IN THE COURT OF APPEALS 4/9/96

OF THE

STATE OF MISSISSIPP

NO. 93-CA-00149 COA

JOHN PATRICK BARRETT AND GELINDA JONES

APPELLANTS

v.

INTERNATIONAL PAPER COMPANY AND LARRY FISHER

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HINDS COUNTY

ATTORNEY FOR APPELLANT:

JAMES W. NOBLES, JR.

ATTORNEYS FOR APPELLEES:

THOMAS Y. PAGE & KATHLEEN S.

GORDON

NATURE OF THE CASE: CIVIL - PERSONAL INJURY

TRIAL COURT DISPOSITION: VERDICT FOR PLAINTIFF

BEFORE THOMAS, P.J., COLEMAN, AND PAYNE, JJ.

THOMAS, P.J., FOR THE COURT:

John Patrick Barrett and Gelinda Jones sued Larry Fisher for damages suffered during an automobile accident. Fisher's employer, International Paper Company, was also sued because its employee, Fisher, was acting in the scope of his employment when the accident occurred. The case was presented to the jury by the way of special interrogatories. The jury found that Barrett was eighty-eight percent (88%) negligent and that Larry Fisher was twelve percent (12%) negligent. The jury further found that the total damages suffered by Barrett were $1,000.00, and the total damages suffered by Jones were $2,400.00.

Feeling aggrieved of the jury verdict, Barrett and Jones appeals to this Court. Barrett assigns six alleged issues; Jones assigns four. Finding the appeal to have merit, we reverse the case for a new trial. Because we are reversing this case only on the issues presented by Jones and Barrett concerning jury instructions, we need not address the remaining issues.

FACTS

John Patrick Barrett and his employee, Gelinda Jones, were traveling eastbound in the inside lane of travel on I-20 near the Gallatin Street exit in Jackson, Mississippi. While proceeding east, a large dog ran across the interstate from their right to left. Cars in the two lanes immediately to the right of Barrett stopped their cars after the dog entered their respective lanes. As the dog entered Barrett's lane of travel, Barrett abruptly applied his brakes to prevent his car from striking the dog, bringing his car to a stop on the interstate.

Larry Fisher, an employee of International Paper Company, was driving a Ford pickup truck owned by International Paper, approximately two to three car lengths behind the car driven by Barrett and traveling at a speed of approximately fifty miles per hour. Fisher testified that he noticed Barrrett's brake lights come on and immediately applied the brakes in his truck but could not come to a stop before striking the rear of Barrett's automobile.

Prior to trial, both Barrett and Jones made a motion in limine seeking to have evidence of Barrett's and Jones's divorces from their respective spouses and their subsequent engagement to each other from being admitted into evidence. The trial court denied the motion finding that the testimony could come in to show bias. The trial court further found that there would be little or no prejudice from the admissions of the evidence.

The case was subsequently submitted to the jury. The trial court refused to grant a peremptory instruction as to Fisher's and International Paper's liability, and submitted the case to the jury with contributory negligence instructions. The trial court also refused to grant Jones an instruction which would have allowed her to recover against International Paper the entire amount of damages she sustained.

The jury returned a verdict finding that Barrett was eighty-eight 88% negligent while Fisher was twelve 12% negligent. The jury awarded Barrett $1,000.00 and awarded Jones $2,400.00. From this judgment both Barrett and Jones appeal to this Court.

DISCUSSION

WHETHER THE TRIAL COURT ERRED IN INSTRUCTING THE JURY.

Both Barrett and Jones argue that the jury was improperly instructed and because of this they are entitled to a new trial. This Court will look at Barrett's and Jones' case separately.

I.

BARRETT

Barrett argues that instructions D-2, D-2A, and D-15, were contrary to the facts and the laws of this state. The jury instructions in question were the following:

> INSTRUCTION D-2A
>
> The court instructs the jury that a motorist intending to stop in a traveled highway must use due and reasonable care for the safety of others following so close behind him that they might be imperilled by a sudden stop. Therefore, if you find from a preponderance of the evidence that Dr. John Patrick Barrett failed to use due and reasonable care for the safety of others following behind him when he attempted to avoid a dog crossing the interstate, then you must find that Dr. Barrett was negligent and you must reduce his recovery against the Defendants in the proportion to the happening of the accident and if his negligence was the sole proximate cause of the accident, you must return a verdict in favor of the Defendant.

