IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

2010-CA-01045-COA

LISA WANSLEY — APPELLANT

VS.

VICTORIA BRENT — APPELLEE

APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

SUBMITTED BY:

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A. A COMPARATIVE NEGLIGENCE SITUATION EXISTS WHEN, AS HERE, THE NEGLIGENCE OF BOTH PARTIES IS BEFORE THE JURY; IT WAS ERROR TO REFUSE TO INSTRUCT THE JURY ON COMPARATIVE NEGLIGENCE.

Brent argues in her Brief that there "was no issue of comparative fault for the jury to consider" (Page 6 of Brent's Brief). However, the Trial Court found that sufficient evidence was present to warrant submitting negligence instructions to the jury on the part of both Brent (Plaintiff) and Wansley (Defendant). Brent ***agreed*** with the Trial Court's submission of said negligence instructions and withdrew her objection to the Instruction D-18 regarding her own negligence:

> Should you find from a preponderance of the evidence that the Plaintiff committed one or more of the following acts:
>
> (1) Failure to maintain a proper lookout;
> (2) Failed to use reasonable care; and
> (3) Failed to keep her vehicle under proper control.
>
> Then you may find that the Plaintiff was negligent. Should you further find by a preponderance of the evidence that the negligence of the Plaintiff caused the accident in question, then your verdict shall be for the Defendants.

(Instruction D-18, R.E. 8, R. 49; see also Trial Transcript, R.E. 77, Lines 7-9). Therefore, it is undisputed the negligence of both parties was properly before the jury. This was a comparative negligence situation as a matter of law. Brent makes lengthy arguments in her Brief seeking to establish Wansley's negligence. These arguments are misplaced because Wansley does not dispute that her negligence may have contributed to the accident in question. Our contention on appeal is that the parties agree that the Trial

Court properly instructed the jury regarding each party's own separate negligence, but that the Trial Court erred in refusing to instruct the jury on comparative fault. The jury was only instructed that ***either*** Brent (Plaintiff) ***or*** Wansley (Defendant) negligently caused the accident; Wansley respectfully submits that she was denied a fair trial by being deprived of the right to have the jury instructed that they also had the option to find that ***both*** parties were at fault for the accident. We therefore respectfully submit that the refusal of Instruction D-17 on comparative fault was in contravention of Mississippi's well-established system of comparative fault and that such requires a reversal and remand of this case. Miss. Code Ann. § 11-7-15; *Burton v. Barnett*, 615 So.2d 580, 582 (Miss. 1993).

B. THE EVIDENCE SUPPORTED AN INSTRUCTION ON COMPARATIVE FAULT (INSTRUCTION D-17).

As noted above and (with more detail) in our chief Brief, the parties essentially agreed at the trial that it was proper to instruct the jury regarding the negligence of Plaintiff, in addition to instruction on the negligence of Defendant. Brent states in her Brief that "Wansley's argument that Brent could also have been at fault was based on § 63-3-603."[1] Such characterization

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[1] This statute prohibits vehicles from switching lanes until the driver ascertains that the movement would be safe, and also prohibits traveling in a center lane turn lane to pass another vehicle unless the roadway is clearly visible and the center lane is clear of traffic within a safe distance.

of our position is, at best, incomplete. The jury could have found that Brent was at fault under Instruction D-18 by failing to maintain a proper lookout, failing to exercise reasonable care, or failing to keep her vehicle under proper control as required by the road conditions at the time. (R.E. 8, R. 49). Instruction D-18 was granted by the Trial Court, with the agreement (withdrawal of objection) of Plaintiff. (Trial Transcript, R.E. 77, Lines 7-9). Brent does not argue that this Instruction was erroneous; therefore, the issue of focus for this appeal is limited to whether or not, where a negligence issue is properly present in the evidence as to both the Plaintiff and Defendant, is a Defendant entitled to present a comparative negligence theory to the jury? We respectfully submit that the Defendant, at the trial of this case, was entitled to an instruction that would have allowed the jury to allocate fault to both Brent (Plaintiff) and Wansley (Defendant) and that the refusal of such requires a reversal and remand. (Instruction D-17, R.E. 6-7; R. 63-64).

