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

Case No. 2010-CA-00036-COA

Leigh Mitchell — APPELLANT

VS.

David Barnes — APPELLEE

REPLY BRIEF OF APPELLANT

On Appeal from the Circuit Court
of Hinds County, Mississippi

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ARGUMENT

The Appellee's brief spends many pages arguing that the facts of the case favored his position. While that is certainly disputed, the Appellant has never suggested that the issue of liability in this case was anything but one for a jury to decide. Rather, the problem with the trial below is that the case presented to the jury for deliberation was tainted by the improper admission of evidence and by the failure to properly instruct the jury on the critical issue of the Plaintiff's speed. The Appellee's attempt to minimize the importance of these errors or to distract from the real issues evidences the weakness of the Appellee's position.

THE APPELLE HAS NO GOOD EXPLANATION FOR THE TRIAL COURT'S REFUSAL TO GRANT INSTRUCTION D-2 REGARDING THE PLAINTIFF'S SPEED

The speed at which the Plaintiff was operating his Honda Interceptor motorcycle at the time of the accident was most definitely an important issue in the trial of this case. The issue was injected initially, not by the Defendant, but by the Plaintiff himself, who gave his own testimony about his speed, put on testimony of the investigating officer as to both the speed limit and the Plaintiff's speed and proffered an expert witness, who was improperly allowed to testify that the Plaintiff's speed did not exceed the speed limit. This evidence was contradicted by the statements of two eyewitnesses that Barnes was significantly exceeding the speed limit, by the

testimony of Barnes' treating physician that Barnes stated he was going in excess of the speed limit and by Barnes' own medical records which also evidenced this fact. Despite the clear conflict in the evidence and the undeniable fact that speed was a relevant issue (which even the Appellee does not contest) the trial court refused to grant Instruction D-2, regarding the Plaintiff's speed, solely because the court believed that there was no evidence to support the instruction. (Appellant's R. Ex. D, T. 397-9; R. Ex. E, court's marginal notation)

In his brief, Barnes responds to this assignment of error with three arguments. First, he argues that the instruction was improper, as he claims that it was peremptory and did not allow apportionment of fault. Next, he argues there was not adequate testimony that Barnes was speeding. And his fallback position is that if there was error in failing to grant the instruction, it was harmless because, he claims, another instruction was granted "which was almost identical to the speed instruction. . ." (Appellee's Brief at 17). None of these arguments can survive even minimal scrutiny.

The Plaintiff's first argument, that the instruction was peremptory and did not allow apportionment of fault, is an objection that the Plaintiff did not make at trial; indeed, the Plaintiff did not object to this instruction at all. The trial court denied the instruction, *sua sponte*, but not for this

reason. "On appeal a party may not argue that an instruction was erroneous for a reason other than the reason assigned on objection to the instruction at trial." *Young v. Robinson*, 538 So.2d 781, 783 (Miss. 1989). For this reason alone, Barnes' argument in this regard must fail. But even if he had made such an objection at trial, he would still be wrong. The instruction is not peremptory and only tells the jury to return a verdict for the Defendant if they first find that Barnes was negligent and if they find that his negligence was the sole proximate cause of the accident. The courts of this state have recognized that such language is not peremptory and is proper. *Utz v. Running & Rolling Trucking, Inc.*, 32 So.2d 450, 483 (Miss. 2010); *Strong v. Southside Baptist Church*, 823 So.2d 608, 610 (Miss. App. 2002).

As for allowing apportionment of fault, the Plaintiff never requested any instruction allowing apportionment of fault and again, of course, did not object to the instruction on this basis. Barnes cites this court to no authority that requires a court to instruct a jury on comparative negligence when neither side has requested such an instruction. And, interestingly, the very instruction that Barnes claims minimizes the error of failing to grant Instruction D-2, contains the same alleged peremptory language, to which Barnes also did not object.[1]

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[1] Instruction D-2 stated:

Under the laws of the state of Mississippi, the

Barnes' second line of attack is even weaker than the first. He contends that there was inadequate evidence of speeding to support the granting of an instruction on speed. First, bear in mind that this argument is contradicted by Barnes'

> operator of a motor vehicle, including a motorcycle, has a duty to operate his vehicle at a speed at or below the posted speed limit. Therefore, if you find from a preponderance of the credible evidence in this case that David Barnes was operating his motor cycle at a speed in excess of the posted speed limit at the time of the accident in question, then David Barnes was guilty of negligence. If you find that David Barnes' negligence, if any was the sole proximate cause of the accident in question, then you must return a verdict for the Defendant, Leigh Mitchell.

