

IN THE SUPREME COURT OF MISSISSIPPI  
2010-CA-01045

LISA WANSLEY

APPELLANT

VS.

VICTORIA BRENT

APPELLEE

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

---

BRIEF OF THE APPELLANT

---

ORAL ARGUMENT REQUESTED

SUBMITTED BY:

Philip W. Gaines, Esq. (MSB # [REDACTED])  
Christopher D. Morris, Esq. (MSB # [REDACTED])  
Currie Johnson Griffin Gaines & Myers, P.A.  
1044 River Oaks Drive  
Jackson, Mississippi 39232  
Telephone: 601-969-1010

ATTORNEYS FOR THE APPELLANT,  
LISA WANSLEY

IN THE SUPREME COURT OF MISSISSIPPI  
2010-CA-01045

LISA WANSLEY

APPELLANT

VS.

VICTORIA BRENT

APPELLEE



CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that all listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1. Hon. Houston J. Patton,  
County Court Judge, Hinds County
2. Hon. Winston Kidd,  
Circuit Court Judge, Hinds County
3. Lisa Wansley,  
Appellant
4. Philip W. Gaines, Esq.,  
Christopher D. Morris, Esq.,  
Attorneys for Appellant
5. J. Scott Rogers, Esq.  
James, P. Streetman, Esq.  
Paige Herring, Esq.  
David L. Carney, Esq.  
Appellant/Defendant's Attorneys in the County/Circuit case
6. Victoria Brent,  
Appellee
7. Joe N. Tatum, Esq.,  
Attorney for Appellee

LISA WANSLEY

By: 

Philip W. Gaines, Esq. (MSB #   
Christopher D. Morris, Esq. (MSB # 

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES . . . . .	i
TABLE OF CONTENTS . . . . .	ii
TABLE OF AUTHORITIES . . . . .	iii
I. STATEMENT OF THE ISSUES . . . . .	1
II. STATEMENT OF THE CASE . . . . .	1
III. SUMMARY OF THE ARGUMENT . . . . .	4
IV. ARGUMENT . . . . .	6
THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON COMPARATIVE FAULT (INSTRUCTION D-17) . . .	6
A. STANDARD OF REVIEW . . . . .	6
B. THE TRIAL COURT DID NOT FAIRLY AND ACCURATELY INSTRUCT THE JURY ON MISSISSIPPI'S LAW OF COMPARATIVE FAULT . . . . .	8
C. REVERSAL IS REQUIRED AS THE JURY INSTRUCTIONS RESULTED IN ACTUAL CONFUSION AMONG THE JURY AND/OR ACTUALLY MISLED THE JURY . . . . .	13
D. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON WANSLEY'S PROOF-GROUNDED THEORY ON AN ISSUE OF MATERIAL FACT . . . . .	15
V. CONCLUSION . . . . .	16
VI. CERTIFICATE OF SERVICE . . . . .	17
VII. ADDENDUM . . . . .	18

## TABLE OF AUTHORITIES

### Cases

<i>Boyd Tunica, Inc. v. Premier Transp. Services, Inc.</i> , 30 So.3d 1242 (Miss. Ct. App. 2010) . . . . .	6
<i>Burton v. Barnett</i> , 615 So.2d 580 (Miss. 1993) . . . . .	9-10
<i>Clark v. Clark</i> , 863 So.2d 1027 (Miss. Ct. App. 2004) . . . . .	6-7
<i>Hill v. Dunaway</i> , 487 So.2d 807 (Miss. 1986) . . . . .	7
<i>PACCAR Financial Corp. v. Howard</i> , 615 So.2d 583 (Miss. 1993) . . . . .	6
<i>Utz v. Running &amp; Rolling Trucking, Inc.</i> , 32 So.3d 450 (Miss. 2010) . . . . .	6, 7, 13
<i>Young v. Guild</i> , 7 So.3d 251 (Miss. 2009) . . . . .	6, 7, 15

### Statutes

Miss. Code §11-7-15 . . . . .	9, 14, 19
-------------------------------	-----------

### STATEMENT OF THE ISSUES

There are many overlapping issues in this case, such as the correctness of denying remittitur, a grant of judgment notwithstanding the verdict, and/or a grant of a new trial. Wansley submits, however, that the significant underlying dispositive issue of the case is:

WHETHER THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY ON COMPARATIVE FAULT WHEN EVIDENCE OF NEGLIGENCE ON THE PART OF BOTH PLAINTIFF AND DEFENDANT WAS PRESENT.

