IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CA-01045-COA

LISA WANSLEY **APPELLANT**

v.

VICTORIA BRENT **APPELLEE**

DATE OF JUDGMENT:	12/23/2009
TRIAL JUDGE:	HON. WINSTON L. KIDD
COURT FROM WHICH APPEALED:	HINDS COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	PHILIP W. GAINES JAMES SCOTT ROGERS JEREMY TRISTAN HUTTO CHRISTOPHER DAVID MORRIS
ATTORNEY FOR APPELLEE:	JOE N. TATUM
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	JURY VERDICT IN FAVOR OF BRENT FOR $55,000
DISPOSITION:	REVERSED AND REMANDED: 09/13/2011
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

GRIFFIS, P.J., FOR THE COURT:

¶1. Victoria Brent filed suit against Lisa Wansley in the County Court of Hinds County for personal injuries arising from a car accident. The jury returned a verdict in favor of Brent in the sum of $55,000. Wansley appealed, and the Circuit Court of Hinds County affirmed the judgment. Wansley again appealed, and her appeal was deflected to this Court. Here, Wansley argues that the trial court erred when it refused to instruct the jury on comparative

negligence. We find reversible error and remand for a new trial.

FACTS

¶2. On August 10, 2006, Brent left her office to go to lunch. She was traveling south on Hanging Moss Road, in Jackson, Mississippi. She was involved in an accident that occurred on Hanging Moss Road at the entrance to the parking lot of Save-A-Lot, a grocery store. At this location, Hanging Moss Road has two northbound lanes, a center turn lane, and two southbound lanes.

¶3. Daniel Wiggins was the driver of an eighteen-wheel tractor trailer. Wiggins's truck was also headed south on Hanging Moss Road. Wiggins testified that his truck was waiting to make a right turn into the Save-A-Lot parking lot. He said that his truck was straddling the line between the two southbound lanes of Hanging Moss Road. Wiggins testified that he could not enter the parking lot because Wansley's vehicle was at the entrance. Wansley was waiting to turn left to travel north on Hanging Moss Road. Wiggins testified that he could not enter the parking lot while Wansley's vehicle was at the entrance, so he waited for her to move.

¶4. Brent was traveling south and approached from Wiggins's rear. Wiggins testified that Brent entered the center turn lane to pass his truck. As Brent did so, Wansley pulled out from the Save-A-Lot parking lot. Their vehicles collided.

¶5. Brent testified at trial that she did not know whether Wiggins's truck was straddling the two southbound lanes, but she claimed, contrary to Wiggins's testimony, that she did not enter the center lane.

¶6. The trial consisted of testimony from only Brent and Wiggins. At the conclusion of

the evidence, the trial court gave several jury instructions. The trial judge gave an instruction (P-10) that would allow the jury to find Wansley negligent and render a verdict for Brent. Wansley asked for an instruction (D-17) that would allow the jury to assess comparative fault of both Wansley and Brent, but the trial court refused to give this instruction. Wansley also asked for an instruction (D-18) that would allow the jury to find Brent negligent and render a verdict for Wansley. Instruction D-18 reads:

> Should you find from a preponderance of the evidence that the Plaintiff [(Brent)] committed one or more of the following acts:
>
> 1. Fail[ed] 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 [Brent] was negligent. Should you further find by a preponderance of the evidence that the negligence of [Brent] caused the accident in question, then your verdict shall be for the Defendant [(Wansley)].

¶7. The following discussion occurred about Instruction D-18 during the jury-instruction conference:

> Brent's counsel: Again, this is a generic thing that does not fit, does not incorporate any of the facts. Quite frankly, it's extremely vague. We don't dispute that plaintiff had certain duties, but just to pop up into the jury's face and say if you find the plaintiff did commit this, this, and this but don't say – it doesn't incorporate the facts, Your Honor. I think it's a vague and improper instruction.
>
> Wansley's counsel: Your Honor, it is the same as 10 and 11. The plaintiff gets two; we get two. There's nothing here that is wrong. The plaintiff has a duty to maintain a proper lookout. She has a duty to use reasonable care and to keep her vehicle under control.

> Brent's counsel: Just to move it on, we will withdraw our objection to D-18. The Court can give it.

¶8. The jury was instructed it could find that either Brent or Wansley was negligent. The jury was not permitted to consider and find comparative negligence. The jury returned a verdict against Wansley in the amount of $55,000. The trial court entered a final judgment consistent with the jury's verdict, and it is from this judgment that Wansley appeals.

STANDARD OF REVIEW

¶9. In *Burton ex rel. Bradford v. Barnett,* 615 So. 2d 580, 583 (Miss. 1993), the Mississippi Supreme Court held:

> On appeal, this Court does not review jury instructions in isolation; rather, they are read as a whole to determine if the jury was properly instructed. Defects in specific instructions do not require reversal "where all instructions taken as a whole fairly – although not perfectly – announce the applicable primary rules of law." However, if those instructions do not fairly or adequately instruct the jury, we can and will reverse.

