IN THE COURT OF APPEALS 11/12/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00022 COA

LOYD B. FURLOW, JR. AND NELLIE FURLOW

APPELLANTS

v.

M.D. BAILEY & SONS ELECTRIC CO., INC., AND STANDARD ROOFING AND SHEET METAL, INC.

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: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

JOHN B. MACNEILL

JOE S. DEATON III

EUGENIA RYAN GAERIG

ATTORNEYS FOR APPELLEES:

PATRICK SHAUN WOOTEN

JOSEPH MCDOWELL

JOHN LOW

NATURE OF THE CASE: PERSONAL INJURY

TRIAL COURT DISPOSITION: JURY FOUND FOR THE APPELLANTS AS AGAINST ONE DEFENDANT, APPELLEES WERE GRANTED DIRECTED VERDICTS.

BEFORE THOMAS, P.J., KING, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

Loyd B. Furlow, Jr., was injured when a wooden sign, owned by Byrds, Bucks & Bass, Inc. (BB&B) , and hung by Standard Roofing & Sheet Metal, Inc. (Standard Roofing) by M.D. Bailey and Sons Electric Company (Bailey Electric), fell and struck him on his head and shoulders. As a result of his accident, Furlow and his wife, Nellie Furlow, filed suit against BB&B, Standard Roofing, and Bailey Electric alleging that the sign had been negligently constructed, hung, and suspended. Furlow alleged that the defendants were liable through strict liability, *res ipsa loquitur*, and common law negligence.

The trial court granted a directed verdict on the issues of strict liability and *res ipsa loquitur* and allowed the case to proceed to the jury under the theory of common law negligence. The jury returned a verdict finding that the Furlows were entitled to a total of $2,000,000.00 in damages. The jury found that BB&B was 25% at fault in causing Furlow's injury, and that Furlow's employer, Boat Fever (who was not a party to the lawsuit), was 75% at fault in causing the injury. The jury found that Furlow was 0% negligent in causing his injuries, and further exonerated both Standard Roofing and Bailey Electric.

The Furlows filed a motion for JNOV or a motion for new trial. In their motion, the Furlows alleged that the jury verdict was contrary to the weight of the evidence and the law; that the trial judge erred by granting the defendants' motions for directed verdicts on the issues of strict liability and *res ipsa loquitur*; and that the trial judge erred in refusing certain jury instructions offered by the Furlows. The trial judge denied the Furlows' motion in its entirety.

As to Standard Roofing and Bailey Electric, the Furlows appeal to this Court assigning the following seven alleged errors:

I. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN GRANTING A DIRECTED VERDICT IN FAVOR OF BAILEY ELECTRIC AND STANDARD ON THE ISSUE OF STRICT LIABILITY.

II. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN REFUSING PLAINTIFFS' INSTRUCTION P-42.

III. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN REFUSING PLAINTIFFS' INSTRUCTIONS P-39 AND P-44.

IV. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN REFUSING PLAINTIFFS' INSTRUCTIONS P-26 AND P-28

V. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN REFUSING PLAINTIFFS' INSTRUCTION P-3, A PEREMPTORY INSTRUCTION AGAINST BAILEY ELECTRIC.

VI. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN REFUSING PLAINTIFFS' INSTRUCTION P-4, A PEREMPTORY INSTRUCTION AGAINST STANDARD.

VII. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANTS' INSTRUCTION D-4.

Finding no error, we affirm.

UNDISPUTED FACTS

Loyd Furlow was an employee of Boat Fever, a business owned by Dr. Toney Byrd. Adjacent to and sharing the same building and lot as Boat Fever, was BB&B, a store which sold hunting and fishing equipment. BB&B was also owned by Dr. Byrd.

Boat Fever and BB&B opened for business in March of 1991. Early that year, both businesses began to prepare for their grand openings. As part of these preparations, the manager of Boat Fever, Micky Byrd (brother of Dr. Byrd), and Furlow discussed the possibility of building a large sign which would advertise the location of Boat Fever and which would be visible from the interstate highway. Furlow was told by the manager to build the sign. Furlow used an aluminum frame from a houseboat as the base for the sign, he painted the frame, and then he welded extensions to the frame. The frame was designed to hang between two telephone poles which were tall enough so that travelers on I-55 would be able to see the sign from the interstate.

In addition to the Boat Fever sign, a 4' x 8' sign advertising BB&B was constructed by an employee of BB&B. It was intended that this smaller sign be affixed to the Boat Fever sign.