The instruction given to the jury by the court as jury Instruction No. 9, and labeled D-3, states as follows:

> Under the laws of the state of Mississippi, the driver of a motor vehicle, including a motorcycle, has a duty to maintain control over his vehicle at all times. Therefore, if you find from a preponderance of the evidence in this case, that at the time of the accident, David Barnes was operating his motorcycle on one wheel and failed to maintain control of his motorcycle and struck the vehicle of the Defendant, then David Barnes was negligent. If you further find that by a preponderance of evidence that David Barnes' negligence, if any, was the sole proximate cause of the accident in question, then you must return a verdict for the Defendant, Leigh Mitchell.

This instruction "D-3" is not the actual instruction submitted to the court by the Defendant, and differs somewhat. Although the Defendant's instructions were filed with the Clerk (R. 2), neither the Defendant's original instruction D-3 or D-4 can be found in the record. The court did advise the parties during the instruction conference that D-4 (given as jury instruction number 8) was being modified but said nothing to indicate that any modifications were being made to D-3. (T. 398-99, 401-02)

first and third arguments, which implicitly concede that an instruction on speed was required. In making the argument that there was no evidence to support a speed instruction, the Appellee then proceeds to recite some of the very evidence which supported the granting of the instruction. Barnes responds to the admissions to his doctor and in his medical records that he was speeding by stating that Barnes denied making these statements. (Appellee's Brief at 19). He then sets forth the testimony of Greg Parsons that the Plaintiff was traveling at seventy to eighty miles per hour (Appellee's Brief at 20) and the testimony of Lorna Owens as to the Plaintiff's excessive speed (Appellee's Brief at 22). Barnes thus concedes that there was evidence that he was traveling at an excessive rate of speed, but nevertheless argues that the court should not have granted a speed instruction because, Barnes argues, the evidence against him was not credible. (See e.g. Appellee's Brief at 21, "these bizarre accountings of events lend no credibility to Greg Parsons.")

Even the Appellee must recognize the problem with this argument. If the issue regarding the Plaintiff's speed could only be judged by assessing the credibility of the witnesses, that credibility determination had to be made by the jury, and not peremptorily by the trial judge. *Jackson v. Daily*, 739 So.2d 1031, 1039 (Miss. 1999). Where the credibility of a witness is

an issue, the jury instruction supported by that witness' testimony should be granted and the jury should be allowed to make the credibility determination. *Johnson v. State*, 956 So.2d 358, 364 (Miss. App. 2007).

The Plaintiff's fallback position is that, even if the trial court erred in refusing to grant the instruction, that the error was harmless because Instruction D-3 was granted. But even a cursory reading of Instruction D-3 shows that it has nothing to do with the issue of speed, and only with the issue of whether the Plaintiff maintained control of his vehicle, specifically whether he was "popping a wheelie." Barnes concedes that the instruction "does not actually include the word 'speeding. . .'" but argues nonetheless that the instruction covers the question of speed "because that would be the reason, if any, for Barnes losing control of his motorcycle" (Appellee's Brief at 24). While the testimony certainly showed that Barnes was both "popping a wheelie" and speeding, each is a separate act of negligence and each could legitimately be found to have caused the accident based on evidence presented. It is simply specious to tell this court that an instruction on "popping a wheelie" and maintaining control of your motorcycle is the same as an instruction on speed. And, it must be again pointed out, this was not the reason the court denied the instruction.

There was more than sufficient evidence that David Barnes was exceeding the speed limit at the time of this accident. If he was indeed exceeding that speed limit, he was guilty of negligence as a matter of law. "Failure to instruct the jury of negligence as a matter of law is reversible error." *Jackson v. Daily*, 739 So.2d 1031, 1036 (Miss. 1999). This error, standing alone, absolutely requires reversal of the judgment and a grant of a new trial. But that new trial will still be tainted by error if the following errors are not also corrected.

THE APPELLEE CONFUSES JAMES HANNAH'S QUALIFICATIONS WITH THE NON-EXISTENT BASIS FOR MR. HANNAH'S OPINIONS AND HIS FLAWED METHODOLOGY

Barnes' response to the court's failure to exercise its gatekeeping role under *Daubert* appears to boil down to two things: first, that James Hannah is a qualified accident reconstructionist and therefore should be allowed to testify (Appellee's Brief at 25-26, 38), and second, that if the Defendant had a problem with Mr. Hannah's testimony, the Defendant's recourse was to put on an opposing expert and let the jury sort it out. (Appellee's Brief at 27, 38). (This, in a nutshell, was also the trial court's position. T. 364-65) The problem is that neither of these arguments address the issue; whether the trial court properly exercised its gatekeeping responsibility to keep out unreliable junk testimony. The Appellant did not dispute that Mr. Hannah has the minimum

training necessary to qualify as an accident reconstructionist. What the Defendant did dispute was the qualification of Mr. Hannah or any accident reconstructionist to reconstruct an accident out of thin air.

