COPY

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NO. 2006-CA-00847

FILED

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY, MISSISSIPPI
JACKSON COUNTY CIRCUIT COURT NO. CI2005-00-730

BRIEF OF THE APPELLANT
OLIVIA M. SUMAN

ORAL ARGUMENT NOT REQUESTED

[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
[redacted]
ATTORNEY FOR APPELLANT

CERTIFICATE OF INTERESTED PARTIES

1. Mary Thi Nguyen, Plaintiff/Appellee

2. Olivia M. Sliman, Defendant/Appellant

3. Honorable T. Larry Wilson
   Jackson County, County Court

4. Edmund J. Walker, Esquire, Counsel for Plaintiff/Appellee

5. Jack L. Denton, Esquire, Counsel for Plaintiff/Appellee

6. Myles E. Sharp, Counsel for Defendant/Appellant

7. Honorable Kathy King Jackson
   Jackson County Circuit Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

CASE SITES

STATEMENT OF THE ISSUES

There is a single issue before the Court in this matter: Whether the trial court abused its discretion in granting the Plaintiff/Appellee's motion for a new trial.

STATEMENT OF THE CASE

This is a personal injury case arising from a motor vehicle accident in Jackson County, Mississippi, on November 12, 1999. Plaintiff/Appellee Mary Nguyen filed a complaint alleging Defendant/Appellant Olivia Sliman caused the accident and, therefore, the alleged subsequent damages.

Defendant denied all liability for the accident and the Plaintiff's alleged damages. The matter proceeded to trial on May 11, 2005, and the jury returned a unanimous verdict in favor of the Defendant.

Unhappy with this result, the Plaintiff filed a motion for new trial. Following a hearing on that motion, the trial court granted the motion for new trial, which Defendant appealed to the Circuit Court of Jackson County. The Circuit Court affirmed the trial court's grant of a new trial, and Defendant now appeals.

v.

SUMMARY OF THE ARGUMENT

The testimony at trial as to liability was disputed. Weighing of evidence and making credibility determinations is the function of the jury and the trial court should not have substituted its judgment for that of the jury merely because it would have decided matters differently.

This case involves a two vehicle accident wherein the Defendant was pulling from a private drive (business) across the southbound lane of Vermont Avenue onto the northbound lane of Vermont Avenue. The Plaintiff, who had been traveling on Highway 90, turned onto Vermont Avenue and collided with the Defendant's vehicle. The Plaintiff contends that Defendant failed to yield the right of way to Plaintiff. However, there was no evidence presented at trial by Plaintiff that she ever saw the Defendant prior to the collision itself.

Defendant testified that she looked for traffic prior to entering the northbound lane and that Plaintiff's vehicle was not there. Defendant testified that Plaintiff must have turned onto Vermont Avenue after Defendant had already entered upon it. As such, if Plaintiff was not yet on Vermont Avenue when Defendant entered upon it, Defendant had no obligation to yield to Plaintiff's vehicle. Defendant cannot yield to a vehicle which is not yet even traveling upon the roadway.

In this case, the jury was presented with both parties' version of events and was charged with the duty of deciding which version to believe. By finding in Defendant's favor, the jury clearly expressed its determination that the Plaintiff's version was not credible, or that Plaintiff failed to meet her burden of proof.

In short, the only question before the Court on the Motion for New Trial was whether there was a plausible version of how the subject accident occurred upon which the jury could have found for the Defendant on the issue of liability. Since there was no proof that Plaintiff was traveling on

the subject roadway prior to Defendant entering same, the jury was well within their province to find for the Defendant on the issue of liability. As such, this judgment should not have been disturbed by the trial court, especially when viewing the evidence in the light most favorable to the Defendant for whom the jury found.

ARGUMENT

One fact in this matter is not in dispute. Defendant and the Plaintiff were involved in an auto accident on November 12, 1999. The question of who should be charged with liability for that accident was a question for the jury.

In her complaint, the Plaintiff asserted Defendant was at fault, a fact Defendant denied, both in her answer and all subsequent pleadings and events. At trial, Defendant testified she was making a left turn through stopped traffic from a restaurant parking lot onto a thoroughfare when the Plaintiff collided with her. (T. at 77).