The accident occurred as Brent was passing an eighteen-wheeler operated by Daniel Wiggins (which was stopped and waiting to turn into the Save-A-Lot parking lot) and as Wansley was pulling out from the Save-A-Lot parking lot. Brent testified that she was traveling between 35 and 40mph as she passed the eighteen-wheeler, even though it was raining and her wiper blades were activated. (Trial Transcript, R.E. 45, Lines 24-29; R.E. 46, Lines 1-3). She attempted to pass the eighteen-wheeler in that manner and in those

conditions even though she admitted that she "couldn't see what was on the other side of the truck" and was "prevent[ed] from seeing if someone was coming" out of the Save-A-Lot parking lot. (Trial Transcript, R.E. 16, Lines 28-29; R.E. 17, Lines 1-8). Brent also admitted that she did not even notice if the eighteen-wheeler's turn signal was activated. (Trial Transcript, R.E. 50, Lines 19-21). Traffic at that time was heavy and there were "lots of cars" on Hanging Moss Road. (Trial Transcript, R.E. 54, Lines 24-25). These conditions created a jury question as to whether Brent acted negligently by passing the eighteen-wheeler in that manner and in those conditions; all of which supported Instruction D-18. A comparative negligence instruction should therefore have been allowed.

There was also conflicting evidence regarding whether Brent entered the center turn lane to pass the eighteen-wheeler when it was unsafe to do so. Brent contends that she did not enter the turn lane; independent witness Wiggins testified that his eighteen-wheeler was "blocking" the southbound lanes of traffic and that he personally saw Brent pass his vehicle by entering the center turn lane. (Trial Transcript, R.E. 61, Lines 12-29; R.E. 62, Lines 1-12). That created a jury question as to whether Brent violated Miss. Code § 63-3-603 by entering the center turn lane to pass the eighteen-wheeler, even though Brent admittedly did not know whether it was safe to do so (i.e., her vision was obstructed and she did not know whether a car was attempting to exit the Save-A-Lot

parking lot in front of her lane of travel). Brent argues that Miss. Code §63-3-603 is inapplicable because Hanging Moss Road is a road that goes through or bypasses a municipality. (Pages 4-5 of Brent's Brief). However, Miss. Code §63-3-603 has been generally applied to drivers for accidents occurring in a municipality. *City of Jackson v. Sullivan*, 349 So.2d 527, 529 (Miss. 1977) (Miss. Code §63-3-603 applied to driver operating a vehicle in the city limits of Jackson, Mississippi).

Brent does not deny that her own negligence was properly before the jury under Instruction D-18. (R.E. 8, R. 49; see also Trial Transcript, R.E. 77, Lines 7-9). Plaintiff Brent does not contend that the instruction setting out a theory of potential negligence on her part (D-18) was erroneous or not supported by the evidence. Likewise, Defendant Wansley admits that the issue of her negligence was properly before the jury under Instructions P-10 and P-11 (R.E. 10, R. 38; R.E. 11, R. 39). However, Defendant Wansley was improperly denied her right to have the jury consider her comparative negligence defense, leaving the jury instead with only an "all or nothing" (all Plaintiff's fault or all Defendant's fault) decision. We respectfully submit that such is inconsistent with Mississippi law and the fair trial rights of Defendant Wansley. This situation, in fairness, required a comparative negligence instruction. We therefore respectfully contend that it was error for the Trial Court to deny the comparative negligence special verdict form Instruction D-17. (R.E. 6-7; R. 63-64).

C. APPELLEE'S POSITION IS INCONSISTENT WITH MISSISSIPPI'S COMPARATIVE FAULT LAW.

Mississippi was the first state in the nation to replace contributory negligence with a complete comparative fault standard. *Burton*, at 615 So.2d 582; 1910 Miss. Laws ch. 135 (codified, as amended, Miss. Code Ann. §§ 11-7-15 and 11-7-17). Mississippi's legislative enactment of pure comparative fault was motivated in no small part due to the insight that a pure comparative fault standard is "a fairer and more economically equitable standard of liability than that of the common-law rule of contributory negligence." *Mitchell v. Craft*, 211 So.2d 509, 514 (Miss. 1968). Comparative fault has been the law of Mississippi for over one hundred years and is a firmly rooted aspect of Mississippi jurisprudence.

Plaintiff Brent would have the Court hold that a Defendant can be deprived of instruction to Mississippi juries on the comparative fault defense even when it is agreed that the negligence of both parties is properly before the jury. Such position, if allowed, would indirectly eviscerate Mississippi's comparative fault system. It is contrary to the language and purpose of Miss. Code § 11-7-15 and the scores of Mississippi cases enforcing and affirming the right of Mississippians to have disputes resolved through comparative fault principles. *Boardman v. United Services Automobile Association*, 470 So.2d 1024, 1039 (Miss. 1985) (Mississippi's comparative negligence rules reflect "longstanding

public policies that may be said to be fundamental"). Here, Wansley was denied the benefit of Mississippi's comparative fault system. The jury was only instructed that they could find **either** that Brent **or** Wansley was negligent. We respectfully contend that the Trial Court erred when - after properly instructing the jury with regard to the negligence issues for both parties - it refused to allow the jury to allocate fault to both parties by refusing Instruction D-17.