That issue affects, and is the substantive underlying basis of, the resulting rulings that are appealed herein.

### STATEMENT OF THE CASE

This case arises from a motor vehicle accident that occurred on August 10, 2006, in Jackson, Mississippi. The Appellee, Victoria Brent, filed suit against the Appellant, Lisa Wansley, in the County Court of Hinds County, Mississippi, on October 13, 2006. The case was tried before Honorable Houston J. Patton. The jury returned a verdict in favor of Brent in the amount of fifty-five thousand dollars (\$55,000.00). (Final Judgment, R.E. 80, R. 69). Wansley filed a Motion for JNOV, New Trial, or alternatively, Remittitur. (R.E. 81-97, R. 70-86). The County Court denied Wansley's Motion. (Order, R.E. 98, R. 108).

Wansley appealed to the Circuit Court of Hinds County on the basis that the County Court erred in refusing to instruct the jury on comparative fault/negligence per se and in denying Wansley's post-trial motions. (Statement of the Issues, R. 117-119). The

Circuit Court, through Honorable Winston L. Kidd, affirmed the County Court, holding in pertinent part that the jury's verdict was "...not based on inadequate instructions of law." (Opinion and Order, R.E. 100, R. 140). We seek reversal of that Circuit Court ruling and a remand of this case for trial in order to allow a comparative fault determination to be included in the jury's analysis.

The motor vehicle accident occurred at the intersection of Hanging Moss Road and the entrance of the Save-A-Lot Parking Lot. Hanging Moss Road has two northbound lanes, a center turn lane, and two southbound lanes. Daniel Wiggins, an independent witness to the accident, was driving an eighteen-wheeler carrying cardboard boxes stacked thirteen feet high. (Trial Transcript, R.E. 52, Lines 26-29; R.E. 56, Lines 12-14). Witness Wiggins' eighteen-wheeler was straddling the line between the two southbound lanes of Hanging Moss Road, as he needed to make a wide right turn to enter the Save-A-Lot parking lot. (Trial Transcript, R.E. 61, Lines 3-16). Defendant Wansley was waiting to turn left onto Hanging Moss, out of the Save-A-Lot parking lot. Witness Wiggins came to a complete stop and waited for approximately two or three minutes while waiting for Defendant Wansley to turn. (Trial Transcript, R.E. 55, Lines 20-22; R.E. 56, Lines 1-7). Plaintiff Brent was traveling south on Hanging Moss Road, approaching from behind Witness Wiggins. Wiggins testified that Brent passed his vehicle by "completely" entering the center turn lane. (Trial Transcript, R.E.

61, Lines 23-29; R.E. 62, Lines 1-12). As Brent passed Wiggins' vehicle, Wansley pulled out from the Save-A-Lot parking lot and their vehicles collided. (Trial Transcript, R.E. 62, Lines 1-12). At trial, Brent testified that she did not know whether Wiggins' vehicle was straddling the two southbound lanes, but she claimed, contrary to Wiggins' testimony, that she did not enter the center lane. (Trial Transcript, R.E. 47, Lines 13-29; R.E. 48, Lines 1-2).

The Trial Court instructed the jury that Plaintiff Brent would be negligent if they found by a preponderance of the evidence that she failed to maintain a proper lookout, failed to use reasonable care, or failed to keep her vehicle under proper control. (Instruction D-18, R.E. 8, R. 49). Brent's counsel initially objected to this instruction, but withdrew his objection. (Trial Transcript, R.E. 77, Lines 7-9). The Trial Court similarly instructed the jury that Defendant Wansley would be negligent if they found by a preponderance of the evidence that she failed to yield the right of way or failed to keep a proper lookout. (Instruction P-10, R.E. 10, R. 38; and Instruction P-11, R.E. 11, R. 39).

