IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00737 COA

JASON D. LEDLOW **APPELLANT**

v.

REEVES TRANSPORTATION, INC. AND PERRY PHILLIP VANCE **APPELLEES**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	11/14/95
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	NESHOBA COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	JAMES M. MARS, II
ATTORNEYS FOR APPELLEES:	JOHN B. MACNEILL
	STUART ROBINSON, JR.
	JASON EHRLINSPIEL
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	JUDGMENT FOR THE DEFENDANTS
DISPOSITION:	AFFIRMED - 10/7/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	10/28/97

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

COLEMAN, J., FOR THE COURT:

A collision occurred between a 1991 Camaro driven by Jason D. Ledlow (Ledlow) and a bobtailed truck driven by Perry Phillip Vance (Vance) for Reeves Transportation, Inc. It happened at approximately 1:30 a.m. on June 18, 1994, near the junction of Mississippi State Highways 21 and 488 in Neshoba County. Ledlow filed a lawsuit in the Circuit Court of Neshoba County against Reeves Transportation and Vance to recover damages for his injuries sustained in the wreck. The jury returned a verdict for the defendants, Reeves and Vance, and the trial judge entered judgment for them. Ledlow has appealed to argue that the trial court erred by refusing to grant a particular jury instruction, peremptory in nature, which would have established Vance's negligence "for his failure to

ascertain the location of [Ledlow's] vehicle prior to executing the left turn . . . ." The trial judge's refusing to grant this instruction was not error; we affirm the judgment for Reeves and Vance.

I. FACTS

Ledlow, then eighteen years old, had graduated twelfth in his class of 164 graduates from Neshoba Central High School in May, 1994. He had earned a band scholarship to attend East Central Community College that fall. To earn extra money for college, he had begun working from 3:30 p.m. until midnight at U. S. Motors in Philadelphia, Mississippi, winding metal cores of electric motors for which he earned $5.00 per hour. At midnight on June 17, 1994, Ledlow finished his shift at U. S. Motors and drove around in Philadelphia to look for his friends who might still be out past midnight. About an hour and a half later, Ledlow decided to return home and go to bed. Thus, he drove west from Philadelphia on Highway 21 to where it joined Highway 488 and then continued west on Highway 488 toward his home located several miles farther west from this junction.

On that same day, June 17, Perry Vance, a thirty-five-year-old long-haul truck driver for Reeves Transportation, had driven from Runnels, Virginia, through North Carolina on his way home to Amory from a run to New York City. When Vance arrived in Amory at about 8:30 p.m. that night, his employer, identified in the record only as Red Reeves, asked Vance to continue driving his truck without a trailer, or "bobtailed," to Philadelphia to repair another truck owned by Reeves but driven by James R. Broadway. Broadway lived on the south side of Highway 488 less than one mile west of the junction of Highways 21 and 488. The truck to be repaired was parked in the front yard of Broadway's house.

Once Vance arrived in Philadelphia at around 11:30 p.m., he drove to Broadway's house to get Broadway to accompany him to Alex Chipley's auto parts store so that they could get the part needed to repair the truck. With Broadway as his passenger and with Vance's wife riding in the truck's bunk, Vance stopped at Chipley's house so that they all might go to Chipley's store to get the part, an air shifter for the transmission, needed to repair the truck. Chipley's house was located on the north side of Highway 488 just west of its junction with Highway 21. Chipley's auto parts store was located in the curve of Highway 21 just off its junction with Highway 488. After Vance obtained the air shifter, or "dog," to repair the truck, Chipley returned to his home in his vehicle, and Vance, his wife, and Broadway returned west in Vance's truck toward Broadway's house.

As Vance began to turn his bobtailed truck left into the driveway to Broadway's house, Ledlow had pulled his Camaro into the east-bound lane of Highway 488 to pass the truck. Ledlow's Camaro collided with the front left wheel of Vance's truck in the south lane of the highway and then careened into the left rear wheels of the truck parked in Broadway's front yard. The truck was parked in the driveway perpendicularly to the highway. The impact of Ledlow's Camaro with Broadway's parked truck knocked the parked truck fourteen feet farther west. Ledlow could not be removed from his Camaro until rescue personnel arrived with the "jaws of life," which they used to pry open the door on the passenger's side of the Camaro so that they could remove Ledlow from the car through that door. Both the fibula and the tibia in Ledlow's left leg were fractured into ten or twelve pieces just above the ankle.

Because Ledlow presents but one issue in his appeal, we reserve recitation of the testimony which occurred during the trial of this case for our analysis and resolution of that issue.

