IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00793 COA

CAROLYN N. RAINES APPELLANT

v.

CHARLES D. SEALE, MICHAEL

STONE AND DELTA BEVERAGE

COMPANY APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. THOMAS J. GARDNER III

COURT FROM WHICH APPEALED: LEE COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT: JERRY BYTHEL READ

CHARLES T. YOSTE

PAUL T. BENTON

ATTORNEY FOR APPELLEES: REBECCA LEE WIGGS

NATURE OF THE CASE: CIVIL: NEGLIGENCE

TRIAL COURT DISPOSITION: JURY FOUND NO NEGLIGENCE ON THE PART OF THE DEFENDANTS

MANDATE ISSUED: 9/30/97

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

PAYNE, J., FOR THE COURT:

Plaintiff, Carolyn N. Raines, appeals from a judgment of the Circuit Court of Lee County, Mississippi, in which a jury found for the Defendants, Charles D. Seale, Delta Beverage Company, and Michael F. Stone. Finding that the trial court erred in refusing Raines's negligence per se instruction, we reverse and remand for a new trial.

FACTS

This case arises from a motor vehicle accident that occurred on a two lane bridge in Tupelo, Mississippi. Appellant, Raines, was traveling west when the hood on the vehicle traveling in front of Raines being driven by Charles Seale flew off and struck the hood and windshield of a Pepsi trailer truck traveling east on the bridge. When Raines saw the hood come off of the vehicle in front of her, she brought her vehicle to a complete stop in the west bound lane of the bridge. The driver of the Pepsi truck, Michael Stone, testified in a deposition that when the hood came toward his vehicle he hit his brakes, and as a result, his truck jackknifed and crossed the center line of the highway striking Raines's vehicle. There is further deposition testimony by Stone that because he is short, he was unable to reach the hand operated trailer brakes. Stone indicated that had he been able to reach the trailer brakes he would have been able to keep his vehicle in its proper lane. The Appellees contend, however, that the impact of the hood on Stone's hood and windshield caused Stone to lose control of his vehicle and swerve into Raines's lane. Stone bases his defense in this case on excuse or justification.

The jury returned a verdict in favor of the Appellees finding that neither Stone nor Seale were negligent in their actions which resulted in Raines's damages and injuries. Raines, feeling aggrieved by the verdict, filed this appeal asserting two errors: (1) whether the driver of a vehicle who is stopped in

her own lane of travel on a bridge and is struck by another vehicle whose driver has crossed the center line of the highway is entitled to recover for her injuries from the driver who crossed the center line under the theory of negligence per se, and (2) whether the jury's verdict was against the overwhelming weight of the evidence.

ANALYSIS

I. WHETHER THE DRIVER OF A VEHICLE WHO IS STOPPED IN HER OWN LANE OF TRAVEL ON A BRIDGE AND IS STRUCK BY ANOTHER VEHICLE WHOSE DRIVER HAS CROSSED THE CENTER LINE OF THE HIGHWAY IS ENTITLED TO RECOVER FOR HER INJURIES FROM THE DRIVER WHO CROSSED THE CENTER LINE UNDER THE THEORY OF NEGLIGENCE PER SE.

Raines argues that she was entitled to summary judgment on this issue or at a minimum, to a jury instruction based on a negligence per se theory of liability. Raines contends that Stone, by crossing the center line of the highway, violated Section 63-3-601[(1)] of the Mississippi Code and is therefore negligent per se. Raines argues that because Stone does not fall within any of the exceptions in Section 63-3-601, he has violated the statute and is negligent as a matter of law. Raines submitted a negligence per se instruction, but it was denied. Raines contends that denial of this instruction prevented her from placing her theory of liability before the jury. The instruction submitted by Raines is as follows:

You are instructed that violations of traffic laws in safety statutes may constitute negligence as a matter of law. Therefore, if you find from a preponderance of the evidence in this case that:

1. the defendant, Michael Stone, while operating a motor vehicle, failed to comply with § 63-3-601 [Miss. Code Ann.] by keeping his vehicle on the right half of Highway 6, and

2. the defendant's failure to comply with this regulation was the sole proximate cause or proximate contributing cause of plaintiff's injury,

then your verdict shall be for the plaintiff.

However, if you find that the plaintiff has failed to prove any of the elements by a preponderance of the evidence in this case, then your verdict shall be for the defendant.

Stone argues that Raines's argument is without merit as she completely ignores Stone's excuse/justification defense. Stone contends that Raines's instruction was an incorrect statement of the law because it failed to permit the jury to consider the "excuse" defense.