Prior to, and in preparation for the grand opening, Furlow called Bailey Electric to come to the premises of Boat Fever and set the telephone poles from which the Boat Fever and BB&B signs were to be hung and assist in hanging the signs. On March 5, 1991, Bailey Electric set the telephone poles. A few days later, Bailey Electric employees returned to the premises to hang the signs, however, soon after arriving, they realized that their boom truck would not have enough height to hang the sign on the forty-five-foot telephone poles. Because they could not complete the job, Bailey Electric

called Standard Roofing and requested that it bring its larger boom truck to the Boat Fever premises and assist in hanging the signs.

Once the Standard Roofing truck arrived, a Bailey Electric employee attached the crane from the Standard Roofing Truck to the Boat Fever sign. The Boat Fever sign was then attached to the telephone poles. The testimony is disputed as to when the BB&B sign was connected to the Boat Fever sign. However, the testimony is undisputed that Bailey Electric and Standard Roofing had nothing to do with attaching the Boat Fever sign and the BB&B sign together. Ronnie Johnson, an employee of Boat Fever, drilled the holes in the BB&B sign and attached the BB&B sign to the Boat Fever sign with shackles and chains.

At various times after the Boat Fever and BB&B signs were hung, several witnesses noticed that the BB&B sign was whipping and jerking in the wind. On March 22, 1991, fourteen days after the signs were hung, Furlow was on the premises of Boat Fever in his capacity as an employee of Boat Fever. While Furlow was standing in the common parking area shared by both Boat Fever and BB&B, the plywood BB&B sign tore through its shackles, fell down, and smashed into Furlow's head, face, and chest.

DISPUTED FACTS

According to Michael Byrd, the son of Dr. Byrd and the manager of BB&B, he was hanging the BB&B sign under a boat when Furlow suggested that he attach the BB&B sign beneath the Boat Fever sign. Michael Byrd testified that Furlow then sketched the Boat Fever sign with eye bolts on the bottom and chains hanging down from the eye bolts to attach the smaller BB&B sign. Michael Byrd testified that Furlow was in charge of hanging the signs and that he relied on Furlow to hang the BB&B sign under the Boat Fever sign. Furlow denied that he had any responsibility or duty in the designing, painting, crafting, or hanging of the BB&B sign.

Roy Lee Lockhart, an employee of Standard Roofing, testified that when the Boat Fever sign was attached to the telephone poles, the BB&B sign had not yet been attached to the Boat Fever sign. However, several witnesses testified that the BB&B sign was already attached to the Boat Fever sign before it was hung by Standard Roofing and Bailey Electric.

DISCUSSION

I. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN GRANTING A DIRECTED VERDICT IN FAVOR OF BAILEY ELECTRIC AND STANDARD ON THE ISSUE OF STRICT LIABILITY.

At the close of Furlow's case-in-chief, all of the defendants moved for a directed verdict on the issues of strict liability and *res ipsa loquitur*. The trial court granted both motions and let the case proceed to the jury on the theory of common law negligence.

Furlow argues that the trial court erred in granting the directed verdict because, according to Furlow,

the jury could have reached a verdict that Standard Roofing and Bailey Electric were strictly liable to the Furlows because they failed to protect or warn Mr. Furlow of the danger which would result from the BB&B sign, which Furlow asserts was a dangerous condition. In essence, Furlow argues that the employee of Boat Fever created a dangerous condition when he connected the BB&B sign too close to the Boat Fever sign. However, Furlow argues that not until the signs were hung in the air by Bailey Electric and Standard Roofing that the signs became inherently dangerous, thereby making this a strict liability case. Furlow does not argue that the trial court erred in granting a directed verdict on the theory of *res ipsa loquitur*; therefore, we consider that issue waived.

On the issue of strict liability, we disagree with Furlow's contentions and find that the trial court was correct in granting the directed verdict on this issue. In granting the motion, the trial court made the following ruling:

> Then the Court determines as a matter of law that the condition which existed at that time was not an ultrahazardous condition as defined in *Am. Jur*. where the definition is that it's an activity with a risk of serious harm which cannot be eliminated by the exercise of the utmost care. The Court determines as a matter of law that that was not the condition which existed at that time so the motion for directed verdict on the issue of strict liability is granted.

As the trial court noted, strict liability is inappropriate unless the court determines that the defendant was unable "to eliminate the risk by the exercise of reasonable care." *Restatement (Second) of Torts* § 520 (1963). In *Prosser and Keeton on Torts,* the authors state that "[t]hose who deal with instrumentalities that are known to be dangerous . . . must exercise a great amount of care because the risk is great." *W. Page Keeton et al., Prosser and Keeton on the Law of Torts* § 34, at 208 (5th ed. 1984). It is clear to this Court that a sign is not an instrumentality "known to be dangerous," and if someone hangs a sign "exercising reasonable care", then the activity will not be one in which there is a risk of serious harm.

II. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN REFUSING PLAINTIFF'S INSTRUCTION P-42.

At trial, the Furlows offered instruction P-42, which was refused by the trial court. This instruction read as follows:

The Court instructs the jury that unless one represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise a skill and knowledge normally possessed by members of that profession or trade in good standings in similar communities.

The Court further instructs the jury that if you find from a preponderance of the evidence that Defendant M.D. Bailey and Sons Electric Company, Inc. undertook to render services which were within the practice of a sign hanger; and that Defendant M.D. Bailey and Sons Electric Company,

Inc. did not exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities; and that the failure by M.D. Bailey and Sons Electric Company, Inc. to so act was the sole proximate cause or a proximate contributing cause to the injuries of Plaintiff Loyd Furlow, then you must find for the Plaintiffs against Defendant M.D. Bailey and Sons Electric Company, Inc. and assess Plaintiffs' damages in accordance with other instructions of the Court.

The trial court was correct in refusing to grant this instruction. As the trial court stated "nobody ever sat up here and said what the practice of sign hanging is." Instructions which are not supported by the facts should not be given. *See Munford Inc. v. Fleming*, 597 So. 2d 1282, 1286 (Miss. 1992); *Rester v. Lott*, 566 So. 2d 1266, 1269 (Miss. 1990).

III. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN REFUSING PLAINTIFFS' INSTRUCTIONS P-39 AND P-44.

Furlow next argues that the trial court committed reversible error in denying instructions P-39 and P-44 regarding the liability of contractors hired by landowners to erect structures on land. However, these two instructions imposed strict or absolute liability on Bailey Electric and Standard Roofing and concluded that hanging the sign was dangerous. As we have already stated, the trial court was correct in granting the directed verdict as to strict liability; therefore, he was correct in refusing to grant these instructions.

IV. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN REFUSING PLAINTIFFS' INSTRUCTIONS P-26 AND P-28.

Furlow next argues that the trial court erred in refusing to grant instructions P-26 and P-28. These two instructions, dealing specifically with the liability of Standard Roofing, stated the following:

> P-26
>
> The Court instructs the Jury that if you find from a preponderance of the evidence in this case that Defendant Standard Roofing & Sheet Metal, Inc. was engaged in construction and if you further find that it was required, by a reasonable construction practice, to conduct a reasonable inspection of the sign prior to hanging it, and should have hung it in a reasonable manner so as not to cause harm to persons under or near the sign; and that Defendant Standard Roofing & Sheet Metal, Inc. failed to do so, then Defendant Standard Roofing & Sheet Metal, Inc. was negligent, and you must find in favor of the Plaintiffs against the Defendant Standard Roofing & Sheet Metal, Inc. and assess Plaintiffs' damages in accordance with the other instructions of the Court.

P-28

> The Court instructs that Jury that if you find from a preponderance of the evidence in this case that Defendant Standard Roofing & Sheet Metal, Inc. failed to exercise reasonable care and utilize those reasonable practices normally used by the construction industry in hanging, suspending, or erecting the subject sign and that such failure was the sole proximate cause, or a proximate contributing cause, of the injuries suffered by Plaintiff, Loyd Furlow, then you must find for Plaintiffs against Defendant Standard Roofing & Sheet Metal, Inc. and assess Plaintiffs' damages in accordance with the other instructions of the Court.

Furlow argues that the trial court should have admitted these two instructions because they instruct the jury on the standard of care of "reasonable construction practices" and "reasonable practices normally used by the construction industry."

However, there was evidence showing that Standard Roofing did not hang the sign which ultimately fell on Furlow. If we are to look at the facts in the light most favorable to the verdict, as we must, then we must conclude that the jury believed that Standard Roofing was not present when the BB&B sign was attached under the Boat Fever sign. These instructions are peremptory on the issue of whether Standard Roofing actually lifted and placed the BB&B sign on the telephone poles, which was disputed at trial. Because these instructions were peremptory on that issue, the trial court was correct in refusing them. *See White v. Miller*, 513 So. 2d 600, 601 (Miss. 1987).