Defendant further testified she looked for oncoming traffic but saw none as the Plaintiff must have turned the corner onto the road after Defendant had checked for oncoming traffic. (T at 78). Defendant stated unequivocally that she was already into the lane of traffic at the time of the impact. (T. at 82).

The Plaintiff offered no affirmative evidence on the cause of the accident at trial. Instead, she merely stated there was suddenly a collision. (T. at 85). This was the entirety of her testimony as to causation, one sentence. The Plaintiff did not testify that Defendant pulled out in front of her, nor that Defendant was speeding or otherwise driving in a negligent manner. The Plaintiff simply stated there was a collision. Plaintiff simply did not offer one scintilla of evidence, testimony or otherwise, that Defendant was not already in the roadway when Plaintiff entered Vermont Avenue from Highway 90. Plaintiff must establish that she had the right of way, and the only way she could have had the right of way was if she was already traveling upon Vermont Avenue prior to Defendant pulling from the restaurant. Plaintiff completely failed in that regard.

The remainder of her direct testimony went to the Plaintiff's alleged injuries of a torn fingernail, headaches, dizzy spells and back pain. (T. at 85-88).

Upon cross examination, the Plaintiff admitted she had refused medical treatment at the scene of the accident. (T. At 91-92). The Plaintiff further confessed that at her sworn deposition, she had repeatedly denied any prior history of headaches, dizzy spells or back pain she alleged to have resulted from the accident with Defendant. However, her medical records showed she had suffered from all these conditions for many years before the accident. (T. at 94-105).

The only explanation the Plaintiff offered for these falsehoods was that at the time of her deposition, she just didn't remember having the problems, even though she had been treated for them for years before the accident, and, of course, before her deposition testimony under oath. (T. at 104-105).

The only witness put on by the Plaintiff as to liability was Ms. Susie Hall, who candidly and repeatedly admitted she did not see the collision. (T. at 107, 110, 111). Actually, Ms. Hall testified on direct examination by the Plaintiff that the **Plaintiff** could have avoided the accident. (T. at 108).

The jury returned a verdict in favor of Defendant. (T. at 249). The Plaintiff thereafter filed a motion for new trial, arguing at the motion hearing that the jury verdict was contrary to the facts of the case and the law. (T. at 251). The Plaintiff argued Defendant was negligent as a matter of law because she pulled out in front of the Plaintiff. (T. at 252-53).

The judge granted the motion for new trial without making any findings of fact or conclusions of law. (R. at 538).

1. The trial court abused its discretion by substituting its opinion for the judgment of the jury in granting the motion for new trial.

Appellate courts review decisions to grant motions for new trial for abuse of discretion by the trial court. *Allstate Ins. Co. v. McGory*, 697 So. 2d 1171, 1174 (Miss. 1997). Such motions should only be granted when the jury verdict is against the overwhelming weight of the evidence or is contrary to law. *Id.* See also, *Junior Food Stores, Inc. v. Rice*, 671 So. 2d 67, 76 (Miss. 1996) and *Smith v. Parkerson Lumber, Inc.*, 888 So. 2d 1197, 1204 (Miss. Ct. App. 2004).

The trial court is required to view the evidence in the light most favorable to the party in whose favor the jury decided. *Motorola Communications and Electronics, Inc. v. Wilkerson*, 555 So. 2d 713, 723 (Miss. 1989). See also, *Entergy Mississippi, Inc. v. Hayes*, 874 So. 2d 952,958 (Miss. 2004).

The court is to assume the jury drew all permissible inferences from the evidence presented at trial. *Motorola*, 555 So. 2d at 723. It is the province of the jury to determine the weight, worth and credibility of witnesses at trial. *Burnham v. Tabb*, 508 So. 2d 1072, 1077 (Miss. 1987) See also *Haggerty v. Foster*, 838 So. 2d 948, 964 (Miss. 2003).

The trial court **may not** substitute its judgment for that of the jury merely because it would have decided the matter differently. *Illinois Cent. R.R. Co. v. Harrison*, 80 So. 2d 23, 26 (Miss. 1955)(emphasis added).

a. The jury verdict was not contrary to the overwhelming weight of the evidence as the Plaintiff failed to carry her burden of proof.

