IN THE COURT OF APPEALS 7/2/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-01047 COA

WILLIAM C. MASHBURN AND MARCELL DAVIS

APPELLANTS

v.

WAYNE COUNTY, MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. ROBERT WALTER BAILEY

COURT FROM WHICH APPEALED: CIRCUIT COURT OF WAYNE COUNTY

ATTORNEY FOR APPELLANTS:

S. CHRISTOPHER FARRIS

ATTORNEY FOR APPELLEE:

RAYMOND O. BOUTWELL

NATURE OF THE CASE: WRONGFUL DEATH

TRIAL COURT DISPOSITION: JUDGMENT IN FAVOR OF DEFENDANT

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

THOMAS, P.J., FOR THE COURT:

William C. Mashburn and Marcell Davis filed a wrongful death suit against Wayne County,

Mississippi, alleging that Wayne County negligently caused the death of Kenny Mashburn by placing a pile of dirt in the middle of the roadway without proper warning signs. Greg Mason, the driver of the automobile which struck the pile of dirt, was brought into the action by Wayne County as a third party defendant.

A trial was had upon the matter in which a jury returned a verdict in favor of Wayne County, finding that Wayne County was not negligent. From this verdict Mashburn and Davis appeal to this Court assigning five alleged errors. Finding no reversible error, we affirm.

FACTS

Wayne County placed a large pile of dirt in the middle of the Clara-Chicora-Buckatunna Road, approximately one-quarter of a mile from the Clara-Chicora-Buckatunna Road bridge. The dirt was allegedly placed there in order to stop traffic from crossing the bridge because the bridge was in need of repairs. A road closed sign was placed approximately three quarters of a mile in front of the dirt pile, and on the day of the accident, there were no other signs or lights placed near the pile of dirt. The road closed sign was not intended to stop all traffic on the road because some people had to use the road to reach their homes.

On the night of January 29, 1993, Greg Mason and his cousin, Kenny Mashburn, decided to go to the store and rent a movie. They proceeded down the Clara-Chicora-Buckatunna Road, intending to stop at the bridge and walk across to the store. However, before they reached the bridge their truck struck the pile of dirt in the road, resulting in the death of Kenny Mashburn.

DISCUSSION

I. WHETHER THE LOWER COURT ERRED IN ALLOWING THE JOINDER OF GREG MASON AND JANICE MASON AS THIRD PARTY DEFENDANTS INSTEAD OF CO-DEFENDANTS WITH WAYNE COUNTY, MISSISSIPPI.

Prior to trial, Greg Mason filed a Rule 12(b)(6) for failing to state a claim upon which relief should be granted, arguing that he should not have been brought into the action as a third party defendant. Arguments were made by the Defendant, Wayne County, and Mason; however, Mashburn and Davis did not object nor did they argue to the trial court, what they are arguing to this Court now, that bringing Mason into the trial as a third party defendant would unduly confuse the jury.

The only involvement Plaintiffs' counsel made during the arguments on this matter was to state the following:

BY MR. CHRIS FARRIS: Judge, I was somewhat involved on behalf of the trial lawyers when part of the tort reform package came up. It is my understanding that in this defeated battle that the purpose of this statute was solely to do away with joint and several liability situation, where you get a verdict between both of them. And if one is defuncted, you just collect the whole nine yards against the other. And this statute is, basically, addressing that situation. It is typical legislators who don't understand the law that want to fix it when it is something that is not broken. And I think we're getting mixed up with contributory negligence and contribution. You can still have a contributory negligence situation with a jury instruction and the jury finding ten percent for one defendant who is

not even there and ninty [sic] percent for the other. And then you have your judgment there and you have to go collect it. I think this statute deals with just collectibility among the defendants. And that's the only point I wanted to raise.

The trial court denied Mason's Rule 12(b)(6) motion. Now on appeal, Mashburn and Davis argue, for the first time, that the trial court erred in joining the Mason's as a third party defendant instead of as co-defendants. They argue that the trial court's ruling confused the jury as to the standing of the parties.