(Internal citations omitted).

ANALYSIS

¶10. The only issue on appeal is whether the trial court erred when it failed to instruct the jury on comparative fault. Here, Brent withdrew her objection to the instruction offered by Wansley that allowed the jury to be instructed it may find that either Brent or Wansley was negligent. Yet the jury was not permitted to find comparative negligence.

¶11. Wansley argues that the trial court's rejection of the comparative-fault instruction (D-17) constitutes reversible error because: (1) the instructions granted did not reflect Mississippi law on comparative fault; (2) the instructions caused confusion among the jurors; and (3) the instructions did not allow the defendant's comparative-negligence theory of the

case to be considered by the jury.

¶12. Wansley is correct. Mississippi Code Annotated section 11-7-15 (Rev. 2004) provides:

> In all actions hereafter brought for personal injuries, . . ., the fact that the person injured, . . . 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.

Indeed, in *Burton*, the supreme court held that "Mississippi is a pure comparative[-]negligence state." *Burton*, 615 So. 2d at 582 (citations omitted). The supreme court explained:

> Under the comparative[-]negligence doctrine, negligence is measured in terms of percentage, and any damages allowed shall be diminished in proportion to amount of negligence attributable to the person for whose injury, damage[,] or death recovery is sought. Where negligence by both parties is concurrent and contributes to injury, recovery is not barred under such doctrine, but plaintiff's damages are diminished proportionately, even to the extent that negligence on the part of the plaintiff was ninety percent (90%) and on the part of the defendant was ten percent (10%), the plaintiff would be entitled to recover theoretically that ten percent. Therefore, a plaintiff, though himself negligent, may still recover from a defendant whose negligence contributed to his injuries. Comparative negligence thus diminishes but does not bar recovery.

Id. (citations omitted).

¶13. Wansley argues that if a jury can properly find that failure to maintain a proper lookout could render either driver guilty of negligence, then logically it should follow that both drivers could potentially have been negligent, and the jury was entitled to the option of apportioning fault or damages between the two parties. She is correct.

¶14. Brent argues that when a motorist enters a highway from a private driveway, that motorist is the sole cause of any resulting accident. Brent cites *Stribling v. Hauerkamp*, 771

So. 2d 415, 417 (¶11) (Miss. Ct. App. 2000). The legal principle cited by Brent is simply not the holding in *Stribling*. Rather, in *Stribling*, this Court concluded that a directed verdict is appropriate where there is no evidence that the plaintiff acted negligently in an automobile-collision case where the defendant negligently attempted to cross a highway and was struck by the plaintiff's car. *Id.* at 418 (¶14).

¶15. Brent also argued that refusal to grant a comparative-negligence instruction was supported by *Rotwein v. Holman*, 529 So. 2d 173, 174-75 (Miss. 1988). There, the defendant rear-ended a car as she exited a parking lot. The defendant admitted negligence during voir dire, and the trial court gave a peremptory instruction on liability. *Id.* Here, there was no admission of negligence by Wansley. Instead, Brent conceded there was a potential question of fact on the issue of negligence. Brent withdrew her objection to instruction D-18 and agreed that the jury should be allowed to consider Brent's own negligence. Thus, by Brent's own admission, her negligence was a factual issue for the jury to decide.

¶16. Wansley also argues that the jury instructions resulted in confusion on the part of the jury. Wansley claims that the jury was faced with instructions that allowed it to find Wansley negligent or to find Brent negligent, but it could not find that both were negligent. Wansley points us to the fact that, during their deliberations, the jury sent out a note which asked: "May we award a lesser amount?" The trial judge responded with the following admonition: "Just follow jury instructions." The jury then returned their verdict against Wansley in the amount of $55,000. Wansley cites this as proof that the jury was confused whether they could apportion negligence between Brent and Wansley rather than finding one party solely negligent.

¶17. When taken in their entirety, we conclude that the jury instructions failed to instruct fairly or adequately the jury as to the law of comparative negligence and did not provide a format for an apportionment of fault or damages. Therefore, we reverse and remand this case for a new trial consistent with this opinion.

¶18. **THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS REVERSED, AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

LEE, C.J., MYERS, BARNES, ISHEE, ROBERTS AND MAXWELL, JJ., CONCUR. IRVING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY CARLTON, J. RUSSELL, J., NOT PARTICIPATING.

IRVING, P.J., DISSENTING:

¶19. In this personal-injury case, the jury found that Wansley, who did not testify, was solely responsible for the injuries sustained by Brent as a result of a two-vehicle accident between Brent and Wansley. The facts are simple. Wansley, without warning, pulled out from a parking lot into the southbound lanes of Hanging Moss Road in Jackson, Mississippi, and struck Brent's vehicle as it was proceeding south on Hanging Moss Road.

¶20. The majority finds that the circuit court erred in not giving a comparative-negligence instruction. I disagree. I would affirm the judgment of the circuit court which, based on the jury's verdict, awarded Brent $55,000 in damages.