> INSTRUCTION D-2
>
> The Court instructs the jury that a motorist is prohibited from suddenly decreasing his speed on the traveled portion of the roadway without first giving appropriate signal to the traffic traveling in the rear. Therefore, if you find from a preponderance of the evidence under the circumstances then and there existing that Dr. John Patrick Barrett did not give an appropriate signal to the traffic behind him of his intention to suddenly decrease his speed or that he could not, by exercising reasonable care, decrease his speed in sufficient time to give an appropriate signal, then you must find that Dr. Barrett was negligent.
>
> If you find that Dr. Barrett's negligence was the sole proximate cause of the accident, then you must return a verdict for the Defendants.
>
> If you find that Dr. Barrett's negligence was a proximate contributing cause to the accident, you must reduce the damages you award him, if any, in the proportion in which his negligence contributed to the accident.

> INSTRUCTION D-15
>
> If you find from a preponderance of the evidence that Larry Fisher and Dr. John Patrick Barrett were

both negligent, you must determine the extent to which each of their negligent acts contributed to the accident. You may find that Larry Fisher's negligence was the sole proximate cause of the accident or that Dr. Patrick Barrett's negligence was the sole proximate cause of the accident. Alternatively, you may find that the negligence of each contributed to the accident.

If you find that the negligence of Larry Fisher was the sole proximate cause of the accident, you must award a verdict in favor of Dr. John Patrick Barrett.

If you find that the negligence of Dr. John Patrick Barrett was the sole proximate cause of the accident, you must return a verdict in favor of Larry Fisher and international Paper Company.

If you determine that the negligence of both Larry Fisher and Dr. John Patrick Barrett contributed to the accident then you will determine the amount of Dr. Barrett's damages and reduce that sum in proportion that his negligence contributed to the accident.

Barrett argues that: (1) these instructions placed upon him a higher duty than is required under the law; (2) the facts clearly support a peremptory instruction as to Fisher's liability and because of such Barrett could not be the sole proximate cause of the accident; and, (3) there were no facts presented which would show that he acted in an unreasonable manner in stopping his car and signaling following traffic of his intention to stop.

The law in this state concerning the duty of a vehicle following another vehicle is clear. In *White v. Miller*, 513 So. 2d 600, 601 (Miss. 1987), our supreme court stated that:

> The driver of a vehicle following along behind another, and not attempting to pass, has a duty encompassing four interrelated functions: he must have his vehicle under proper control, keep a proper look-out ahead, and commensurate therewith drive at a speed and sufficient distance behind the preceding vehicle so that should the preceding vehicle stop suddenly, he can nevertheless stop his vehicle without colliding with the forward vehicle. *See: Barkley v. Miller Transporters, Inc.*, 450 So. 2d 416 (Miss. 1984); *Shideler v. Taylor*, 292 So. 2d 155 (Miss. 1974); *Dean v. Dendy*, 253 So. 2d 813 (Miss. 1971); *Griffin v. Gladden*, 197 So. 2d 891 (Miss. 1967); *Jones v. Richards*, 254 Miss. 617, 181 So. 2d 923 (1966); *Fowler Butane Gas Co. v. Varner*, 244 Miss. 130, 141 So. 2d 226 (1962); Miss. Code Ann. § 63-3-619 (1972).

Likewise, the duty of a preceding vehicle is also clear. In *Sprayberry v. Blount*, 336 So. 2d 1290, 1293 (Miss. 1976), our supreme court imposed a duty of reasonable care upon a preceding driver. The court developed a test of "whether under the circumstances then facing [the preceding driver], he used reasonable care." *Id.* In dicta, the court further stated that in situations in which there was heavy traffic or a nearby vehicle a high duty of due care may be imposed. *Id.* Furthermore, before a person can stop or decrease the speed of his vehicle he must first give an appropriate signal to the traffic following. Miss. Code Ann. § 63-7-707 (1972). Brake lights have been determined to be the proper

signal. *Id.* § 63-3-709.

In the case *sub judice* Barrett had a duty to act as a reasonable person under similar circumstances, while Fisher had a duty to keep his car a sufficient length behind Barrett's car so that if Barrett suddenly applied his brakes Fisher would be able to keep his vehicle from striking Barrett's.

Barrett next argues that the facts so overwhelmingly point to the fact that Fisher was negligent that he should have been granted a peremptory instruction, and that the jury should not have been instructed that it could find him the sole proximate cause of the accident. In this we must agree with Barrett.

Instructions D-2 and D-15 allowed the jury to find that Barrett was the sole proximate cause of the accident. While a jury could find that Barrett was partially responsible for the accident, in that he stopped his car on the interstate, the evidence does not show that he was the sole proximate cause. *See generally Phillips v. Delta Motor Lines, Inc.*, 235 Miss. 1, 108 So. 2d 409 (1959).