In granting the motion for new trial in this case, the trial court did just what it should not, improperly substituted its judgment for that of the jury. It also failed to view the evidence in the light most favorable to Defendant, as it was required to do.

Defendant denied liability and presented her account of how the wreck occurred. The

Plaintiff essentially presented no testimony on how the accident occurred nor did she ever even testify that Defendant was at fault. The Plaintiff, of course, bears the burden of proving her complaint and in this, she clearly failed.

The entirety of the Plaintiff's testimony as to causation was thus:

Q: Tell the jury what you remember about the accident.

A: I was traveling north of Highway 90 going to stop at the Vermont light. As I turned left, as I was going between Taco Bell and BP, as I was going north on Vermont, I didn't see Defendant until the impact hit, the two cars collided, that's when I saw the car.

(T. at 85).

The Plaintiff provided no other testimony as to causation. This is, in effect, no testimony at all as to causation; the Plaintiff did not give any testimony as to how the collision occurred, just that it did. The Plaintiff did not even testify that Defendant pulled out in front of her.

Therefore the only testimony before the court as to causation, a necessary element of a claim of negligence, was that of the Defendant. Defendant testified as follows:

Q. So, if you would have looked her way would you have seen her?

A. At that moment I would have. She probably turned the corner after I looked. She probably turned the corner after I looked that way.

(T. at 78).

This further supports the conclusion that when Defendant entered Vermont Avenue, Plaintiff had not yet entered upon Vermont Avenue from Highway 90. Given the complete absence of evidence of causation submitted by the Plaintiff, the jury was justified in inferring Defendant was not at fault, an inference the trial court was required to respect in passing on the motion for new trial.

Alternatively, and perhaps most importantly, the Plaintiff in her testimony, admits that she just entered Vermont Avenue from Highway 90 and never saw Defendant. Thus, Plaintiff provided no proof whatsoever that had the right of way at the time Defendant pulled from the restaurant onto Vermont Avenue. As such, giving Defendant all reasonable inferences that can be drawn from the evidence, it is certainly possible that the Plaintiff had not yet entered upon Vermont Avenue at the time Defendant pulled out into traffic. Thus, Plaintiff would not have had the right of way at all. Accordingly, Plaintiff's reliance upon Miss. Code Ann. §63-3-807 provides Plaintiff no assistance.

Based upon the wholly insufficient evidence presented at trial, it cannot be said that the evidence was so overwhelmingly in favor of the Plaintiff that no reasonable juror could have found for the Defendant. Not only did Plaintiff fail to meet her burden of proof, there was certainly a very plausible theory upon which the jury could have relied to find that Defendant was not negligent, and that the Plaintiff was not even on the roadway when Defendant pulled into traffic, but had entered upon it after the Defendant was already there. The Defendant cannot yield the right of way to a vehicle which has not yet even entered upon the roadway. The jury verdict was therefore not against the overwhelming weight of the evidence and the trial court erred when it granted the Plaintiff's motion for new trial.

Moreover, Plaintiff's credibility had been severely damaged when it was revealed during trial that she had repeatedly denied any prior history of headaches, dizzy spells or back pain she alleged to have resulted from the accident with Defendant. However, her medical records showed she had suffered from all these conditions for many years before the accident. (T. at 94-105). Plaintiff's assertions that she had simply forgotten she suffered from these conditions was disingenuous, especially considering these conditions had required

hospitalization. As such, the jury was even more justified in viewing Plaintiff's testimony with skepticism.

b. The jury verdict was not contrary to law and should not have been disturbed by the trial court.

In essence, the Plaintiff argued at the hearing on the motion for new trial that Defendant was negligent as a matter of law, or was per se negligent pursuant to Miss. Code Ann. § 63-3-807, because she pulled out from a private drive. (T. at 252-54). That section of the Code states as follows:

> § 63-3-807. Vehicle entering or crossing highway from private road or driveway
>
> The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway.

