IN THE COURT OF APPEALS 10/15/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00842 COA

CECIL C. HAYS

APPELLANT

v.

MINNESOTA MINING & MANUFACTURING COMPANY AND BOBBY SIMMONS

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. LEE J. HOWARD

COURT FROM WHICH APPEALED: OKTIBBEHA COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

CHARLES T. YOSTE

JERRY BYTHEL READ

ATTORNEYS FOR APPELLEES:

A. KELLY SESSOMS, III

RAYMOND L. BROWN

NATURE OF THE CASE: PERSONAL INJURY

TRIAL COURT DISPOSITION: VERDICT FOR DEFENDANT

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

THOMAS, P.J., FOR THE COURT:

Cecil C. Hays brought a personal injury suit against Minnesota Mining & Manufacturing Company (3M) for injuries he sustained after using a disk pad holder that was manufactured by 3M. After a trial on the merits a jury rendered a verdict in favor of 3M. From this verdict, Hays appeals to this Court assigning two alleged errors. Finding no error, we affirm.

FACTS

Cecil C. Hays, an automobile mechanic from Starkville, Mississippi, purchased a disc pad holder manufactured by 3M from Bobby Simmons, an independent Snap-On parts dealer. This disc pad holder is made of hard plastic and contains a Velcro-like surface which allows a separate sanding disc to be affixed on top of the holder. The disc holder is inserted into an air rotary tool for use in grinding and sanding.

On the day in question, Hays, holding the rotary tool along with the disc pad holder a short distance from his face, engaged the tool. The disc pad holder failed and a piece of the holder struck Hays in the left eye. Hays suffered injuries as a result of the accident and subsequently brought suit against 3M and Bobby Simmons alleging a manufacturing defect in the holder and further alleging that he did not receive adequate warnings.

During 3M's case in chief, 3M called Edward Manor to testify as an expert and was tendered "as an expert in the use of abrasives, abrasive accessories, surfing--surface conditioning products in the industrial and automobile trades, and quality and control testing thereof and the used of the tools involved with them." Hays did not object or choose to voir dire Manor on his qualifications. During Manor's testimony Hays objected on the ground that 3M designated Manor as a corporate representative and never designated him as an expert expected to testify at trial. The trial court overruled Hays' objection and allowed Manor to continue giving expert opinions.

DISCUSSION

I. WHETHER THE RIAL COURT ERRED IN ALLOWING MANOR TO TESTIFY AS AN EXPERT?

Hays argues that he was sandbagged at trial by 3M's failure to disclose the facts and opinions of 3M's expert witness Edwin Manor. Hays argues that Manor's testimony was unfairly prejudicial in that Hays had no opportunity to prepare to meet it.

Rule 26(b)(4)(A)(I) requires that after the request of the opposing party, a party must disclose not only the names of his experts, but he must also "state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion." M.R.C.P. 26.The purpose of this rule was stated in *Harris v. General Host Corp.*, 503 So. 2d 795, 796 (Miss. 1986):

> We have long been committed to the proposition that trial by ambush should be abolished, the experienced lawyer's nostalgia to the contrary notwithstanding. We have sought

> procedural justice through a set of rules designed to assure to the maximum extent practicable that cases are decided on their merits, not the fact that one party calls a surprise witness and catches the other with his pants down.

In this case we cannot say that Hays was ambushed by Manor's testimony. Prior to trial, Hays requested the Rule 30(b)(6) deposition of 3M. The areas of inquiry included "the reasons the product failed and the cause of the product's failure." 3M designated and produced Edward Manor, whom 3M had previously listed as its inside expert in response to Plaintiff's Interrogatories. After Manor was designated as 3M's inside expert, Hays deposed Manor as a corporate representative of 3M several months before trial began. During the deposition, Manor was questioned in depth about the reasons the product failed and the causes of the failure.

Furthermore, in the pre-trial order, which was agreed upon by the parties, Edward Manor was listed as a fact expert witness on liability issues. Manor's inclusion on this list was not objected to by Hays.

In addition, during the trial of this matter, Hays read Manor's entire deposition into evidence. This deposition included all of Manor's opinions which Hays now asserts that he had no knowledge of prior to his testimony, i.e. opinions as to how and why the disc pad holder failed.

Hays argues that "Defendant's provided no report concerning [Manor's opinions expressed at trial], and when Mr. Manor was tendered as the Rule 30(b)(6) representative for 3M, he did not express these opinions." While Hays is correct in his assertion that Manor's deposition was taken as a Rule 30(b)(6) corporate representative, the areas that Hays questioned Manor dealt with Manor's expert opinions as to how and why the disc pad holder failed. In his deposition, Manor was questioned on every point that Hays is now complaining of with the exception of two points he made in response to the testimony of Hays' own experts.