¶21. The majority's reasoning may be succinctly summarized as follows: Since the circuit court gave instructions which permitted the jury to find either party liable for the accident, it was error not to allow a comparative-negligence instruction because if a party could be solely responsible for the accident, it logically follows that that party could also be partly

responsible. While this reasoning in the abstract may have merit, a vehicular accident does not occur in a vacuum. It occurs as a result of specific actions or omissions on the part of the vehicle's operator. Whether a particular operator caused or partly caused an accident is a question of fact that must be determined by analyzing the operator's actions or inactions in conjunction with applicable traffic rules and regulations, attendant to the specific circumstances on the ground. Furthermore, the law recognizes that there must be an evidentiary basis for granting jury instructions. *Young v. Guild*, 7 So. 3d 251, 259 (¶23) (Miss. 2009). They are never granted on the basis of some abstract theory or simply because another instruction may have been given, whether the other instruction was properly given or not.[1] There must be an evidentiary basis for each instruction.

¶22. As stated, the evidence is undisputed that Wansley pulled out of a parking lot into the flow of southbound traffic on Hanging Moss Road. It is undisputed that the southbound traffic had the right-of-way. It is likewise undisputed that Wansley was attempting to make a left turn to travel north on Hanging Moss Road. To accomplish her purpose, it is undisputed that Wansley had to travel across the southbound lanes. The majority does not explain how Brent, who was proceeding south in one of the southbound lanes of Hanging Moss Road, could be guilty of contributory negligence. Brent testified that the accident occurred in the inside or left lane of the southbound lanes of Hanging Moss Road. At that

[1] Indeed there was no evidentiary basis for granting the negligence instruction against Brent. It is clear that Brent's counsel recognized as much. Nevertheless, in order to move the proceedings along, he reluctantly agreed to allow the instruction to be given. However, that does not mean that the circuit court was then obligated to give another improper instruction.

point, there is no street intersection. The Save-a-Lot and Family Dollar parking lot is located to the right of the southbound lanes, and there is a driveway that allows traffic, from either direction on Hanging Moss Road, to enter the parking lot. The driveway intersects the outside or right southbound lane of Hanging Moss Road. Wansley proceeded from this driveway across the outside or right southbound lane and struck Brent's car that was proceeding, according to Brent, in the inside or left southbound lane.

¶23. Wiggins testified that his eighteen wheeler was blocking both of the southbound lanes of traffic while he was waiting to turn into the parking lot of Save-a-Lot, and that Brent moved into the turning lane to go around his truck. However, this testimony changes nothing. There is absolutely no evidence in the record that Wansley ever saw Brent's vehicle or Wiggins's truck. As stated, Wansley did not testify. Therefore, despite the conflicting testimony of Brent and Wiggins, Wansley receives no benefit from it because there is no evidence in the record that she predicated her action—pulling out into the southbound lane of traffic—on the mistaken notion that Brent was going to remain behind Wiggins's truck until Wansley cleared the driveway. Again, I repeat: Wansley did not testify; therefore, there is no evidence that her actions were influenced by what she perceived was going on in the southbound lanes when she pulled out.

¶24. It cannot be legitimately argued that Wiggins's testimony provided a sufficient evidentiary basis for granting a comparative-negligence instruction. I know of no traffic law that requires a southbound motorist to remain behind a southbound vehicle that is attempting to execute a right turn, even if the turning vehicle is blocking a portion or all of the two southbound lanes. If the southbound motorist can safely go around the turning vehicle

without impeding oncoming traffic, it may do so, even if it has to travel in a portion of a turning lane. Moreover, Wiggins's truck could not have been blocking all of the inner southbound lane unless he was attempting to make the right turn from that lane instead of from the right lane, which would have been illegal. Further, assuming that Wiggins's truck was blocking both of the southbound lanes, that fact would not have obviated Wansley's obligation to yield the right-of-way to southbound traffic. "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." Miss. Code Ann. § 63-3-807 (Rev. 2004). It is undisputed that Brent was traveling southbound and approaching the private driveway when Wansley pulled into Hanging Moss Road. Wansley may have thought that Wiggins's truck was blocking all of the southbound traffic and that she could safely pull out into Hanging Moss Road. However, she acted at her peril, as her obligation to yield the right-of-way was unaffected by what Wiggins did.

¶25. It necessarily follows that there was no evidentiary basis for giving a comparative-negligence instruction, as there is no evidence that Brent's action contributed to the accident even if she did move into the turning lane to proceed around Wiggins's truck. Her actions could not have contributed to the accident unless she did something that caused Wansley to proceed into the southbound lanes at a time when Wansley would not have done so but for Brent's action. There is absolutely no evidence to support such a theory. For the reasons presented, I dissent. I would affirm the judgment of the circuit court that awarded Brent $55,000 in damages for Wansley's sole negligence in causing the accident.

CARLTON, J., JOINS THIS OPINION.