However, the Plaintiff fails to understand that it is not enough to simply prove that Defendant pulled from a private drive. The Plaintiff must also prove that at the time Defendant pulled from the private drive, that the Plaintiff was already "approaching on said highway." Defendant disputes that Vermont Avenue meets the definition of a "highway." Regardless, the Plaintiff completely failed in that regard. In fact, Plaintiff admitted that she had just turned onto the subject roadway from another road. Thus, the jury certainly could have concluded that Plaintiff was not yet on the subject roadway when Defendant pulled from the private drive; thus, there was no one for Defendant to yield to.

The Plaintiff proceeded to discuss a number of cases in which a defendant was found liable for pulling out in front of a Plaintiff where there was no evidence of negligence by the Plaintiff. *Id.* The Plaintiff went on to state that Defendant "admitted" the facts at trial and therefore there was no question of fact for the jury to resolve. (T. at 254-55).

There are several problems with this argument. First, respectfully, it constituted a mischaracterization of Defendant's trial testimony. Defendant never admitted to any negligence whatsoever. Liability was always disputed, therefore there was a question of fact for jury resolution and, given the lack of evidence put on by the Plaintiff as to causation, it was a perfectly reasonable inference for the jury to conclude that Defendant was not negligent.

Second, the Plaintiff appears to be arguing that Defendant was required to put on proof of the Plaintiff's own negligence before the jury would be justified in finding for Defendant . However, the burden of proof rests upon the Plaintiff in any law suit to prove the negligence of the defendant. *Fells v. Bowman*, 274 So. 2d 109, 111 (Miss. 1973). See also *Baugh v. Alexander*, 767 so. 2d 269, 271 (¶ 7)(Miss. Ct. App. 2000).

With her argument that the Defendant failed to prove any negligence on her part, the Plaintiff is improperly and impermissibly attempting to shift the burden of proof from her own shoulders to that of the Defendant. Not having filed a counterclaim, Defendant was not required to prove anything. This argument at the hearing on the motion for new trial was improper.

Furthermore, the cases cited by the Plaintiff as supporting her position are not applicable. The first case, *Thompson v. Lee County School Dist.*, 925 So. 2d 57 (Miss. Ct. App. 2005), was a direct appeal of a contributory negligence jury instruction. It had nothing whatsoever to do with the grant or denial of a new trial.

Additionally, that case does not stand for the proposition the Plaintiff infers it does. It does not hold that drivers who exit private drives are automatically at fault for any accidents which occur. Nor does it hold that a defendant must establish negligence on the

part of a plaintiff before the jury may find in the defendant's favor. The discussion of the plaintiff's negligence in that case was appropriate given the issue of whether a contributory negligence instruction should have been given to the jury. That issue is completely absent from the present case since the court refused to give a contributory negligence charge and any discussion as to the negligence, or lack thereof, of a plaintiff is completely irrelevant and inapplicable.

The second case cited, *McKinzie v. Coon*, 656 So. 2d 134 (Miss. 1995), does not hold that automatic liability falls upon the driver exiting a private driveway either. On the contrary, both this case and the third case the Plaintiff cited for this proposition, *Stribling v. Hauerkamp*, 771 So. 2d 415 (Miss. 2000), carefully and repeatedly state that in the event the facts as to liability are in dispute **(as they were here)**, liability is a matter for the jury, not the court. *McKinzie*, 656 So. 2d at 140 and 141, and *Stribling*, 771 So. 2d at 416-17 and 418.

Additionally, in both cases, disinterested third party eyewitnesses testified as to the manner the accidents occurred and the defendant's actions, all of which supported the plaintiffs' version of events. The present Plaintiff had no such witnesses in this case. In fact, the only liability witness put on the stand stated she did not see the collision, as she had turned away and that the Plaintiff could have avoided the accident.

Clearly, these cases do not support the proposition for which the Plaintiff argued them, that a driver leaving a private drive is automatically per se liable for any collisions. Moreover, those cases are clearly distinguishable in that there was no dispute that plaintiff was approaching on the subject roadway. Here, however, that issue was squarely in dispute. Plaintiff had not established that she had the right of way, and Defendant testified that Plaintiff was not on Vermont Avenue when Defendant pulled out. And the jury sided with

the Defendant on that issue. Moreover, there is, in fact, case law directly contrary.