D. *STRIBLING* DOES NOT SUBVERT THE APPLICABILITY OF MISSISSIPPI'S COMPARATIVE FAULT LAW; *ROTWEIN* IS INAPPLICABLE BECAUSE THERE WAS EVIDENCE OF BRENT'S NEGLIGENCE AT TRIAL.

Appellee Brent cites *Stribling v. Hauerkamp*, 771 So.2d 415 (Miss. App. 2000) and *Rotwein v. Holman*, 529 So.2d 173 (Miss. 1988) to support her contention that negligence on the part of Wansley would necessarily preclude consideration of whether Brent was also negligent. However, those cases are distinguished factually from the present case. *Stribling* does not state, as alleged by Appellee Brent, that "when a motorist enters the highway from a private driveway, that motorist is the **sole** cause of accident where it collides in the roadway with a motorist going within the speed limit." (Page 8 of Brent's Brief, emphasis in original). And if such a principle were to be applied and applied as new law in the present case, it would necessarily disregard and ignore the numerous elements and evidence of negligence on the part of Brent that are here present; it would also disregard Brent's own concession at trial that an instruction on her own negligence was

proper to give to the jury in this case. *Stribling,* to the contrary, found that it was appropriate to grant a directed verdict in favor of a party **when there was no evidence that he acted negligently.** *Stribling*, at 771 So.2d 417-18 (it was mathematically impossible for defendant to avoid the collision with plaintiff, who was crossing highway).

Rotwein is likewise distinguished and does not support Brent's assertion that, even if actual negligence issues are present on the proof at trial, no comparative negligence instruction should be allowed to be considered by the jury. There was no evidence in *Rotwein* that the Plaintiff was negligent. The trial court in that case therefore properly granted a peremptory instruction finding that the defendant was liable for the accident and that the sole remaining issue was the amount of damages sustained by plaintiff.

Stribling and *Rotwein* are inapplicable to the issues presented in the instant case because there **was** evidence at the trial of this case that Brent acted negligently and Brent even withdrew objection to the Instruction (D-18) on that point/issue. *Stribling* and *Rotwein* do not subvert the validity and applicability of Mississippi's comparative fault system to cases involving negligence on the part of both the Plaintiff and Defendant, as Brent would suggest.

Brent states that "the cases cited by Wansley are all inapplicable here" and goes on to argue why *McRee v. Haney*, 493 So.2d 1299 (Miss. 1986) and *Nobles v. Unruh*, 198 So.2d 245 (Miss.

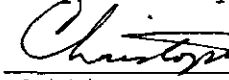
1967) do not apply. (Page 6 and 7 of Brent's Brief). However, Wansley has not cited those cases to this Court, so we are at somewhat of a loss as to the intended point of that argument to this Court. We would nevertheless respectfully submit two major points as being decisive and requiring the reversal and remand of this case: 1) it was agreed at the trial of this case that presentation of jury instructions on the negligence of both the Defendant and the Plaintiff was proper, and not subject to objection; and 2) the refusal of an instruction to allow the jury to find negligence on the part of both parties and to allocate proportionate fault between Plaintiff and Defendant deprived Ms. Wansley of her comparative negligence defense.

CONCLUSION

The Trial Court instructed the jury that it could find that **either** Brent (Plaintiff) **or** Wansley (Defendant) was negligent, but refused to instruct the jury that it could find that **both** parties were at fault and to allocate percentages accordingly. Plaintiff Brent's negligence was presented at trial, and Brent did not deny that it was appropriate for the Trial Court to submit the issue of her negligence to the jury under Instruction D-18. Defendant Wansley respectfully submits that the County Court committed reversible error in denying her the benefit of a properly applicable comparative fault system when it refused to instruct the jury on Mississippi's law of comparative negligence (and that the Circuit Court subsequently erred in refusing to grant Wansley a new

trial on the appeal to that level). The Appellant and lower court Defendant, Wansley, therefore respectfully prays for a reversal and remand of this case to the County Court of the First Judicial District of Hinds County, Mississippi, and for an Order and Mandate to such effect, with all costs and assessments of this appeal to be made against the Appellee.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have this day mailed by U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

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This the 20th day of January, 2011.

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CREDIT(S)

Laws 1938, Ch. 200, § 62; Laws 1977, Ch. 321, § 1; Laws 1983, Ch. 350, § 3, eff. July 1, 1983.

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