At trial, Counsel for Wansley proffered a comparative negligence instruction, Number D-17, seeking instruction to the jury on how to make a ruling if they found both Plaintiff and Defendant to be guilty of negligence, in conformity with Mississippi's legal rule for comparative fault negligence cases. (Instruction D-17, R.E. 6-7, R. 63-64). The Trial Court rejected

that proposed Instruction D-17, and instead only instructed the jury that it could find that *either* Brent or Wansley was negligent. (Trial Transcript, R.E. 76, Lines 11-17; see also Instruction P-2, R.E. 9, R. 33; Instruction D-18, R.E. 8, R. 49; Instruction P-10, R.E. 10, R. 38; Instruction P-11, R.E. 11, R. 39). The jury was not instructed, consistent with Mississippi's comparative negligence law, that they could find **both** Plaintiff **and** Defendant to be at fault, with an appropriate correlating percentage allocation and/or damages award reduction.

During closing argument, Plaintiff's Counsel asked the jury to return a verdict in Plaintiff's favor in the amount of \$55,000.00. (Opinion and Order; R.E. 99-100, R. 139-140). During deliberations, the jury sent out a note asking, "May we award a lesser amount?" (Note, R.E. 79; see also Opinion and Order, R.E. 99, R. 139). The Trial Judge responded with an admonition to "Just follow jury instructions." (Note, R.E. 79; see also Opinion and Order, R.E. 99-100, R. 139-140). The jury then returned their verdict against the Defendant in the amount of \$55,000. (Final Judgment, R.E. 80, R. 69).

#### SUMMARY OF THE ARGUMENT

**THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON COMPARATIVE FAULT (INSTRUCTION D-17).**

Both parties in the case, as well as the Trial Court rulings, were in agreement on the point that it was proper to submit the issue of each parties' negligence to the jury. However, we



respectfully submit that it was error to refuse to allow the jury to consider a finding of the presence of negligence on **both** Plaintiff and Defendant, as opposed to limiting them to only a Plaintiff **or** Defendant negligence finding in this case. The Trial Court improperly refused to allow the jury to make a comparative fault analysis. Even when the jury then sent out a note implying that their deliberations on the evidence gave rise to a comparative negligence situation, they were admonished to conform their deliberations to the instructions that erroneously excluded a comparative negligence option.

Wansley proffered Instruction D-17, which would have allowed the jury to allocate fault between both parties in accordance with Mississippi's comparative negligence law. The Trial Court rejected Instruction D-17, instead effectively telling the jury that they could only find that either Brent or Wansley was negligent. We respectfully contend that the Trial Court's rejection of Instruction D-17 constitutes reversible error because the jury instructions given by the Court: (1) did not fairly and accurately reflect Mississippi law on comparative fault; (2) caused actual confusion among and misled the jury; and (3) did not allow the Defendant's proof-grounded comparative negligence defense to be effectively considered as an option by the fact-finders in the case. We also respectfully submit that this error was highlighted and compounded on the record by the Court's response when the jury's inquiry note was sent out, and that the overall evidence and

record required a subsequent grant of the Defendant's request for a new trial.

### ARGUMENT

**THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON COMPARATIVE FAULT (INSTRUCTION D-17).**

#### **A. STANDARD OF REVIEW**

In reviewing the denial of a proposed jury instruction, the "primary concern" of Mississippi's Appellate Courts is that "the jury was fairly instructed and that each party's proof-grounded theory of the case was placed before it." *Young v. Guild*, 7 So.3d 251, 259 (Miss. 2009). A party has a right to jury instructions that present her theory of the case if those instructions correctly state the law and are based on the evidence. *Utz v. Running & Rolling Trucking, Inc.*, 32 So.3d 450, 474 (Miss. 2010); see also *PACCAR Financial Corp. v. Howard*, 615 So.2d 583, 590 (Miss. 1993) (a party is entitled to jury instructions on "all material issues presented in the pleadings or evidence"); and *Boyd Tunica, Inc. v. Premier Transp. Services, Inc.*, 30 So.3d 1242, 1247-48 (Miss. Ct. App. 2010) (a party is entitled to jury instructions on a "genuine issue of material fact" based on "credible evidence").

