IN THE COURT OF APPEALS 8/6/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00031 COA

EDDIE FERGUSON

APPELLANT

v.

MARSHALL DURBIN FARMS, INC. AND JAMES EDWARDS

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. MARCUS D. GORDON

COURT FROM WHICH APPEALED: NESHOBA COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

BARRY W. GILMER

ATTORNEYS FOR APPELLEES:

STUART G. KRUGER, & M. CHRISTINE CROCKETT

NATURE OF THE CASE: CIVIL - PERSONAL INJURY

TRIAL COURT DISPOSITION: DEFENSE VERDICT

BEFORE FRAISER, C.J., COLEMAN, AND KING, JJ.

KING, J., FOR THE COURT:

Eddie Ferguson is appealing the verdict rendered in Neshoba County Circuit Court in favor of

Marshall Durbin Farms, Inc., and James Edwards. Ferguson argues that a peremptory instruction on the issue of liability should have been granted and that the trial court erred when it denied his motion for a new trial. Finding no error, we affirm the judgment of the trial court.

I.

This personal injury case began on a rural road in Neshoba County, Mississippi, on December 20, 1990, when Eddie Ferguson, driving a Dowdle Butane Gas Company truck, collided with James Edwards, who was operating an eighteen wheeler owned by Marshall Durbin Farms, Inc. Ferguson sustained injuries in the collision. Ferguson's passenger, Bob Boler, also an employee of Dowdle Butane Gas Company, was not injured.

On September 28, 1992, Ferguson filed a complaint against Marshall Durbin Farms, Inc., and James Edwards wherein he alleged that Edwards, acting within the scope of his employment, negligently caused the accident on December 20, 1990. Ferguson further alleged that as a direct and proximate result of Edwards' negligence, he (1) suffered permanent and disabling personal injuries, (2) incurred medical, hospital, and drug expenses, (3) suffered past and future lost wages and profits, (4) suffered excruciating physical pain in the past and will endure the same in the future, and (5) suffered mental pain and anguish in the past and will suffer the same in the future.

Ferguson charged, among other things, that Edwards was under a duty to keep a reasonable and proper lookout in the direction in which said truck was being operated, to keep the truck under reasonable and proper control, to yield the right of way to the automobile being driven by Ferguson, to refrain from operating said truck at a high and reckless rate of speed, and that Edwards was under a duty not to operate the truck in such a manner as to cause the same to collide with the automobile operated by Ferguson. Ferguson requested $250,000 in damages.

In its answer, filed on July 27, 1992, Marshall Durbin Farms, Inc., admitted that Edwards was within the scope of its employment when the accident occurred, but denied Ferguson's allegations that Edwards' actions were negligent. Marshall Durbin Farms, Inc., affirmatively pled that Ferguson was negligent in causing or contributing to the accident, and that such negligence was the sole proximate cause or a proximate contributing cause to the accident and the resulting injuries, if any, to Ferguson. It demanded that the complaint be dismissed with prejudice, with all costs assessed against Ferguson.

In his answer filed on December 10, 1992, Edwards admitted that he was involved in an accident on December 20, 1990, but denied Ferguson's allegations that he was negligent. Edwards affirmatively pled that Ferguson was acting in a careless and unreasonable manner in the operation of his vehicle at all times and that such negligence included, but was not limited to (1) the failure to exercise reasonable care for his own safety and the safety of others; (2) the failure to keep a proper lookout to observe that which he should have seen; (3) the failure to yield the right of way; (4) speeding; (5) failure to maintain his vehicle in free, reasonable and easy control; and (6) failure to observe existing road conditions. Edwards also requested that the action be dismissed with costs assessed against Ferguson.

At the trial, which commenced on March 8, 1994, Ferguson testified that on December 20, 1990, after installing a heater for his employer, he resumed his travel back to his place of employment. During his drive back to the office, he took a route in which limbs, trees, and curves obstructed his

view. Upon approaching the intersection of County Road #329, which is kind of a "Y" dirt road, Ferguson hit Edwards' truck. When he first saw the truck, he saw it more or less to its side, and the truck was in a turning position to its left.