II. ANALYSIS AND RESOLUTION OF LEDLOW'S ONLY ISSUE

We quote Ledlow's one issue verbatim from his brief:

Based solely on the defendant's testimony, it was reversible error for the trial judge to refuse jury instruction no. P-5.

Instruction P-5 read as follows:

The Court instructs the jury that the Defendants, Reeves Transportation, Inc., by and through its agent, servant and employee, Perry Phillip Vance, is guilty of negligence by failing to comply with his duty to keep a proper lookout, specifically his failure to ascertain the location of the Plaintiff's vehicle prior to executing the left hand turn, and if you further find that the Defendant, Reeves Transportation, Inc. by and through its agent, servant and employee, Perry Phillip Vance's failure to comply with this duty was a proximate cause or a proximate contributing cause of the injuries and damages, if any, suffered by the Plaintiff, then your verdict shall be for the Plaintiff, Jason D. Ledlow and against the Defendants, Reeves Transportation, Inc. and Perry Phillip Vance.

The record contains the following colloquy among the trial judge and the attorneys for Ledlow, Reece, and Vance about Instruction P-5 during their conference on the jury instructions:

BY THE COURT: P-5?

BY MR. MacNEILL: We object. It's peremptory in nature. It instructs the jury that Mr. Vance is, in fact, guilty of negligence. Also, it talks about the failure to ascertain the location of Plaintiff's vehicle, and we don't think that is a correct duty, and that is not a duty imposed by common law of Mississippi. So, for those reasons, we object to P-5.

BY THE COURT: It is not a duty to look in the rearview mirror before making a turn?

BY MR. MARS: We have cases.

BY THE COURT: But, it is a peremptory instruction, and I am not going to give it, because it peremptorily instructs he is guilty of negligence, to keep a proper lookout.

Ledlow acknowledges that Instruction P-5 is peremptory in nature, but he argues that it was taken almost verbatim from the factually identical case of *Conner v. Harris*, 624 So. 2d 482 (Miss. 1993),

in which the Mississippi Supreme Court reversed a judgment for the defendants and remanded the case for a new trial because the trial judge refused to grant this instruction. *Id.* at 483. The plaintiff-appellant Conner was driving a Pontiac Sunbird behind a spreader truck which the appellee, James D. Harris, was driving north on U.S. Highway 11 in Pearl River County. When Conner drove the Pontiac into the left lane to pass the spreader truck, Harris turned left to enter a side road. Conner could not stop the car she was driving in time to avoid colliding with the spreader truck in the southbound lane of Highway 11. *Id.* at 482. At trial, the defendant Harris admitted that he had seen the Pontiac behind him as he crested a hill prior to his attempt to turn left onto a side road and was aware that the Pontiac was following the spreader truck. Harris further admitted that he did not look behind him before he began his turn into the side road, and he also admitted that had he looked to the rear, he would have seen the Pontiac. *Id.* The trial judge refused to give an instruction that was identical to the one that is at issue in the case *sub judice. Id.*

In its opinion, the Mississippi Supreme Court cited Section 63-3-707 of the Mississippi Code of 1972, which provided in pertinent part that "[n]o person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety . . . ." Miss. Code Ann. § 63-3-707 (Rev. 1996). The supreme court then concluded that the case of *Gates v. Murphree*, 286 So. 2d 291 (Miss. 1973), disposed of the issue because in *Gates*, the Mississippi Supreme Court had affirmed the circuit court's holding that the defendant Gates was negligent as a matter of law. However, the circuit court did not instruct the jury to find against Gates. Thus, the circuit court had submitted to the jury the question whether Gates' negligence was a proximate contributing cause of the accident and resulting injuries to plaintiff. *Gates*, 286 So. 2d at 292. In *Conner*, the supreme court held: "It was reversible error for the court to refuse this requested instruction, and we according[ly] reverse and remand for a new trial." *Conner*, 624 So. 2d at 483. Justice Smith, who was joined by three of his colleagues, dissented in *Conner* because he opined that there was conflicting evidence in the case which warranted submitting the issue to the jury for their resolution, as the trial judge had done. *Conner*, 624 So. 2d at 484 (Smith, J., dissenting). This Court is, of course, bound by the majority opinion in *Conner*.