Consideration of the refusal of a jury instruction requires that the evidence relevant to that proffered instruction be viewed in the light most favorable to the party requesting the instruction:

...The refusal of a timely requested and correctly phrased jury instruction on a genuine issue of material fact is

proper, only if the trial court - and this Court on appeal - can say, taking the evidence in the light most favorable to the party requesting the instruction, and considering all reasonable favorable inferences which may be drawn from the evidence in favor of the requesting party, that no hypothetical, reasonable jury could find the facts in accordance with the theory of the requested instruction.

*Clark v. Clark*, 863 So.2d 1027, 1032 (Miss. Ct. App. 2004); quoting *Hill v. Dunaway*, 487 So.2d 807, 809 (Miss. 1986). In the present case, there is no real dispute on that aspect of this analysis - both parties agreed with the Trial Court's rulings that sufficient evidence was present to submit negligence instructions with regard to both Plaintiff and Defendant. Our aggrievement and contention in this appeal is that the Court erred in not allowing - after proper submission of negligence instructions regarding both parties - the jury to then find that **both** parties were negligent and to apply the requisite comparative negligence law standard to that finding, rather than limiting them solely to the all or nothing alternative that **either** Plaintiff **or** Defendant could be found negligent.

A trial court commits reversible error by rejecting a proposed jury instruction if the granted instructions, as a whole, do not fairly present the applicable law. *Utz*, at 32 So.3d 474; *Young*, at 7 So.3d 259. Reversal is also appropriate when the granted instructions are "likely to mislead or confuse the jury as to the principles of the law applicable to the facts in evidence." *Young*, at 7 So.3d 259. We respectfully submit that the either/or negligence option given by the esteemed authoritative Trial Court

in this case, with refusal to allow the jury to be instructed on the comparative negligence option, did not fairly present the applicable Mississippi law and misled the jury into believing, in conformity with the instructions and the subsequent admonition regarding those instructions when they inquired about their options, that they must find **either** Plaintiff **or** Defendant at fault. Such was a denial of Defendant's Due Process right to have her comparative negligence defense considered by the ultimate fact-finder in this case. We therefore contend that reversal is warranted, with Defendant to be given another trial on proper and fair instructions that allow a comparative negligence consideration by the jury.

**B. THE TRIAL COURT DID NOT FAIRLY AND ACCURATELY INSTRUCT THE JURY ON MISSISSIPPI'S LAW OF COMPARATIVE FAULT.**

The jury was instructed that they could find that *either* Brent or Wansley was negligent. However, the Trial Court refused to instruct the jury that *both* parties could be negligent or telling them how to apply the rules of Mississippi's comparative negligence law to such a finding.

The Trial Court properly gave Jury Instruction D-18 on the issue of Plaintiff Brent's 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.

Plaintiff Brent withdrew her initial objection to that instruction. (Trial Transcript, R.E. 77, Lines 7-9). The Trial Court likewise properly instructed the jury that Defendant Wansley would be negligent if they found by a preponderance of the evidence that she failed to yield the right of way or failed to keep a proper lookout. (Instruction P-10, R.E. 10, R. 38; Instruction P-11, R.E. 11, R. 39). However, the Court refused to allow Defendant's proffered instruction on comparative negligence, even though the other Court rulings necessarily confirmed the propriety of application of that legal doctrine to this case. As a matter of logical consistency, if comparative negligence is disallowed, how could the fact-finder still otherwise properly consider a negligence option on both the Plaintiff and Defendant in this case? Or, in accordance with the standard of analysis required for proffered jury instructions, perhaps the question is more aptly and specifically presented as: If the jury could properly find on the evidence, in accordance with the instructions given to them, that a failure to maintain a proper lookout could render either driver guilty of negligence, then how can that same jury be barred from allocating percentages of fault if they find that both drivers are guilty?