The passenger in Ferguson's vehicle, Bob Boler, testified that Ferguson was driving approximately thirty miles per hour when the accident occurred. Boler stated that they were about fifty to a hundred feet away from Edwards' truck when they first saw the truck, with the tractor part of the truck going away from them. Boler noted that Edwards had pulled his truck over as far as he could to the embankment and that when he first saw Edwards' truck, Edwards was already turning. Boler explained that if Ferguson could have gotten his vehicle stopped, Ferguson probably could have gotten by Edwards' truck and avoided the accident. At the conclusion of the Plaintiff's case, a motion for a directed verdict was made, which was denied.

During the defense's case, Defendant Edwards testified that because he had previously made deliveries at the Smith-Dion chicken farm, he was familiar with the route and that he chose that particular route of the three routes available to him because it was the safest. Because he was approaching the "Y" intersection, an intersection he considered to be a bad turn, Edwards began driving in the third gear and reduced his speed to somewhere between ten and fifteen miles an hour. After reaching the "Y" and starting to turn, Edwards saw a pickup truck through the trees approaching at a high rate of speed. Edwards explained: "Whenever I saw him coming, I was already into the turn, so there was no stopping, because when you are loaded, you can't stop a truck on just a matter of a few feet. So, I ran for the ditch, got as far over, and gave him as much room as I could, and stopped when I hit the bank, and just waited for him to hit me."

James McNally, transportation manager and safety director for Marshall-Durbin, testified that on December 20, 1990, when he conducted an investigation of the accident, he observed indications that the vehicle driven by Ferguson was traveling at a high rate of speed. However, he was unsure of the exact speed. McNally also observed that there were skid marks going in the direction of Edwards' truck which measured approximately fifty-two feet. He explained that Edwards' truck was "located as far right as it possibly could with the tractor -- [Edwards] had got completely in the ditch to avoid the accident, or I judged it to be to avoid the accident. He couldn't get over any further than he was."

At the conclusion of the Defendants' evidence, the case was submitted to the jury against Edwards and Marshall-Durbin. The jury found for the Defendants. The trial court denied Ferguson's motion for a new trial. It is from this order that Ferguson perfected this appeal.

II.

Ferguson contends that he was entitled to jury instruction P-1, a peremptory instruction as to the Defendants' liability. The instruction which the trial court refused stated:

> P-4.
>
> The Court instructs the jury to find for the Plaintiff, Eddie Ferguson and against the Defendants, Marshall Durbin Farms, Inc. and James Edwards and to assess Plaintiff's damages in accord with other instructions given you in this case.

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

In support of his contention that the trial court should have granted him a peremptory instruction on liability, Ferguson cites section 63-3-601 of the Mississippi Code of 1972, which provides that a vehicle should be driven upon the right half of the roadway except in certain enumerated situations.

Ferguson's argument that a peremptory instruction should have been granted must fail. First, Ferguson's reliance on section 63-3-601 of the Mississippi Code of 1972 is misplaced. Although section 63-3-601 provides in pertinent part that "[u]pon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway," Miss. Code Ann. § 63-3-601 (1972), it does not preclude a motorist from making necessary turns from the right half of the roadway in which the motorist is legally driving. *See Robinson v. Sims*, 227 Miss. 375, 375, 86 So. 2d 318, 318 (1956). Upon applying a literal interpretation of the statute, it is clear that there was no violation by Edwards.

Second, the real question in this case was not whether Edwards was driving in the appropriate lane in violation of the statute, but whether or not Edwards should have made the turn from the right lane of traffic at the time that he did. It was, therefore, a question for the jury as to whether or not Edwards should have made a decision other than to make a turn which obstructed a major portion of the left half of the highway. *Robinson*, 86 So. 2d at 321. "The jury may have believed that he should have remained in the right lane, and that this would have afforded the [Plaintiff Ferguson] an opportunity to pass him on the left without the accident having occurred." *Id.* at 322. On the other hand, the jury may have believed, as indicated by the defense verdict, that under the circumstances since Edwards testified that he did not see the truck approaching until after he began the turn, Edwards took the necessary precautions in continuing to make the turn to avoid the accident.

