IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2006-CA-01552

DAVID LEE WASHINGTON — APPELLANT

VERSUS

MARIAN L. KELSEY — APPELLEES

BRIEF OF APPELLANT,
DAVID WASHINGTON

Appeal from the Circuit Court of
Leake County, Mississippi

ATTORNEYS FOR APPELLANT:
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I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justice of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. David Lee Washington, Appellant
2. Marian L. Kelsey, Appellee
3. James C. Patton, Jr., Esq., Attorney for Appellant
5. William Moore Dalehite, Attorneys for Appellee Marian L. Kelsey
6. Honorable, Circuit Court Judge, Marcus Gordon, Leake County, Mississippi

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III. TABLE OF AUTHORITIES

Cases

1. Bill v. The City of St. Louis, 467 Southern 2d 657 (Miss. 1985)

2. Junior Food Stores, Inc. v. Rice, 671 Southern 2d 67 (Miss. 1996)

Mississippi Rules of Evidence

1. MRE Rule 801

2. MRE Rule 803

3. MRE Rule 804

IV. STATEMENT OF ISSUES

Appellee, David Washington, states that the issues before this Court are:

A. The trial court erred in denying the motion of the appellant Washington for a new trial because the verdict of the jury is against the overwhelming weight of the evidence.

B. Inadmissible hearsay evidence was introduced by the defendant Marion Kelsey regarding prior speeding of David Washington and said error was prejudicial to Washington.

V. STATEMENT OF THE CASE

In this civil action, a jury consisting of twelve (12) men and women of Leake County, Mississippi rendered a verdict in favor of Marion Kelsey, Defendant, in said proceeding on May 11, 2006. On May 25, 2006 final judgment in favor of the Defendant was entered in said Circuit Court proceeding and on Monday, June 5, 2006, Plaintiff filed a Motion for a New Trial which was denied by this Court on August 7, 2006 and filed on August 9, 2006. David Washington filed his Notice of Appeal on September 8, 2006 and alleges that he should have been granted a new trial by the Circuit Court of Leake County, Mississippi.

VI. STATEMENT OF FACTS

The facts relevant to the issues involved in the subject civil action and appeal center around a motor vehicular collision that occurred August 16, 1999. On said date David L. Washington ("Washington") was driving a 1984 Chevrolet pick-up truck in a easterly direction when a vehicle driven by Marion L. Kelsey ("Kelsey") collided with Washington, Kelsey turned in front of Washington into the driveway of the home at which she resided at said time. The subject collision occurred shortly before 8:00 a.m. on said date on a county road in Leake County, Mississippi, Pickens Road, approximately two (2) miles from the intersection of said road and Highway 429. The indisputable physical evidence at the scene and the testimony of Kelsey's expert Cecilia Kazery ("Kazery"), prove the collision took place in the roadway on the south edge of the paved surface where the vehicles created gouge marks evidencing the point of impact as being a couple of feet inside the south edge of the road surface. (T. 127 and 128)

The testimony of Washington was that he saw Kelsey turning her vehicle as she looked into "her yard" when he was only a short distance from her vehicle. (T. 57) The testimony of Kelsey was that she never saw Washington before initiating her turn even though she "never took my eye off the road." Kelsey only became aware of Washington's presence from the sound of his vehicle when it was within a few feet of impact. (T. 77 and 86) In contrast, Defendant's expert Kazery testified that Kelsey could have seen the plaintiff's vehicle if she were keeping a proper lookout for over three hundred feet from her driveway. (T. 127)

Kazery also testified that Kelsey traveled a distance of some ten (10) feet to Washington's three hundred and seventy-five feet (375). (T. 133) On cross-examination Kazery admitted that Washington would have had to have been traveling 150 miles per hour at the time he approached the collision site for her estimate of the distances traveled by each vehicle to be accurate. Kazery further impeached the testimony of her own party, Kelsey, by saying that the impact-created gouge marks were in the roadway and that Washington was not totally off the road way as Kelsey testified. (T. 128 and 86)

Finally, Kelsey clearly prejudiced the jury's ability to weigh the credible evidence of Washington's speed at the time and place of subject occurrence by introducing hearsay testimony, over the objection of Washington, concerning prior incidents of speeding claimed against Washington. Kelsey was allowed to testify that she overheard Gene Harmon, a neighbor, reiterating a conversation he claimed to have had with Washington regarding his need to slow down. (T. 82 and 83) Further, Harmon's testimony about a prior conversation with Washington was allowed into evidence through a deposition of Harmon even though Kelsey made no showing that Harmon was unavailable to testify at the trial on the merits of the subject civil action.(T, 92 thru 103)

VII. SUMMARY OF THE ARGUMENT

On August 16, 1999, David Washington was injured in a motor vehicular collision, Marion Kelsey was responsible, or at least partly responsible, for said collision that resulted in injuries to Washington and gave rise to his claim for damages.