Mississippi is a comparative fault state. Miss. Code Ann. § 11-7-15. Under the comparative fault doctrine "negligence is

measured in terms of percentage, and any damages allowed shall be diminished in proportion to [the] amount of negligence attributable to the [plaintiff]." *Burton v. Barnett*, 615 So.2d 580, 582 (Miss. 1993). The Trial Court gave Jury Instruction P-2:

If you reach a verdict for the Plaintiff in this case, it should be written on a separate piece of paper, need not be signed by you, and may be in the following form:

"We the jury, find for the Plaintiff, Victoria Brent, and assess her actual damages at \$\_\_\_\_\_."

If you reach a verdict for the Defendant in this case, it should be written on a separate piece of paper, need not be signed by you and may be in the following form:

"We the jury, find for the Defendant."

(Instruction P-2, R.E. 9, R. 33). At trial, Defendant Wansley's attorney (Mr. Rogers) contended to the Court that this instruction was inadequate, seeking an alternative instruction with the requisite comparative fault options available on the jury verdict form. Plaintiff Brent's counsel disagreed with this, and the Court choose to proceed solely with the "find for either party" option:

MR. TATUM: We will withdraw number 1. Number 2 we'd ask the Court to give. It gives the jury an opportunity to find for either party.

MR. ROGERS: I don't think that does, Your Honor, especially the portion of fault. I suggest we use our special verdict form [Instruction D-17]. I don't think Mr. Tatum made an objection to it earlier.

MR. TATUM: I haven't heard any evidence that Ms. Brent actually caused the accident.<sup>1</sup> You didn't even put

---

<sup>1</sup>As noted above, Brent conceded that the issue of her negligence was properly before the jury, as she withdrew her objection to Instruction D-18.

on a witness. We are asking P-2 be given.

THE COURT: P-2 is a pretty standard instruction, so we will give P-2.

(Trial Transcript, R.E. 66, Lines 3-17). Defendant Wansley's attorney here sought to have the jury instructed on Mississippi's law of comparative negligence through the proffered special verdict form [Instruction D-17], which stated:

In returning your verdict in this case, you are to consider all of the facts and instructions of law given to you, and then return your verdict by completing this form. When a verdict has been reached by five (5) or more members of the jury, write out your answers to the following questions on this form and notify the bailiff that you have reached a verdict.

1. Do you find from a preponderance of the evidence that the Plaintiff, Victoria Brent, was guilty of any negligence (fault) which was a proximate contributing cause to her own injuries?

\_\_\_\_ YES  
\_\_\_\_ NO

2. If your answer to Question No. 1 is "YES", please state the percentage of negligence (fault) for the Plaintiff, Victoria Brent, as compared to all of the negligence (fault) which caused her own damages.

\_\_\_\_ PERCENT

3. Do you find from a preponderance of the evidence that the Defendant, Lisa Wansley, was guilty of any negligence (fault) which was a proximate contributing cause to the plaintiff's damages?

\_\_\_\_ YES  
\_\_\_\_ NO

4. If your answer to Question No. 3 is "YES", please state the percentage of negligence (fault) for the Defendant, Lisa Wansley, as compared to all of the

negligence (fault) which caused the plaintiff's damages.

\_\_\_\_\_ PERCENT

If you find that any of the aforementioned persons is not guilty of any negligence, enter a "0" (zero) in the blank for that person. THE TOTAL PERCENTAGES IN QUESTIONS NUMBERED 2 AND 4 MUST EQUAL 100 PERCENT.

5. What is the total amount of damages incurred by the plaintiff, Victoria Brent as a result of the accident in question?