The Appellee devotes much of the space in his brief to quoting page after page of Mr. Hannah's trial testimony, much of which proves that he never should have been allowed to testify at all. Portions of Mr. Hannah's testimony are quoted on page 28 of the Appellee's brief where he was asked if he formed an opinion about where the impact actually occurred. This was of course important, as a central issue in the case was whether the Plaintiff hit the Defendant's stopped vehicle as it was waiting to enter the street or whether, as the Plaintiff claimed, the Defendant pulled out into the street and hit him. Hannah was allowed to testify on this point, despite the other testimony from Hannah, quoted on page 29 of the Appellee's Brief,

> there was never a fact of a skid mark, a gouge mark that would give us a specific area of impact. What we did have was all the information I've heard even by sitting in the courtroom, reading depositions, talking to the officer as the car in that driveway area.

In the absence of any physical evidence from which a qualified reconstructionist could determine anything about this accident, Hannah was simply allowed to put his "expert stamp of approval"

on the regurgitated testimony of others.[2]

And with regard to Mr. Hannah's testimony as to the speed of the motorcycle, he divined this using the fourteen month old recollection of the officer as to the approximate location of the motorcycle and artificially reduced numbers for the critical coefficient of friction. Recall that the coefficient of friction is dependent, in large part, on whether the motorcycle was upright or on its side as it traveled from the point of impact to its indeterminate final resting place and, on whether any brakes were applied during the time that the motorcycle was still on its wheels. The Appellee quotes Hannah's testimony that "we did not know at any point where there was braking or where it fell over on its sides or any of that" (Appellee's Brief at 33).

Barnes even quotes Hannah's admission "as I stated earlier, there was no physical evidence this accident occurred. . ." (Appellee's Brief at 34). How in the world can an accident reconstructionist, qualified or not, visit an accident scene and reconstruct an accident when the scene itself offers no evidence that an accident even occurred? This was one of the points made by Cecilia Kazery in the affidavit submitted by the Defendant to

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[2] In at least three places in the Appellee's brief, the claim is made that James Hannah met with Gustavo Delarosa at the scene of the accident. (Appellee's brief at 6, 31, 47). Counsel has diligently searched the record and, while conceding that it could have been missed, can find nothing in the record to substantiate that Hannah or anyone else testified to such a meeting.

the trial court. (R. 112)

The Appellee's summary of Hannah's investigation from page 47 of his brief reveals just how little "expertise" was required to do what Mr. Hannah did. As the Appellee tells it, Mr. Hannah's investigation consisted of "observing the scene of the accident, speaking with the investigating officer, speaking with Barnes, speaking with Delarosa, reviewing the accident report, reviewing the pleadings in the case, reading the deposition of Barnes and Mitchell, looking at the photographs and conducting a survey. . ." (Appellee's brief at 47). With the exception of conducting a survey (which Mr. Hannah had someone else do), there is nothing in this list that required an expert. Indeed, it all sounds suspiciously like the kind of evidence a jury could easily consider without having someone else tell them what to think about it. It was incumbent upon the trial court to examine these issues before the jury ever heard any testimony. But it was evident from the trial court's handling of this issue and the statements made at trial that it was predisposed to let everything in and let the jury sort it out. (T.264-266).

With regard to the federal district court case of *Johnson v. Willbros Construction*, in which the court disallowed part of Mr. Hannah's testimony based on insufficient evidence, it does not help the Appellee's case to quote the district court with regard to the things Mr. Hannah would have been allowed to testify to

because, as the court noted, it was allowing Mr. Hannah to testify to those things to the extent that "they are supported by the physical evidence". *Johnson v. Willbros Construction*, 2009 W.L. 1635736 (S.D. Miss. 2009).

It should also not be forgotten that Mr. Hannah was designated to testify in this case before he had ever viewed the accident scene or one shred of testimony or evidence of any kind. (R. 65, T. 314-15) Yet, in the absence of absolutely any evidence or investigation, his designation stated that he would testify that the accident was the Defendant's fault and that the Plaintiff was guilty of no wrongdoing. But then, this should not be surprising. For after Mr. Hannah finished his"investigation," he still had no evidence upon which to base any legitimate accident reconstruction.