This Honorable Court has only to consider the Kelsey's own case on liability and there can be no doubt that Kelsey and her expert, Cecilia Kazery, proved Kelsey's negligence for David Washington. Kelsey's expert, Kazery clearly proved that had Kelsey been keeping a proper look out and properly yielded the right-of-way to the oncoming vehicle of David Washington, then the subject collision could have been avoided. Before initiating her turn, Kelsey had sufficient sight distance as testified to by her expert, Kazery, to have made it possible for her to have easily have seen Washington's vehicle for over three hundred (300) feet. Kazery's testimony is nothing short of incredilous in her attempt to establish Washington to have been speeding. If believed Kazery would place Washington's speed at approximately two hundred fifty (250) miles per hour as set-out specifically hereinbelow in the argument of the appellant.

The Court's instruction which the jury followed to render its verdict does not take into account any negligence on the part of Kelsey, and a finding of no negligence on the part of Kelsey is clearly against the overwhelming weight of all the evidence admitted at the trial of the merits in this civil action.

VIII. ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING THE MOTION OF THE APPELLANT WASHINGTON, FOR A NEW TRIAL. BECAUSE THE VERDICT OF THE JURY AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Washington argues that the jury verdict is against the overwhelming weight of the evidence and is contrary to law and the instructions given to the jury in the trial on the merits on the subject civil action. After the jury verdict was rendered, Washington filed a Motion for a New Trial that was denied by the trial judge. Washington submits that the standard of review for the trial judge as well as this Honorable Court is well established in the law of this State. Appellant understands that the Court is not entitled to substitute its judgment for that of the jury unless, when taking the evidence as a whole and in the light most favorable to Kelsey, the Appellee, no reasonable jurors could have found as the jury did in the subject civil action. Bell v. The City of St. Louis, 467 Southern 2d 657 (Miss. 1985) and Junior Food Stores, Inc. v. Rice, 671 Southern 2d 67 (Miss. 1996).

Interestingly, in examining all of the evidence in the light most favorable to Kelsey, Kelsey's own expert completely impeaches Marion Kelsey's denial of any fault and her argument that she did not turn in front of an oncoming vehicle in plain view, Washington couldn't have been so far away that Kelsey could have not seen him had she been looking. Instead the Defendant Kelsey convinced the jury that Mr. Washington was traveling at such a high rate of speed that he just appeared in her drive magically and without warning.

To further add to Kelsey's incredible version of this occurrence, her expert, Kazery testified without equivocation that Kelsey traveled a distance of ten (10) feet while.3 Washington traveled over three hundred (300) feet in the same period of time. Kazery agreed that a vehicle traveling at 10 to 15 miles per hour would travel approximately 15 feet in one second; thus, Washington would have had to have traveled almost three hundred seventy-five (375) feet in that same second and Washington's speed using Kazery's calculations (375 ÷ 1.466) would actually would exceed two hundred fifty (250) miles per hour. Ironically, Kazery, the expert, could not even calculate Mr. Washington's speed for traveling a distance of traveling a distance of three hundred seventy-five (375) feet in one second and shyly testified that it would be only one hundred fifty (150) miles per hour. (T. 133)

Additional overwhelming evidence impeaching the credibility of Kelsey at the trial of this matter is Kazery's testimony and the physical evidence supporting said testimony that the impact occurred in the roadway and on the edge of the road surface of Old Pickens Road. Kelsey told the jury that Washington's vehicle hit her vehicle with Washington totally off the roadway, Washington literally traveled between her mailbox and her residence which inferred that Washington literally drove up in her yard to hit her. Kelsey admitted that she was looking into her yard in order to make sure she didn't hit another vehicle parked at said yard on the morning of the subject collision and yet the jury did not even consider her own admission of looking away and never looking back before turning. (T. 86 and 128)

It is clear that the evidence available to support a finding that Kelsey kept a reasonable and proper lookout, that she did not fail to yield the right-of-way to Washington, that she saw his vehicle when it was in plain view, and that she was otherwise not negligent is non-existent and a reasonable jury had nothing to consider and make any reasonable inferences therefrom.