\$ \_\_\_\_\_

(Instruction D-17, R.E. 6-7, R. 63-64).<sup>2</sup> In arguing that this Instruction should be given, counsel for Wansley stated to the Trial Court that:

Your Honor, the Court needs to instruct the jury on contributing cause. She [(Brent)] may have contributed to the accident. The jury should be given that.

(Trial Transcript, R.E. 74, Lines 12-16). The Trial Court nevertheless refused to grant Instruction D-17. (Trial Transcript R.E. 76, Lines 11-17).

Mississippi's comparative fault principles are applicable to this case as it is undisputed that the issue of both parties'

---

<sup>2</sup>Numerous alternative comparative negligence special verdict forms are now circulating among trial court practitioners and judges. Appellant's counsel herein is frankly of the opinion that the form frequently utilized by then Circuit Judge James E. Graves, Jr., and the late Circuit Judge Robert G. Evans is probably superior to the form proffered as Instruction D-17 in this case. We note that guidance on this issue from this Court as to the preferred general comparative negligence form may be helpful to trial court practitioners and judges. However, the point of this issue in this appeal is that the refusal of the proffered Instruction D-17 deprived the Defendant of her right to a fair submission of her comparative negligence defense as an option to the fact-finder in this case.



negligence was properly before the jury. However, the jury was instructed only that they could find that either Brent or Wansley was negligent. The Trial Court refused to instruct the jury that they could find that *both* parties were negligent and to allocate the percentages of such negligence in conformity with the complete evidence and law for the case. The jury was instead only instructed with an "all or nothing" approach to negligence, which is, of course, inconsistent with Mississippi law. Reversal is required where, as here, the jury instructions did not fairly and accurately reflect Mississippi's applicable law. *Utz*, at 32 So.3d 474; *Young*, at 7 So.3d 259.

**C. REVERSAL IS REQUIRED AS THE JURY INSTRUCTIONS RESULTED IN ACTUAL CONFUSION AMONG THE JURY AND/OR ACTUALLY MISLED THE JURY.**

Reversal is appropriate when jury instructions are "likely to mislead or confuse the jury as to the principles of the law applicable to the facts in evidence." *Young*, at 7 So.3d 259. In this case it is evident that the instructions were not only "likely" to mislead or confuse the jury, the record confirms that the instructions actually did mislead and confuse the jury, especially when coupled with the admonition given when they inquired about their available options during deliberations.

The jury was instructed that Plaintiff Brent was negligent if she failed to maintain a proper lookout, failed to use reasonable care, and/or failed to keep her vehicle under proper control. (Instruction D-18, R.E. 8, R. 49). They were instructed that

Defendant Wansley was negligent if she failed to yield the right of way or keep a proper lookout as she exited the parking lot. (Instruction P-10, R.E. 10, R. 38; and Instruction P-11, R.E. 11, R. 39). The jury was instructed that they could find that either Brent or Wansley was negligent. (Instruction P-2, R.E. 9, R. 33; Instruction D-18, R.E. 8, R. 49; Instruction P-10, R.E. 10, R. 38; Instruction P-11, R.E. 11, R. 39). The jury was not provided any means to reconcile these instructions (i.e., how to proceed if *both* Brent and Wansley were negligent); in fact, they were not even allowed the option, under the limited instructions as given, to find both Brent and Wansley guilty of negligence, as the instructions contained only the either/or option.

With the absence of proposed Instruction D-17 (which would have given the jury a mechanism for allocating fault to both parties), the jury was given conflicting and confusing instructions. Their confusion is apparent in the record as they submitted the following written query to the Trial Court: "May we award a lesser amount?" (Note, R.E. 79; see also Opinion and Order, R.E. 99-100, R. 139-140). In response, the Court instructed the jury to "Just follow jury instructions." (Note, R.E. 79; see also Opinion and Order, R.E. 99, R. 139).