During the Plaintiff's case in chief, Ferguson testified that Edwards was negligent in operating his vehicle since Edwards saw the vehicle that Ferguson was driving prior to making the turn. Ferguson's witness, Boler, testified that when they saw Edwards' truck, Edwards was already turning to the right and that when they approached, Edwards had pulled his truck over as far as he could to the embankment. In Boler's opinion, it was an unavoidable accident, and there was nothing that either party could have done differently to avoid the accident.

At the close of the Plaintiff's case, the trial court ruled that based upon the evidence presented *during the Plaintiff's case*, a jury question had been developed and denied the motion for a directed verdict. The trial court also denied Plaintiff's request for a peremptory instruction. Additionally, during the Defendants' case, Edwards testified that in an attempt to avoid the accident, he drove his truck into a ditch and embankment on the side of the road and came to a stop. Clearly, there was a jury question as to liability.

We find that the trial court properly denied the peremptory instruction. This issue is without merit.

II.

Ferguson contends that based on the evidence presented in the instant case, a reasonable jury should have found the Defendants liable for negligence. Ferguson, therefore, submits that the trial court erred in failing to grant a new trial since the verdict was against the overwhelming weight of the evidence.

When addressing a motion for a new trial, "the trial judge should set aside a jury's verdict when, in the exercise of his sound discretion, he is convinced that the verdict is contrary to the substantial weight of the evidence." *McKinzie v. Coon*, 656 So. 2d 134, 138 (Miss. 1995); *see also Harvey v. Wall*, 649 So. 2d 184, 186 (Miss. 1995). However, absent an abuse of discretion, this Court is "without power to disturb such a determination." *Muse v. Hutchins*, 559 So. 2d 1031, 1033 (Miss. 1990).

In the instant case, there were disputed issues: First, there was a conflict on the speed which Ferguson was driving. At trial, Ferguson testified that he was not really sure how fast he was going, but he knew that he had reduced his speed since he had just come around a curve. However there was undisputed evidence that Ferguson told his physician that he was going forty miles per hour at the time of the accident. Boler, a passenger in Ferguson's truck, testified that they were traveling on a road with which he was vaguely familiar and that Ferguson was driving at approximately thirty miles per hour because of the curves on the road. On the other hand, Edwards testified that after he began his turn, he saw Ferguson driving toward him at a high rate of speed, somewhere between fifty and sixty miles per hour.

Second, there was a conflict on when Ferguson and Boler saw Edwards' truck prior to the point of impact. Ferguson testified that because he did not see the truck until it was five feet in front of him, there was nothing that he could have done to avoid the accident. On the other hand, Boler testified that he saw the truck somewhere between twenty-five and one hundred feet prior to the point of impact.

Third, Ferguson presented evidence that because Edwards saw him approaching at an alleged high rate of speed prior to starting his turn, Edwards could have avoided the accident by waiting until he passed before the turn was made. However, Boler testified that in his opinion, there was nothing further that Edwards could have done to avoid the accident. Additionally, Edwards testified that because of the height of his truck, he was able to see Ferguson's truck in the distance and that upon seeing the truck, he took all the necessary precautions to avoid the accident with Ferguson, including pulling his truck over into the ditch and embankment.

Here, after hearing all of the evidence, the jury found for the Defendants. When testimony is contradicted as in the instant case, this Court defers "to the jury, which determines the weight and worth of testimony and credibility of the witness at trial." *Harvey*, 649 So. 2d at 188 (citing *Odom v. Roberts*, 606 So. 2d 114, 118 (Miss. 1992)). We find that the trial court did not abuse its discretion in denying the motion for a new trial.

For the foregoing reasons, the judgment of the trial court is affirmed.

THE JUDGMENT OF THE CIRCUIT COURT OF NESHOBA COUNTY IS AFFIRMED. APPELLANT IS TAXED WITH ALL COSTS OF THIS APPEAL.

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