Washington would show that the jury was given a jury instruction that allowed for the jury to consider Kelsey's negligence as well as Washington's negligence, compare the two, and award damages to Washington by reducing such damages if any found, by the negligence imputed to Washington.(C.P. 132 Instruction No. P.7) Clearly, Kelsey could have been found guilty of comparative fault according to said instruction, yet if the jury did not believe Washington did not suffer any injury or resulting damages, then that instruction would still have been for the proper form of the jury verdict, because clearly the evidence overwhelmingly proves Kelsey to have been negligent whether responsible for damages or not.

B. INADMISSIBLE HEARSAY EVIDENCE WAS INTRODUCED BY THE DEFENDANT MARION KELSEY REGARDING PRIOR SPEEDING OF DAVID WASHINGTON AND SAID ERROR WAS PREJUDICIAL TO WASHINGTON.

On direct examination, Marion Kelsey was asked questions regarding remarks she overheard between Gene Harmon, a witness who lived in the area where the occurrence took place, and David Washington. Over the objection of the undersigned Washington's

counsel, Kelsey was allowed to testify as to what Mr. Harmon said at the scene. Gene Harmon was totally absent from the trial and Kelsey was actually testifing to hearsay on hearsay. Further, Harmon's own testimony admitted by deposition at the subject trial indicated Harmon made such remarks about Washington to a third party at the scene who was never called to testify at the trial, Roy Young, thus further removing the reliability of Kelsey being able to testify to these inflammatory hearsay remarks.

Clearly, Mississippi Rules of Evidence, Rule 801, defines hearsay in section(d) thereof as statements which are not hearsay in two (2) categories, to-wit: (1) prior statements by a witness and (2) admissions by a party opponent. Clearly, none of the statements admitted by the Court are admissions by a party opponent since they were not statements even made by David Washington. Also, the prior statement exclusion states that such statements must either be inconsistent with the witness's prior testimony, consistent with his testimony and offered to rebut a charge against the declarant, or a statement of identification of a person made after perceiving him. Obviously. Kelsey's testimony doesn't fit any of these categories.

Next, Mississippi Rule of Evidence, Rule 803, covers hearsay exceptions when the availability of the declarant is immaterial and there is no listed exception that warrants admission of the testimony elicited through Kelsey to corroborate Harmon's on the scene accusations against Washington. The admission of the same acted as nothing more than prejudicially cumulative hearsay that Washington was traveling at a high-rate of speed when Kelsey and her expert Kazery could not prove the speed of Washington. Kelsey never saw

Washington and only heard him a second before the collision and Kazery gave testimony that would have proven Washington's speed to be an incredible rate of two hundred fifty (250) miles per hour.

Finally, the hearsay deposition of Harmon, in it entirety should have been excluded because no showing was made by Kelsey at the May 2006 trial of this matter that Harmon, a Leake County citizen, was unavailable. (MRE Rule 804)

IX. CONCLUSION

Marion Kelsey was without question negligent in the operation of her vehicle on August 16, 1999 at the time and place of the collision that occurred between David L. Wahsington and herself. The evidence admitted on behalf of Kelsey herself demonstrates that she could not possibly have been keeping a proper lookout as she approached her driveway to her residence and not seen David Washington. Kelsey turned in front of the on coming Washington vehicle and certainly that left turn through Washington's lane of travel as he approached was a proximate cause of the subject collision. The jury verdict finding for Kelsey and their failure to find any negligence on her part is clearly against the overwhelming weight of the evidence presented at trial in this case.

For the reason stated above, Appellant David Washington respectfully request that this Court overturn the jury verdict of the trial of this matter in the Circuit Court of Leake County, Mississippi, rendered on September 11, 2006, and order a new trial of this civil action.

Respectfully submitted,

DAVID L. WASHINGTON,
APPELLANT

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X. CERTIFICATE OF SERVICE

I, James C. Patton, Jr., attorney for plaintiff, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the foregoing pleading to:

Honorable William Moore Dalehite, Jr.
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Honorable Marcus D. Gordon
Leake County Circuit Court Judge
P.O. Box 220
Decatur, MS 39327

This the 6th day of June, 2007.

JAMES C. PATTON, JR.