However, the law in this State is clear. In order for an issue to be preserved on appeal a contemporaneous objection must be made. As our supreme court has stated: "Where a party fails to make a proper, specific objection to allow the lower court to consider an issue, this Court will not normally entertain the assignment of error." *T.K. Stanley, Inc. v. Cason*, 614 So. 2d 942, 954 (Miss. 1992); *see also Dedeaux v. J.I. Case Co.*, 611 So. 2d 880, 887 (Miss. 1992).

II. WHETHER THE COURT ERRED IN ALLOWING FOUR PEREMPTORY CHALLENGES TO BE SPLIT BETWEEN THE PLAINTIFFS AND THE THIRD PARTY DEFENDANT'S, THE MASONS.

During the jury selection process arguments were made by Wayne County that the Plaintiffs and the third party defendants were similarly aligned and because of such their peremptory challenges should be used jointly. Over the objections of both the Plaintiffs and the third party Defendant, the trial court agreed with Wayne County and ruled that the four peremptory challenges should be split between the two parties.

The trial court made the following ruling:

> We have three parties. The plaintiff has sued the defendant, the defendant Wayne County then filed suit against a third-party defendant Gregory Mason. The plaintiff, as I understand it, and the third-party defendant were cousins. It is my ruling that under peremptory challenges the plaintiff Mashburn and the third-party defendant Mason will have a total of four strikes. I see they are aligned with a common interest.

The decedent, Kenny Mashburn, and the third-party Defendant, Greg Mason, were cousins and friends. In fact, even though Mason was the driver of the automobile, and there was a possible issue as to whether Mason was partly responsible for the accident, no suit was brought against Mason. The only reason that Mason was brought into the trial was that Wayne County brought him in as a third party defendant. Furthermore, both the Plaintiffs and the third-party Defendant's position in the motions and pleadings that were filed in the case, was that Wayne County was the sole proximate cause of the accident.

Rule 47(c) provides:

> In actions tried before a twelve-person jury, each party may exercise four peremptory challenges; in actions tried before a six-person jury, each party may exercise two peremptory challenges. Parties may challenge any juror for cause. In all claims or actions tried together, two or more parties having relatively similar interests may be aligned as a single party or the court may permit challenges to be exercised separately or jointly.

M.R.C.P. 47(c).

The decision of deciding whether the interests of two parties are similarly aligned to the degree that peremptory challenges may be properly split between the two parties, is left to the trial court's sound discretion. *Mutual Life Ins. v. Estate of Wesson*, 517 So. 2d 521, 530-31 (Miss. 1987). As our supreme court has stated: "The trial court has a measure of discretion in such matters, and we are in no wise able to say that he erred in this respect." *Id.* at 531 (quoting *Acree v. Collins*, 124 So. 2d 118, 120 (Miss. 1960)).

III. WHETHER THE TRIAL COURT ERRED IN SUBMITTING THE ISSUE OF WAYNE COUNTY'S ALLEGED NEGLIGENCE TO THE JURY AND IN NOT GRANTING PLAINTIFF'S INSTRUCTION P-2.

The Pplaintiffs argue that the trial court erred in not granting a peremptory instruction to the jury as to Wayne County's negligence. They argue that the city did not place any warning signs that would indicate that there was a pile of dirt in the roadway, and that this failure to do so was error, and the jury should have been so instructed.

The standard of review regarding a denial of a judgment notwithstanding the verdict and a peremptory instruction are the same. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 252 (Miss. 1993); *Munford, Inc. v. Fleming*, 597 So. 2d 1282, 1283 (Miss. 1992); *Motorola Comunications & Elec., Inc. v. Wilkerson*, 555 So. 2d 713, 723 (Miss. 1989). Under this standard we are to "consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence." *Sperry-New Holland*, 617 So. 2d at 252.

Looking at the evidence in the light most favorable to Wayne County, we hold that the trial court was correct in denying the peremptory instruction.