In *Haggerty v. Foster*, the Supreme Court faced a nearly identical set of circumstances as occurred in the present case, the only difference being that instead of pulling out of a restaurant parking lot, the defendant was crossing through stopped traffic to enter one. See *Haggerty*, 838 So. 2d at 952.

In analyzing whether the trial court erred in denying the plaintiff's motion for new trial after the jury found in favor of the defendant, the Supreme Court reminded that conflicting facts are to be resolved by the jury, which also determines the weight, worth and credibility of witness testimony. *Id.* at 963-64. The Court rejected the plaintiff's argument she should have been granted a new trial. *Id.* at 963.

Thus, there is clear authority negating the Plaintiff's contention that one exiting (or entering, as the case may be) a private drive is automatically liable for any subsequent accident.

Furthermore, the trial court admitted that liability was disputed and was to be decided by the jury. In determining jury instructions, the trial court specifically said, "I think either they're going to find she, Defendant , was negligent or she was not." (T. at 204).

The trial court went on to state the following:

> ...as it stands right now, if Defendant, if they find that she was not negligent–what I'm saying is, if the Plaintiff has failed to prove that she failed to yield the right-of-way, if they don't believe the actions that Defendant did in operating her vehicle, that they didn't prove that that was negligent, then they're going to find for you.

T. at 204-05

Clearly, the trial court recognized that disputed facts existed as to liability. Although the court may have considered the matter a close call, the matter was still required to be sent

to the jury, who decided Defendant was not the negligent party.

Finally, the Plaintiff's argument requires the Court to assume that Defendant did, in fact, pull out in front of the Plaintiff's vehicle. That was a question of fact for the jury to decide. Given that not even the Plaintiff testified that Defendant improperly pulled out in front of her, there was absolutely no evidence presented to support that assertion.

2. The Plaintiff's Credibility was Seriously Damaged

Although not directly relevant to the issue of liability, Plaintiff's testimony regarding her past medical history and her denial of same seriously undermined any credibility she might enjoy with the jury. Despite making claims of headaches, dizzy spells, back pain and fainting in this case, the Plaintiff had to confess that, at her sworn deposition, she had repeatedly denied any prior history of headaches, dizzy spells or back pain she alleged to have resulted from the accident with Defendant. However, her medical records showed she had suffered from all these conditions for many years before the accident. (T. at 94-105). She was impeached at trial as to her deposition testimony denying any pre-existing injuries. However, not only had she suffered from these ailments prior to the subject accident, she was even hospitalized on some occasions directly as a result - from previous migraines and fainting spells, all prior to the subject accident.

The only explanation the Plaintiff offered for these falsehoods was that at the time of her deposition, she just didn't remember having the problems, even though she had been treated for them for years before the accident, and, of course, before her deposition testimony under oath. (T. at 104-105). As such, her assertion of forgetting is disingenuous.

This, without question undermined her credibility with jury. That coupled with the complete lack of any evidence that she was "approaching" on Vermont Avenue prior to

Defendant pulling out, all supports the jury finding for the Defendant in this case, especially when that evidence is viewed in the light most favorable to the Defendant.

3. The Circuit Court Improperly Remanded the Case Back to County Court

Additionally and alternatively, the Circuit Court's Order remanding the matter to the County Court of Jackson County was in error. Should this Court find that a new trial is warranted, the new trial must occur in the Circuit Court, since once appealed there, it belongs to the Docket of the Circuit Court pursuant to Miss. Code Ann. § 11-51-79. See also, *McIntosh v. Munson Rd. Mach. Co.,* 167 Miss 546, 145 So.2d 731 (1933).

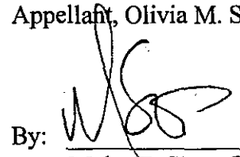
CONCLUSION

It is readily apparent the trial court erred in granting the Plaintiff's motion for a new trial. The evidence of liability was disputed and the Defendant denied liability. It was a question of fact for the jury to determine whether the Plaintiff's single sentence of testimony as to causation of the accident was both sufficient and believable. By finding in favor of the Defendant, the jury clearly expressed its factual determination as to liability in this case, and there was certainly sufficient evidence to find for the Defendant.