It is clear that Hays knew exactly what Manor was going to testify to. We find that Hays was not ambushed at trial by 3M; therefore, we find this issue to be without merit.

II. WHETHER THE TRIAL COURT ERRED IN GRANTING INSTRUCTION D-1-2 AND REFUSING TO GRANT INSTRUCTION P-16.

Hays argues that the trial court committed reversible error when it refused to grant instruction P-16, and further erred in granting instruction D1-2. The instructions in question state the following:

> D1-2
>
> The Court instructs the jury that if you conclude from a preponderance of the evidence that the sole proximate cause of the accident or injury to Plaintiff was one or more of the following actions taken by the Plaintiff or the others:
>
> 1. Misusing or abusing the disc pad holder negligently or otherwise;
>
> 2. Failing to heed warnings or instructions for use of the dis pad holder;

3. Changing or altering substantially the disc pad holder after it left the hands of the manufacturer; or

4. Failing to exercise reasonable care in the use of the disc pad holder;

then you must find for the Defendants.

P-16

Bobby Simmons, as a seller of the Minnesota Mining and Manufacturing Company's disc pad holder, was under a duty to exercise reasonable care to assure that the manufacturer's product information and warnings was actually given to the consumer when the product was purchased. If you find, from a preponderance of the evidence, that Bobby Simmons failed to use reasonable care to assure that the instructions and warnings Minnesota Mining and Manufacturing Company prepared were given to the Plaintiff Cecil C. Hays when he purchased this disc pad holder, and if you further find from a preponderance of the evidence, that Bobby Simmons' neglect in this regard was the proximate cause, or a proximate contributing cause of the plaintiff's injury, then you should return a verdict in favor of the plaintiff and against Bobby Simmons. If you find that Bobby Simmons' failure to deliver the instructions and warnings was due to Minnesota Mining and Manufacturing Company's lack of reasonable care in packaging the disc pad holders with one product information sheet in each box of five disc pad holders, your verdict should be in favor of plaintiff and against Minnesota Mining and Manufacturing Company. In the event your verdict is in favor of plaintiff against either Bobby Simmons or Minnesota Mining and Manufacturing Company or both, you should award such damages as you find, from a preponderance of the evidence, to have been proximately caused by the neglect of either or both defendants in delivering the product information and warnings to the plaintiff.

Hays argues that instruction D1-2 is improper for two reasons. First, according to subsection (4) of the instruction, any negligence on the part of Hays would be a complete bar to any recovery. According to Hays this is a "contributory fault" rather than a "comparative fault" instruction. We disagree. Subsection (4) instructed the jury that if it found that the sole proximate cause of Hays' injuries was due to his failure to use reasonable care than the jury should find for 3M. This is a correct instruction. Hays does not cite to this Court any case law or statute stating that this instruction is improper; therefore, we find this issue to be without merit.

Hays also argues that subsections (2) and (3) of instruction D1-2 are unsupported by the evidence and should not have been given. While Hays is correct in his statement that there were no facts which would support subsections (2) and (3), he again cites to us no authority to support his proposition that this is reversible error. The long standing rule in this State is that the "failure to cite any authority can be treated as a procedural bar, and this Court is under no obligation to consider the assignments." *Smith v. Dorsey*, 599 So. 2d 529, 532 (Miss. 1992). Even if Hays was not procedurally barred from asserting this issue, the granting of this instruction did not harm his case considering that the jury was adequately instructed as to the law.

Finally, Hays argues that instruction P-16 should have been given and that the trial court's failure to grant this instruction deprived Hays of a legitimate theory of recovery. Again Hays failed to cite to us any authority in support of his proposition; therefore, we find this issue to be procedurally barred. *See Smith v. Dorsey*, 599 So. 2d 529, 532 (Miss. 1992)*; Ramseur v. State*, 368 So. 2d 842, 844 (Miss. 1979).

However, even if we were to set the procedural bar aside, Hays would still not prevail. This Court agrees with the trial court in his findings that instruction P-16 as written was confusing to the jury and should not have been given in light of the fact that instruction P-15 adequately instructed the jury on Hays' theory of recovery. As our supreme court has stated:

> [T]his Court does not review jury instructions in isolation; rather, they are read as a whole to determine if the jury was properly instructed. Accordingly, 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, this Court can and will reverse.

Peoples Bank & Trust Co. v. Cermack, 658 So. 2d 1352, 1356 (Miss. 1995).

In this case, the trial court properly instructed the jury on each of Hays' theories of recovery; therefore, we find this issue to be without merit.

THE JUDGMENT OF THE CIRCUIT COURT OF OKTIBBEHA COUNTY IS AFFIRMED. COSTS OF APPEAL ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.