In determining whether the trial court should have granted Barrett a peremptory instruction, it must consider all of the evidence in the light most favorable to Fisher. "If the facts and inferences so considered point so overwhelmingly in favor of [Barrett] that reasonable men could not have arrived at a contrary verdict, granting the peremptory instruction is required." *See White v. Miller*, 513 So. 2d 600, 602 (Miss. 1987) (citing *Burnham v. Tabb*, 508 So. 2d 1072, 1074 (Miss. 1987)).

Fisher testified that he was traveling at a speed of approximately fifty miles per hour. He further testified that when he pulled behind Barrett's car, he was approximately two to three car lengths behind. Fisher stated that he noticed Barrett's brake lights come on and subsequently attempted to stop his vehicle but was unable too. His car skidded into the back of Barrett's car. It is undisputed that Fisher was driving his truck too close to the automobile of Barrett. With Fisher driving fifty miles per hour with only two to three car lengths separating his car with Barrett's, it was manifestly impossible for Fisher to avoid running into the back of Barrett's car.

The evidence is incapable of supporting a finding that Barrett was the sole proximate cause of the accident. Therefore, a peremptory instruction as to Fisher's liability would have been proper. The failure to give one in this case was error, however, harmless error. The jury did not find that Barrett was the sole proximate cause of the accident, and it did attribute part of the fault to Fisher.

Finally, as to the jury instructions, Barrett argues that instruction D-2 was fatally defective in that there was no evidence presented before the jury which would indicate that Barrett failed to give an appropriate signal to the traffic following behind him. Under the law of this State we must agree.

Instruction D-2 instructed the jury that if it found that Barrett had failed to give an appropriate signal to the traffic following him of his intentions to stop then the jury must find Barrett negligent. The facts presented at trial do not support such an instruction. Our supreme court has stated that:

> The brake or stop light not only is a statutorily approved method of indicating to the driver of a following vehicle an intention to stop or "suddenly" to decrease speed, but is a fact of common knowledge, which this Court may judicially notice, that it is a means in constant and everyday use for that

purpose, particularly in city traffic.

Callender v. Cockrell, 217 So. 2d 643, 647 (Miss. 1969); *see* Miss. Code Ann. §§ 63-3-707 to 709 (1972).

The evidence is undisputed that Barrett applied his brakes and that his brake lights were functioning properly. Fisher admitted in his testimony that the reason he applied his own brakes was that he saw Barrett's brake lights come on. In *Taylor v. Culpepper*, 208 So. 2d 176, 178 (Miss. 1968), a similar instruction was given in a factually similar case. Our supreme court stated that such an instruction was defective in that "the evidence was not sufficient to make a jury issue on whether plaintiff failed to give a signal that he was stopping." *Taylor*, 208 So. 2d at 178.

Giving this instruction under the facts present in this case is reversible error. This Court does not find persuasive arguments that this instruction was proper because Barrett coasted for a second before applying his brakes. Even if Barrett did actually take his foot off of the accelerator and coast for a fraction of a second rather than immediately apply his brakes, he still gave a signal to Fisher that he was stopping his automobile.

II.

JONES

Jones argues that: (1) she was entitled to jury instruction P-1, a peremptory instruction as to the Defendants' liability; (2) she was also entitled to instruction P-13, a comparative negligence instruction; and (3) the jury was misled and confused because there was no instruction to the jury as to what to do if it found Barrett partly responsible for the accident as well as International Paper.

The two instructions in question, which were refused by the trial court, stated the following:

> P-1.
>
> The Court instructs the jury to return a verdict for the Plaintiff, Gelinda Jones, and against the Defendants, Larry Fisher and his Employer, International Paper Company, and to assess Plaintiff's damages in accordance with other instructions given in this case.
>
> P-13.
>
> The Court instructs the jury that if your verdict be for the Plaintiff, Gelinda Jones and against the Defendants, Larry Fisher and International Paper Company, in arriving at the dollar amount of your verdict, you shall not reduce such verdict on account of any contributory negligence, if any, as may be shown against the Plaintiff, John Patrick Barrett.

First, Jones argues that even if the jury found that both Barrett and Fisher were negligent in the accident, they were joint tort-feasors, and therefore, she was entitled to proceed against Fisher and his employer, International Paper, for the entire amount. We note at the outset that International Paper has not responded to the issue of whether Jones was entitled to instructions P-1 and P-13, and has not cited to us any authority relevant to this point. This Court employs the same rule as the Mississippi Supreme Court which has consistently stated that failure to respond to an issue raised by a party is tantamount to a confession of error. *Snow Lake Shores Property Owners Corp. v. Smith,* 610 So. 2d 357, 361 (Miss. 1992).