Finally, even though the trial court refused to grant the above two instructions, the Furlows were granted an instruction which properly instructed the jury as to Standard Roofing's alleged negligence. That instruction, P-45, stated as follows:

> The Court instructs the jury that if you find from a preponderance of the evidence in this case that Defendant Standard Roofing & Sheet Metal, Inc. participated in the hanging, suspending, or erecting the sign advertising the Byrds, Bucks & Bass, Inc. d/b/a Birds, Bucks N' Bass business; and the jury further finds from a preponderance of the evidence that this participation was considered as construction as otherwise defined in these instructions and that the jury further finds from a preponderance of the evidence that Defendant Standard Roofing & Sheet Metal, Inc. failed to exercise reasonable care and utilize those reasonable practices normally used by the construction industry in hanging, suspending, or erecting the sign advertising the business of Byrds, Bucks & Bass, Inc. d/b/a Birds, Bucks N' Bass, and that such failure was the sole proximate cause of the injuries suffered by Plaintiff Loyd Furlow, then you must find for the Plaintiffs against Defendant Standard Roofing & Sheet Metal, Inc. and assess Plaintiffs' damages in accordance with the other instructions of the Court.

This Court, like our supreme court, "does not review jury instructions in isolation; rather, they are read as a whole to determine if the jury was properly instructed." *Peoples Bank & Trust Co. v.*

Cermack, 658 So. 2d 1352, 1356 (Miss. 1995). While Furlow was refused instructions P-26 and P-28, he was given P-45 which properly instructed the jury on his theory of recovery. We find no error here.

V. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN REFUSING PLAINTIFFS' INSTRUCTION P-3, A PEREMPTORY INSTRUCTION AGAINST BAILEY ELECTRIC.

VI. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN REFUSING PLAINTIFFS' INSTRUCTION P-4, A PEREMPTORY INSTRUCTION AGAINST STANDARD.

In determining whether the trial court should have granted Furlow a peremptory instruction, it must consider all of the evidence in the light most favorable to Bailey Electric and Standard Roofing. "If the facts and inferences so considered point so overwhelmingly in favor of [Furlow] 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)).

It is clear that under the facts of this case, the trial court was correct in failing to grant a peremptory instruction against Bailey Electric and Standard Roofing. While Bailey Electric did raise and attach the Boat Fever sign to the telephone pole, it is undisputed that it was an agent of Boat Fever who actually attached the BB&B sign to the Boat Fever sign. The jury could have reasonably concluded, as it did in this case, that Boat Fever was 100% negligent in attaching the signs and that Standard Roofing and Bailey Electric were 0% negligent. This is not a case in which a peremptory instruction is due.

VII. WHETHER THE LOWER COURT COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANTS' INSTRUCTION D-4.

Furlow argues that the lower court committed reversible error in granting defendants' instruction D-4. The instruction stated the following:

> If you find from a preponderance of the evidence in this case that Plaintiff's injury was due directly and exclusively to natural causes, without human intervention, which could not have been prevented by the exercise of reasonable care and foresight, the occurrence is an act of God for which the Defendant is not liable.

This instruction was requested by BB&B who is not a party to this appeal.

Neither Bailey Electric nor Standard Roofing requested this instruction, therefore, the Furlows cannot assert as error an instruction not offered by the Appellees. As stated in *Corpus Juris Secundum:*

If the alleged errors of the Trial Court concern only parties below but not parties to the appeal, a judgment or decree will not be reversed at the insistence of the appellant or plaintiff in error.

5 C.J.S. Appeal & Error §741, at 171-72 (1957).

Regardless of the above standard, Furlow would still not prevail for the following reasons. First, numerous witnesses described the wind force on the day in question as "abnormally high." In fact, one witness described the wind as "gale force," and the plaintiff himself described the wind as "blowing pretty good" on the day of the accident. This testimony would justify the trial court's granting of the "Act of God" instruction to the jury. *See City of Hattiesburg v. Hillman*, 222 Miss. 443, 76 So. 2d 368 (1954); *City of West Point v. Barry*, 218 Miss. 739, 67 So. 2d 729 (1953).

Second, while the jury was instructed on the "Act of God" instruction, it is readily apparent from the jury's verdict that the jury did not conclude the accident to be caused by an "Act of God." The jury returned a verdict of 75% fault to Boat Fever and 25% fault to BB&B. The jury attributed 100% of the accident to Boat Fever and BB&B, and 0% to an act of God. Because the jury clearly did not decide the case based on the "Act of God" instruction, there was no error in granting the same.

THE JUDGMENT OF THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY IS AFFIRMED. COSTS OF APPEAL ARE TAXED TO THE APPELLANTS.

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