Ledlow argues that the record in this case conclusively establishes that Vance never looked back behind him when he made his left turn into Broadway's driveway. He points to the following testimony of Vance: "I told my passenger that was in the vehicle with me [Broadway], I said, 'There's a car back yonder just turned behind me pretty quick.' I said, 'I hope he notice (sic) my signal up here that we are getting ready to make a turn.'" In his rebuttal brief, Ledlow also cited the following portions of Vance's testimony under cross-examination by Ledlow's counsel:

Q. When is the second time you saw him?

A. Second time I saw him he was approaching me.

Q. Okay. Where were you, maybe ten feet from the turn at that point?

A. I was in the process of turning.

Q. Okay. So, you saw him again and you turned?

A. Yes.

Q. Okay. How far behind was Mr. Ledlow at the time you began your turn?

A. Sir, that mirror, you can't approximately judge nobody on that there mirror on the distance when they are coming up on you at night, after you done started -- not even after you done started to making your -- you can't judge your distance. If that man running the rear of your truck, you still cannot judge -- you can judge a distance there, but you cannot judge -- if he's within twenty yards of you, you can't say if it's thirty yards, you can't say it's forty yards, behind you or nothing like that there.

Q. Well, you can see him behind you?

On direct examination, Vance testified:

A. You can see him, true.

Q. Did you see [Ledlow's] headlights in your rearview mirror at some point during all of this?

A. Yes, sir.

Q. How many times did you see the headlights from the Plaintiff's vehicle in your rearview mirror?

A. I saw him twice.

Vance had also testified that he did not see Ledlow until immediately before the impact, when he looked down just in time to see Ledlow's Camaro strike the left front wheel of his truck. Based on all of the foregoing testimony by Vance, Ledlow argues that the evidence is conclusive that while Vance knew that Ledlow was behind him, he only saw the Camaro twice, once as Ledlow turned onto Highway 488 at its junction with Highway 21 and again when Ledlow's Camaro actually collided with the truck which Vance was driving. Therefore, to quote from Instruction P-5, "Perry Phillip Vance, is guilty of negligence by failing to comply with his duty to keep a proper lookout, specifically

his failure to ascertain the location of the Plaintiff's vehicle prior to executing the left hand turn . . . ."

Vance counters Ledlow's argument by emphasizing the following portions of his testimony:

A. Then when I got close to the driveway, which Broadway was with me, got close to his driveway, I started slowing down and throwed (sic) my turn signal on, because I saw a vehicle turn behind me. When I saw that vehicle turn behind me, I throwed (sic) my turn signal and let that vehicle know aware that I was ready to turn ahead of him, and I started slowing down and let him acknowledge that I was slowing down up in front of him.

Q. When did you first realize that there was a vehicle behind you?

A. Okay. When I first acknowledged knowing a vehicle was behind me, that's when I got ready to make my turn, just before I got ready to make my turn. I always look in my mirror before I make any kind of move on turning or anything. I look in my mirror so that no one is not there. When I looked in my mirror, I saw a car like come up behind me, and I saw the car light when it made, I call it a turn, because the road come off in a split. So, I saw it come up and coming up the road behind me, and I was at my driveway, and when I throwed (sic) my turn signal on, and I proceeded over the hill, which there's a little grade down through there, started over the hill down the grade.

On cross-examination, Vance was questioned as follows:

Q. Now, in this twenty yard period that you are talking about, I'm trying to be as fair to you as I can be, did you look again into your rearview mirror before you made your turn?

A. I did look in my rearview mirror.

Q. And, you didn't see anything?

A. Sir, I looked in my rearview mirror. I saw him for the second time, and then when I started making my turn the next time, I didn't see him no more, and that's when he hit me.

Q. When is the second time you saw him?

A. Second time I saw him he was approaching me.

Q. Okay. Where were you, maybe ten feet from the turn at that point?

A. I was in the process of turning.

Q. Okay. So, you saw him again and you turned?

A. Yes.

. . . .

Q. It is your testimony you only saw him the last twenty yards or so before the turn, right, because that's when he turned onto Highway 488?

A. No, I looked back again. At all times, when I saw that car make that turn back behind me, I constantly kept looking in my rearview mirror. You asked me what took me so long to run that little twenty yards, because I was looking for the same car that I saw make that turn behind me, and why I was doing that there, I know I couldn't keep complete construction on the vision that was coming ahead of me. If I was driving slow, I could, and then I turned my turn signal and went into the driveway.

Vance thus argues that his testimony established that he had looked to the rear of his truck before he began to turn left into Broadway's driveway and that he had seen the headlights of an approaching vehicle twice before he began to turn to the left. Thus, this testimony supports the proposition that he had maintained the necessary lookout for traffic approaching from the rear of the truck and was not negligent -- at least on this basis.