Setting the procedural bar aside, this Court finds that Jones was entitled to seek full recovery from International Paper. In *Richardson v. APAC-Mississippi, Inc.*, 631 So.2d 143, 151 (Miss. 1994), our supreme court set forth the law as it relates to joint tort-feasors. In that case the court stated:

> Joint tortfeasor claims arise where the separate wrongful conduct of two or more individuals combine to cause an injury, and each because of his conduct bears some responsibility for the injury. There is a good reason to permit a plaintiff to settle as to one of the joint tort-feasors, reserving the right to proceed against the other wrongdoer. Where the principal is sought to be held liable for acts of his agent, as here, however, only one, the employee, has committed any wrong. Settlement with one and then proceeding against the other in this kind of case bears far greater scrutiny than settling with a joint tortfeasor and proceeding against the other.

In support of her contention that she was entitled to an instruction telling the jury that she could seek full recovery from the Defendants, Jones cites to this Court the case of *Westerfield v. Shell Petroleum Corp.*, 161 Miss. 833, 838, 138 So. 561, 562 (1932). In that case, Westerfield, a passenger in a car owned by Harrison, was injured as a result of an accident which involved Harrison and an automobile owned by Shell Petroleum. *Id.* Our supreme court stated that Harrison and the driver of the Shell automobile were joint tort-feasors, and because of such Westerfield could proceed solely against Shell. *Id.*

> [T]his is true, although there was no common duty, common design, or concert of the action between the joint tort-feasors.
>
> Under the law it is not necessary that the negligence of the operator of an automobile shall be the sole cause of the injury, in order to make him liable therefor. It is sufficient that his negligence, concurring with some other sufficient cause or causes, proximately caused the injury. (Citations omitted).

Id.; *see also Wilson v. Giordano*, 475 So. 2d 414, 417 (Miss. 1985); *Jones v. Collier*, 372 So. 2d 288, 291 (Miss. 1979).

III.

While this was not raised by Barrett or Jones in their briefs, this Court takes judicial notice of the fact that the three instructions dealing with contributory negligence were in conflict with the form of the verdict. Instruction D-2A instructed the jury that if it found that Barrett did not use reasonable care in stopping his vehicle, then the jury was to find him negligent and "reduce his recovery against the Defendants in the proportion to which his negligence contributed to the happening of the accident...." Likewise, instruction D-15 instructed the jury that it should reduce Barrett's damages by his degree of fault. However, the form of the verdict did not allow the jury to reduce the damages by Barrett's negligence. It simply told the jury to express in terms of a dollar amount the injuries sustained by Barrett. These are contradictory and confusing.

We do not know if the jury awarded Barrett the total amount of his damages or did they reduce his damages by his degree of fault. In other words, did the jury follow jury instructions D-2A and D-15 and reduce the damages by eighty-eight percent (88%), the degree of fault attributable to Barrett; or, did the jury follow the interrogatories and simply state the amount of damages sustained by Barrett? We do not know. The jury could have found that Barrett suffered $8,333.33 in damages which would be reduced to $1,000.00 once his degree of fault is deducted. Likewise, the jury could also have found that Barrett suffered $1,000.00 in damages, which after being reduced would leave Barrett a recovery of some $120.00.

It is clear that on this point alone the jury instructions were in error. On remand the jury instructions and the jury interrogatories should coincide.

CONCLUSION

This Court is reversing this case only on the erroneous jury instructions given by the trial court. This Court finds that under the laws of this State, Fisher was liable for the accident; therefore, Barrett and Jones were entitled to a peremptory instruction. However, even though Fisher was negligent, this does not mean that he was not entitled to a contributory negligence instruction as to Barrett's negligence. The jury could find that Barrett was negligent in stopping his vehicle on the interstate, or, the jury could find his actions reasonable under the circumstances.

This Court further finds that under the facts elicited at trial, Fisher was not entitled to jury instruction D-2. The facts were uncontroverted that Barrett applied his brakes and that Fisher saw Barrett's brake lights come on prior to the accident. There was no evidence which would present a jury question as to whether Barrett gave traffic following him a signal that he was stopping.

Finally, Jones was entitled to seek full recovery from International Paper for injuries sustained during the accident.

THE HINDS COUNTY CIRCUIT COURT JUDGMENT AS TO BARRETT'S LIABILITY AND BARRETT'S AND JONES' DAMAGES IS REVERSED AND REMANDED FOR A NEW TRIAL. COSTS ARE TAXED TO THE APPELLEES.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, AND

PAYNE, JJ., CONCUR.

SOUTHWICK, J., NOT PARTICIPATING.