"Gatekeeping" does not mean holding the gate open for anyone with an acceptable resume. It means conducting a thorough analysis of the basis of Mr. Hannah's opinions, before allowing his testimony.[3] The trial court made it clear that, although it

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[3] For examples of the proper exercise of the circuit court's gatekeeping role, this court need only look at the opinions of other circuit court judges in the state who have examined Mr. Hannah's proposed testimony and found it to lack any evidentiary basis. See R. 132 where, in another case in which Mr. Hannah was designated as an expert for the Plaintiff, Judge Larry Lewis found:

> Mr. Hannah's opinions are not based upon sufficient facts or data; in some instances are not supported by the facts; and are not the product of reliable

would allow the Defendant to "make a proffer," it had no intent to act as a gatekeeper. (T. 265-268, 281). Had the court done so, Mr. Hannnah's testimony would not have been allowed.

OFFICER FOSTER WAS ALLOWED TO TESTIFY TO HER OPINIONS, AND NOT JUST FACTS

Barnes responds to the error in allowing Officer Foster to offer her opinions at trial, and in the admission of her accident report, by asserting that "Officer Foster never offered any opinions" (Appellee's Brief at 39). This is simply not true. Officer Foster testified that Leigh Mitchell failed to yield the right-of-way. That is an opinion, not a fact. Officer Foster testified that Mr. Barnes was not guilty of any improper driving. Again, that is an opinion, not a fact. And she testified to where the impact allegedly occurred, again an opinion, not a fact. This issue is remarkably similar to one addressed by the Mississippi Court of Appeals in an opinion handed down August 9, 2011 in *Rhoda v. Weathers*. In that case, the trial court had kept out the accident report, finding the conclusions in it

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> principles and methods. Mr. Hannah has not applied the principles and methods reliably to the facts of the case. Instead, the opinions are based on Mr. Hannah's subjective beliefs and unsupported speculation and, to some extent, are misleading. While Mr. Hannah may have the requisite qualifications, the court finds that Mr. Hannah's opinions are unreliable and inadmissible under Mississippi law."

and R. 129, the order of Judge Jannie Lewis where she found "that the opinion of Mr. Hannah has no evidentiary basis. . ."

unreliable. In that case, as in this one, the investigating officer had indicated "no apparent improper driving" on the part of one driver and "failed to yield the right-of-way" on the part of the other. *Rhoda* at paragraph 5. The court of appeals analyzed the admissibility of this report under Rule 803(8), and the comment to it which indicates that "opinions and conclusions contained in [public records and reports] should be excluded." But the court also reviewed a decision from the Mississippi Supreme Court in *Rebelwood Apartments LP v. English*, 48 So.3rd 483 (Miss. 2010), in which the court stated that a trustworthiness analysis should be conducted to determine if conclusions in police reports are admissible. The court in *Rhoda* looked at the trustworthiness indications in that case and found that the only thing the officer did was consider conflicting accounts of who was at fault. "This amounted to little more than a credibility determination-weighing the same conflicting testimony presented to the jury in the trial." (Para. 15) The court noted that despite the investigating officer's years as a police officer, the lack of evidence as to the basis for his opinions left the court only to speculate as to how his experience was applied to investigating that particular accident.

In this case, Barnes repeatedly claims in his brief that everything that the officer testified to was based on statements Mitchell allegedly made to the officer. While the officer does

claim that Mitchell told her certain things (which Mitchell denied), the officer also admitted that nothing in her report indicates that Mitchell told her anything. (T. 162-63) The officer testified at the trial of this matter over five years after the accident occurred and made the dubious claim that she remembered in detail everything that Mitchell had told her. But it is also important to note that Officer Foster did in fact talk to David Barnes about the accident, indicating that, at best, she "weighed the conflicting testimony" of the two drivers. Foster admitted that she did very little in the way of investigating the accident. She did not take any pictures, did not take any measurements, did not make any markings on the roadway, did not show any landmarks on her report to indicate where anything occurred, and did not even show which entrance of the parking lot Mitchell's vehicle was supposedly coming out of. The trial court failed to consider these issues and failed to conduct a trustworthiness analysis before admitting this evidence. This was an abuse of discretion. *Rebelwood*, 48 So.3d at 494. (T. 164-65).

Officer Foster gave unsupported and unqualified opinions in this case which, by virtue of her status as a police officer, carried undue weight with the jury. The opinions expressed in her report, and repeated by her in her testimony, were clearly inadmissible. These errors should not be repeated when this

matter is tried again.

CONCLUSION

For the foregoing reasons and as set forth in the Appellant's initial brief, the Appellant respectfully submits that a new trial in this matter is absolutely required, and asks this court to order a new trial of this matter in which the errors set forth herein are not repeated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that on August 10, 2011 I mailed, via United States Mail, postage prepaid, a true and correct copy of the Appellant's Brief to:

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This the 10th day of August, 2011.

MICHAEL F. MYERS