the inadmissible evidence did not have a substantial effect on the outcome, reversal is not warranted. Id.

In some cases, even a brief mention of evidence may be sufficiently prejudicial to taint the fact-finding process. However, that is not the case here. When the good driving evidence is compared to the entire record, for example, the stopping of the van to protect unsuspecting motorists from

hitting a large limb obstructing the highway; Ms. Spriggs' and Ms. Silmon's ability to avoid hitting the van and each other; the fact that Mr. Harkness was tailgating Ms. Silmon and that he was the only driver unable to avoid a collision, the inadmissible evidence did not have a substantial effect on the outcome. Thus, reversal on that ground is not warranted. Additionally, noting that the only defendant found at fault, Mr. Harkness, had settled prior to trial, I also find no error in the jury's failure to award the damages complained of by plaintiffs. For these reasons, I respectfully concur.