IV. THE TRIAL COURT ERRED IN GIVING INSTRUCTION C-5 WHICH WAS THE FORM OF THE VERDICT.

Mashburn and Davis argue that the court's instruction C-5 was in error under Mississippi law. Particularly, they argue that the instruction was contrary to Mississippi Code, section 85-5-7 which states that "[I]n actions involving joint tort-feasors, the trier of fact shall determine the percentage of fault for each party alleged to be at fault." Miss. Code Ann. § 85-5-7 (1972). Mashburn and Davis argue that C-5 instruction was contrary to the above statute in that it did not allow the jury to

determine the percentage of fault of each party. We disagree with Mashburn and Davis for two reasons.

First, prior to submitting the instruction to the jury, the trial court asked Plaintiffs' counsel if he had any objection to the proposed instruction, to which counsel replied that he did not. Not only was there no objection to the instruction, Mashburn and Davis did not include this issue in their motion for a new trial.

"[W]here a party fails to make a proper, specific objection to allow the lower court to consider an issue, this court will not normally entertain the assignment of error." *T.K. Stanley*, 614 So. 2d at 954; *see also Dedeaux*, 611 So. 2d at 887. This issue was not properly preserved for appeal.

Even if this issue was properly before us, Mashburn and Davis would still not prevail. After a careful review of the instruction we hold that the jury was properly instructed considering the alignment of the parties.

Instruction C-5 states the following:

> The Court instructs the Jury that if you find for the Plaintiffs, then the form of your verdict shall be as follows:
>
> We, the Jury, find for the Plaintiffs, William Mashburn and Marcell Davis, and award damages in the sum of $_.
>
> We, the Jury, find for the Plaintiff, Marcell Davis, as Administratrix of the Estate of James Kenneth Mashburn for medical, funeral, and headstone expenses in the sum of $_.
>
> The Court instructs the Jury that if you find for the Defendant, Wayne County, then the form of your verdict should be as follows:
>
> We, the Jury, find for the Defendant, Wayne County.
>
> In the event you find for the Plaintiffs, then you must consider the issue of the Defendant, Wayne County's contribution claim against Gregory K. Mason. The verdict should be in one of the following forms:
>
> (1) If you find that the Defendant, Wayne County, is entitled to contribution from Gregory K. Mason, then the form of your verdict shall be as follows:

We, the Jury, find for the Defendant, Wayne County, on its claim for contribution against Gregory K. Mason, and Third-Party Defendant, Gregory K. Mason shall contribute to Wayne County the sum of $_.

(2) If your verdict is for Gregory K. Mason, then the form of your verdict shall be as follows:

We, the Jury, find for Gregory K. Mason.

This instruction told the jury that if it finds for the Plaintiffs against Wayne County, then it was to

determine whether Greg Mason was also at fault in the accident, and if so, attribute in a dollar amount how much of the Plaintiffs damages should be paid by Mason. This is not a case in which there is one plaintiff and two defendants. Because of the way that the case was presented to the jury, the Plaintiffs could not prevail against Mason, unless it first prevailed against Wayne County. The instruction in question properly instructed the jury what it should do.

V. THE VERDICT WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

Our standard of review in determining the sufficiency of the evidence has been stated many times.

> [The evidence is considered] in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [then the Court is] required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required. *Munford* [*v. Fleming*, 597 So. 2d 1282, 1284 (Miss. 1992)] (citing *Litton Systems, Inc. v. Enochs*, 449 So. 2d 1213, 1214 (Miss. 1984)).

American Fire Protection v. Lewis, 653 So. 2d 1387, 1390-91 (Miss. 1995).

With this standard in mind, our focus turns on whether there was substantial evidence in the record for a jury to find that Wayne County was not negligently responsible for the accident which resulted in the death of Kenny Mashburn. Even though we might have found differently, under our standard of review, we hold that there was sufficient evidence before the jury for it to find that Wayne County was not negligent. It was for the jury to determine whether Wayne County properly warned of the danger on the road. The jury's verdict shows that the warning signs that were placed on the road were sufficient to put the public on notice of the danger. We will not invade the province of the jury.

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

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