The Trial Court's response amounted to an instruction *not* to diminish Brent's damages, including by any percentage allocation of mutual fault, because the Court instructed the jury to "Just follow jury instructions" and the instructions referenced only the

either/or option. The purpose of Mississippi's comparative fault law is to allow negligent plaintiffs to recover their damages, *but diminished in proportion to their own negligence*. Miss. Code §11-7-15. The jury in this case was prohibited from doing so. Mississippi's comparative negligence rule of law is, to a large degree, also a rule of fairness, public policy, and general ethical sense/inclination. The jury's question and the Trial Court's response to it serve to highlight the propriety of Defendant's proffer of Instruction D-17, and the necessity of granting that instruction to prevent reversible error and the violation of Defendant's right to have the jury consider application of that rule in this case.

**D. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON WANSLEY'S PROOF-GROUNDED THEORY ON AN ISSUE OF MATERIAL FACT.**

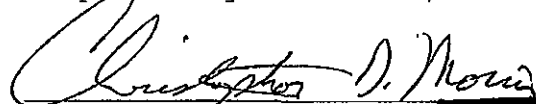
Defendant Wansley's contention at the trial of this case - a contention supported by the evidence, as a valid jury question for decision by the fact-finder - was that Plaintiff Brent's negligence wholly caused the accident *or, at least, contributed to it*. (Trial Transcript, R.E. 74, Lines 12-16). As discussed above, there is no dispute that Plaintiff Brent's negligence was properly before the jury. (Trial Transcript, R.E. 77, Lines 7-9; Instruction D-18, R.E. 8, R. 49). Defendant Wansley's proffered Instruction D-17 sought to allow the jury to consider this consistently with Mississippi's comparative negligence law. We respectfully submit on appeal that the Trial Court's refusal to allow presentation of that option to

the jury, through its refusal of Instruction D-17 and its subsequent admonition to the jury to just follow the limited instruction options provided to them, deprived the Defendant of a fair trial. On the evidence, the jury could have found that **both** Plaintiff **and** Defendant Wansley were negligent, but they were denied that option in the instructions of the Court (that they had of course sworn they would follow).

#### CONCLUSION

Civil defendants have a due process right to jury instructions that fairly set out all relevant defenses, and which allow the fact-finder to apply relevant Mississippi law to the contested evidence before them. The jury in this case was instructed that it could find that **either** party was at fault, but was not allowed the requisite instruction that it could find **both** parties to be at fault. Wansley respectfully submits that the Trial Court committed reversible error on this point and that the Circuit Court likewise erred in not reversing the Trial Court and granting Defendant a new trial. The Appellant and lower court Defendant, Wansley, therefore respectfully prays for a reversal and remand of this case and for an Order and Mandate to such effect, with all costs of this appeal to be assessed against the Appellee.

Respectfully submitted,



Philip W. Gaines (MSB# [REDACTED])  
Christopher D. Morris (MSB# [REDACTED])

**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:

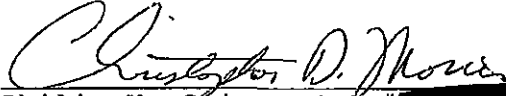
Ms. Kathy Gillis  
Mississippi Supreme Court Clerk  
P.O. Box 117  
Jackson, Mississippi 39205

Hon. Houston J. Patton  
P.O. Box 327  
Jackson, Mississippi 39205

Hon. Winston Kidd  
P.O. Box 327  
Jackson, Mississippi 39205

Joe N. Tatum, Esq.,  
Tatum & Wade, PLLC  
P.O. Box 22688  
Jackson, Mississippi 39225  
*Attorney for Appellee/Plaintiff*

This the 12<sup>th</sup> date of October, 2010.

  
Philip W. Gaines (MSB# [REDACTED])  
Christopher D. Morris (MSB# [REDACTED])



**C**

West's Annotated Mississippi Code Currentness

Title 11. Civil Practice and Procedure

Chapter 7. Practice and Procedure in Circuit Courts

In General

→ § 11-7-15. Comparative negligence

In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact that the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property.

Current through the 2010 Regular and 1st Extraordinary Sessions

(C) 2010 Thomson Reuters. No Claim to Orig. US Gov. Works.

END OF DOCUMENT