We do not agree with Stone's argument that Raines's instruction was an incorrect statement of the law. Stone seems to be under the impression that his excuse theory merits more consideration than Raines's negligence per se theory. This is simply not the case. Stone's argument borders dangerously

close to the now abolished "sudden emergency doctrine." *Knapp v. Stanford*, 392 So. 2d 196 (Miss. 1980). In *Knapp*, the court stated that "[t]he existence of an emergency is simply one of the circumstances contemplated by the normal standard of care, in seeking to ascertain whether the defendant acted as an ordinarily prudent and careful person would have done under the same circumstances." *Id.* at 198. "The conduct required is still that which is reasonable under the circumstances." *Id.* We fail to see how Raines's negligence per se instruction would have nullified Stone's excuse theory as the jury was permitted to hear evidence of an excuse and at no time were told that they could not consider it.

We find that Raines is correct in that Stone violated Section 63-3-601 of the code as this section does not have an exception which would encompass the events leading to Stone's crossing the center line of the highway. For this reason alone, Raines was entitled to a negligence per se instruction. In determining liability under a negligence per se theory, the fact finder must go through two steps. First, the jury must determine that the defendant violated a statute which resulted in an injury of the type the statute intended to prevent and that the injured party was in the category of persons the statute is designed to protect. If the jury so determines, then negligence is established. The jury must then determine whether the negligence was the sole proximate cause or contributing proximate cause of the injury. *McRee v. Raney*, 493 So. 2d 1299, 1300 (Miss. 1986). "Thus, negligence alone does not establish liability." *Id.* at 1300-01.

We find that Raines is correct in that refusal of the negligence per se instruction prevented her theory of the case from going to the jury. *See Splain v. Hines*, 609 So. 2d 1234, 1239 (Miss. 1992) (holding that "a party has a right to have his theory of the case presented to the jury by instructions, provided there is credible evidence that supports the theory"). Therefore, the negligence per se instruction should have been granted, and the jury should have been permitted to determine liability in light of Stone's violation of the statute.

We therefore reverse and remand for a new trial. Because we are reversing on Raines's first issue, we will not address Raines's second issue regarding the weight of the evidence.

THE JUDGMENT OF THE LEE COUNTY CIRCUIT COURT IS REVERSED AND THE CASE IS REMANDED FOR A NEW TRIAL. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLEES.

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HERRING, AND KING, JJ., CONCUR. McMILLIN, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY HINKEBEIN AND SOUTHWICK, JJ.

1. § 63-3-601. Vehicles to be driven on right half of roadway; exceptions.

Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

2. When the right half of a roadway is closed to traffic while under construction or repair;

3. Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or

4. Upon a roadway designated and signposted for one way traffic.

Miss. Code Ann. § 63-3-601 (Rev. 1996).

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McMILLIN, P.J., DISSENTING:

I respectfully dissent. The proof in this case does not, in my opinion, warrant a negligence *per se* instruction based on a violation of section 63-3-601 of the Mississippi Code -- at least in the form that instruction was requested by the plaintiff. The statute directs that, with certain exceptions, a "vehicle shall be driven upon the right half of the roadway." Miss. Code Ann. § 63-3-601 (Rev. 1996) . Stone testified, without contradiction, that he swerved to the left in reaction to seeing a large piece of sheet-metal in the form of a car hood sailing through the air straight towards him. He claimed that he attempted to steer back into his own lane after the flying piece of metal had struck his hood and bounced off his windshield. The tractor portion of his rig made it back into the proper lane; however, the trailer struck the plaintiff's vehicle, which was stopped in the oncoming lane. In my opinion, it was within the province of the jury to determine whether Stone's maneuver was a conscious act done in a manner that violated his duty to properly operate his vehicle, or was nothing but an involuntary reaction to an unforeseeable occurrence. A purely instinctive reaction, attempting to avoid being struck by a hurtling sheet of steel, would not seem to necessarily constitute a violation of section 63-3-601. A finding of negligence *per se* arising out of a violation of any of the statutory rules of the road ought to be accompanied by proof that the violation was either wilful or the result of culpable inattention. The proposed Instruction P-6 failed to take these factors into account and, in the form proposed, constituted a peremptory instruction against Stone on the issue of negligence.

I do not contend that Stone was not negligent as a matter of law, thereby attempting to revive the moribund "sudden emergency doctrine." Rather, I only contend that there was a legitimate question of fact as to whether Stone's conduct, in view of the circumstances in which he found himself, constituted negligence. The abolishment of the sudden emergency doctrine did not serve to prevent jurors from considering the circumstances in which a defendant's conduct occurred. Such factors may still be considered by the jury in measuring the blameworthiness of the defendant's actions. In this case, the jurors could have -- and apparently did -- conclude that Stone's split-second reaction of swerving to the left when he was confronted, without warning, with a life-threatening peril was not negligent conduct. That is the function of the jury, and it would have been improper to deprive them of that authority by giving the requested negligence *per se* instruction. If there was error in the way the jury was instructed on how to apply the laws of negligence to the facts of this case, that error did not consist of denying plaintiff's requested Instruction P-6, an instruction that would have taken the issue of negligence away from the jury altogether.

HINKEBEIN AND SOUTHWICK, JJ., JOIN THIS DISSENT.