The trial court, while acknowledging on the record that a factual dispute existed for the jury's determination, nonetheless improperly substituted its judgment for that of the jury when granting the motion for new trial. This was an abuse of discretion by the trial court which should be reversed and the jury verdict in favor of Defendant reinstated.

Respectfully submitted,

Appellant, Olivia M. Sliman

By: 
Myles E. Sharp [redacted]

HEWITT and SHARP, PLLC
Attorneys for the Appellant, Olivia M. Sliman
P.O. Box 6669
D'Iberville, MS 39540
228-392-2003 phone
228-392-7618 fax

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served a true and correct copy of the above and foregoing instrument by causing a copy of same to be mailed, postage prepaid, to the following counsel of record at the address(es) shown:

Jack L. Denton, Esquire
DENTON LAW FIRM, PLLC
P.O. Box 1204
Biloxi, MS 39533

Ms. Betty W. Sephton
Clerk of the Supreme Court
P.O. Box 249
Jackson, MS 39205-0249

Honorable Kathy King Jackson, Circuit Court, Jackson County, MS

Honorable T. Larry Wilson, County Court, Jackson County, MS

THIS, the 30th day of October, 2008.

By: 
Myles E. Sharp [redacted]

HEWITT and SHARP, PLLC
Attorneys for the Appellant, Olivia M. Sliman
P.O. Box 6669
D'Iberville, MS 39540
228-392-2003 phone
228-392-7618 fax

ADDENDUM

MISSISSIPPI STATUES

§11-51-79. Appeals from the county court.

No appeals or certiorari shall be taken from any interlocutory order of the county court, but if any matter or cause be unreasonably delayed of final judgment therein, it shall be good cause for an order of transfer to the circuit or chancery court upon application therefor to the circuit judge or chancellor. Appeals from the law side of the county court shall be made to the circuit court, and those from the equity side to the chancery court on application made therefor and bond given according to law, except as hereinafter provided. Such appeal shall operate as a supersedeas only when such would be applicable in the case of appeals to the Supreme Court. Appeals should be considered solely upon the record as made in the county court and may be heard by the appellate court in termtime or in vacation. If no prejudicial error be found, the matter shall be affirmed and judgment or decree entered in the same manner and against the like parties and with like penalties a s is provided in affirmances in the Supreme Court. If prejudicial error be found, the court shall reverse and shall enter judgment or decree in the manner and against like parties and with like penalties as is provided in reversals in the Supreme Court; provided, that if a new trial is granted the cause shall be remanded to the docket of such circuit or chancery court and a new trial be had therein de novo. Appeals from the county court shall be taken and bond given within thirty (30) days from the date of the entry of the final judgment or decree on the minutes of the court; provided, however, that the county judge may within said thirty (30) days, for good cause shown by affidavit, extend the time, but in no case exceeding sixty (60) days from the date of the said final judgment or decree. Judgments or decrees of affirmance, except as otherwise hereinafter provided, may be appealed to the Supreme Court under the same rules and regulations and under the same penalties, in case of affirmance, as appertain to appeals from other final judgments or decrees of said courts, but when on appeal from the county court a case has been reversed by the circuit or chancery court there shall be no appeal to the Supreme Court until final judgment or decree in the court to which it has been appealed. When the result of an appeal in the Supreme Court shall be a reversal of the lower court and in all material particulars in effect an affirmance of the judgment or decree of the county court, the mandate may go directly to the county court, otherwise to the proper lower court. Provided, however, that when appeals are taken in felony cases which have been transferred from the circuit court to the county court for trial, and have been there tried, such appeals from the judgment of the county court shall be taken directly to the Supreme Court.

Sources: Codes, 1930, § 704; 1942, § 1616; Laws, 1926, ch. 131; Laws, 1932, chs. 140, 256; Laws, 1940, ch. 229; Laws, 1966, ch. 348, § 1; Laws, 2001, ch. 423, § 1, eff from and after July 1, 2001.

§ 63-3-807. Vehicle entering or crossing highway from private road or driveway

The driver of a vehicle about to enter or cross a highway from a private road or driveway shall yield the right-of-way to all vehicles approaching on said highway.

Sources: Codes, 1942, § 8198; Laws, 1938, ch. 200.

II.