Ledlow's entire issue rests upon Vance's testimony, which Ledlow urges this Court to interpret to mean only that Vance failed to ascertain the Camaro's position behind the truck as Vance prepared to turn left into Broadway's driveway. Portions of Vance's testimony establish that he had maintained a lookout for vehicles approaching from the rear of his truck; other portions, as Ledlow argues, create doubt about whether he did. In *Odom v. Roberts*, 606 So. 2d 114, 118 (1992), the Mississippi Supreme Court explained that "[w]hen testimony is contradicted, this Court will defer to the jury, which determines the weight and worth of testimony and the credibility of the witness at trial." In *Arteigapiloto v. State*, 496 So. 2d 681, 686 (Miss. 1986), the Mississippi Supreme Court reiterated that "the jury is the judge of the weight and credibility of testimony and is free to accept or reject all or some of each witness's testimony."

Like the driver of the spreader truck in *Conner* who knew the Pontiac was following behind him before he began to turn left, Vance in the case *sub judice* testified that he knew that a vehicle had turned onto Highway 488 from Highway 21 and was traveling behind the truck which he was driving. Unlike the driver of the spreader truck in *Conner*, who admitted that he did not look behind him

before he began his turn into the side road and who also admitted that had he looked to the rear, he would have seen the Pontiac, Vance in the case *sub judice* testified that he looked in his rear view mirror before he began his turn and that he saw Ledlow's vehicle approaching from the rear. Of course, that testimony was inconsistent with his other testimony that he did not see Vance's Camaro until he looked down at the moment of impact in time to see the Camaro colliding with the right front wheel of his truck. These inconsistencies and contradictions in Vance's testimony could not support the trial judge's peremptorily instructing the jury that Vance was negligent because he failed "to ascertain the location of the Plaintiff's vehicle prior to executing the left hand turn."

Instead, these inconsistencies in Vance's testimony created issues of fact for the jury to resolve either for or against Vance's negligence. As the ultimate fact finder in this case, the jury determined the weight and worth of the testimony and the credibility of Vance, and in doing so, the jury was free to accept or reject all or some of Vance's testimony. *Miller Transporters, Ltd. v. Espey*, 253 Miss. 439, 176 So. 2d 249 (1965), appears consistent with our determination that the trial judge did not err when he refused to grant Instruction P-5. In *Miller Transporters*, the Mississippi Supreme Court criticized an instruction because it assumed "that the driver of [a truck] failed to keep a reasonable lookout to the rear of his tractor and trailer." The supreme court explained that "[t]his was a question for the jury." *Id.* at 253.

We have reviewed the other instructions which Ledlow requested and which the trial judge granted. Among those other instructions were Instructions P-6 and P-8, which read as follows:

Jury Instruction No. P-6

The court instructs the jury that under the law of the state of Mississippi, an operator of a motor vehicle has a duty to keep a proper lookout and be on alert for vehicles traveling behind as well as those traveling in front of the driver.

In the case at bar, if you believe from a preponderance of the evidence that at the time of the accident in question, the Defendant Reeves Transportation, Inc. acting by and through its agent, servant and/or employee, Perry Phillip Vance, failed to determine by a proper lookout to the rear of his vehicle as to the location of the vehicle driven by the Plaintiff, Jason D. Ledlow and if you further find that such failure, if any, was a proximate cause or a proximate contributing cause of the injuries and damages sustained by the Plaintiff, then your verdict shall be for the Plaintiff and against the Defendants, Reeves Transportation, Inc. and Perry Phillip Vance.

Jury Instruction No. P-8

The Court instructs the jury that under the laws of the state of Mississippi, no person shall turn a vehicle from a direct course upon a highway unless and until such movement can be made with reasonable safety and then only after giving an appropriate signal of his intent to execute such turn in the event that any other vehicle may be affected by such movement. The law further requires that the signal of intention to turn right or left shall be given continuously for a reasonable distance prior to turning the vehicle.

In the case at the bar, if you believe from a preponderance of the evidence that at the time of the accident in question, the Defendant, Reeves Transportation, Inc. acting by and through its agent,

servant and/or employee, Perry Phillip Vance, failed to determine by a proper lookout to the rear of his vehicle as to whether his left turn could be made safely of failed to give a signal of his intention to turn, left, either by signal device or by hand continuously for a reasonable distance before turning into the private drive and if you further find that his failure, if any, to do either of the above was a proximate cause or a proximate contributing cause of the injuries and damages sustained by the Plaintiff, then your verdict shall be for the Plaintiff and against the Defendants, Reeves Transportation, Inc. and Perry Phillip Vance.

Instructions P-6 and P-8 properly instructed the jury about Vance's duty to maintain a proper lookout to the rear of his vehicle before he began to turn the truck to the left into Broadway's yard in a non-peremptory manner. The trial judge did not err when it refused to give Instruction P-5 which Ledlow requested; thus, we affirm the judgment in favor of Reeves Transportation, Inc. and Perry Phillip Vance.

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

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.