IN THE COURT OF APPEALS 10/1/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00487 COA

BLOSSMAN GAS, INC.

APPELLANT

v.

MARY V. MILLER

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. WILLIAM F. COLEMAN

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

W. SWAN YERGER

ATTORNEY FOR APPELLEE:

JOHN H. OTT

NATURE OF THE CASE: CIVIL - PERSONAL INJURY

TRIAL COURT DISPOSITION: JURY VERDICT

BEFORE BRIDGES, P.J., KING, AND McMILLIN, JJ.

KING, J., FOR THE COURT:

Mary Miller filed suit against Blossman Gas Inc., alleging that the negligence of Blossman's employee, Pace, resulted in her injuries. The jury found in favor of Miller and assessed her damages at $ 1,141,000.00. The trial judge entered an amended order of judgment, reducing Miller's damages

to $750,000.00. Blossman appeals, assigning seven issues as error. Miller cross appeals on one issue. Finding no error in the proceedings below, we affirm.

I.

On November 2, 1992, Mary V. Miller filed a complaint seeking damages arising out of injuries she received on January 14, 1991, during a motor vehicle accident, which occurred between 4:30 P.M. and 5:00 P.M. on Highway 11, in Lamar County. In her complaint, Miller alleged that on or before January 14, 1991, L.A. Pace, while working within the scope of his employment as a driver for Blossman Gas, crossed over into the left half of the roadway on U.S. Highway 11, hit her vehicle, and that as a direct proximate cause or proximate contributing cause of Pace's negligence, she suffered extreme physical injuries, emotional and mental distress, property damage, and medical expenses. Based on the foregoing, Miller alleged negligence against Blossman pursuant to the doctrine of respondeat superior. Miller demanded $750,000 for physical pain and suffering, emotional pain and suffering, medical expenses, property damages, and other damages as the court deemed proper.

On January 19, 1993, Blossman filed an answer in which it asserted that the complaint failed to state a claim upon which relief could be granted. Blossman admitted that at the time of the accident, Pace was its employee and was acting within the scope of his employment. However, Blossman specifically denied that Pace was guilty of any negligence which proximately caused or contributed to any injuries or damages sustained by Miller. Instead, Blossman alleged that Miller's injuries or damages were proximately caused or contributed to by the negligent acts or omissions of persons other than it.

On July 6, 1993, Blossman filed a motion for summary judgment, asserting that Miller had no credible proof of any breach of legal duty on its part which proximately caused or contributed to the subject accident and Miller's injuries. This motion was denied.

At the trial, which commenced on March 7, 1994, Plaintiff Miller presented the following version of events: On January 14, 1991, Miller drove her daughter, Patricia Entrekin, who was pregnant, and her granddaughter to Hattiesburg to visit Entrekin's doctor. They were returning home from Hattiesburg, headed south on Highway 11, a two-lane highway, at approximately 4:30 P.M., The traffic ahead of them was congested as they approached Black Creek River Bridge. Miller began slowing down her automobile. After she crossed the bridge, Miller stopped in her lane of traffic approximately twenty-five to thirty feet from the bridge. Entrekin then noticed a car ahead spinning in a clockwise position. Thereafter they focused on a Blossman propane truck, which was northbound in the opposite lane of traffic. They watched as the truck got closer to them. Initially, they thought that the truck was going off its shoulder down the steep embankment that borders Highway 11. Suddenly, the truck headed toward them. The truck then hit a vehicle driven by Glasscock and flipped over on its side and landed on Miller's Chevrolet Citation. Miller and her passengers saw smoke and fire coming from the truck. Miller's leg was pinned, and she was unable to move. Entrekin and Miller's granddaughter were able to get out of the vehicle. Two onlookers assisted Miller in getting from the vehicle. Miller was transported to Forrest General Hospital, where she stayed for three weeks and had several operations.

Defendant Blossman presented the following version of the events: On January 14, 1991, Pace, an

employee of Blossman Gas Inc., was traveling in a northerly direction at approximately forty-five to fifty miles per hour, in one of its gas trucks. It was between 4:00 and 5:00 P.M.. The northbound lane was fairly congested, and the southbound lane was heavily congested. Suddenly Vernon Holder III, driving a yellow Dodge automobile in the southbound lane, braked and veered directly into the northbound lane, striking the Blossman truck on the left front fender. This impact caused the left front tire of the gas truck to blow out, and the rear of the Blossman truck to be knocked partially in the air. Pace lost control of the truck. Thereafter, the truck turned over approximately three times and landed on two vehicles. The first vehicle on which it landed was driven by Glasscock, who was uninjured. The second vehicle was driven by Miller, who by the impact was injured. As Pace exited the truck, he checked to see if gas was leaking. Pace received injuries and was hospitalized.

After deliberations, the jury returned a verdict, finding that Miller had suffered $1,141,000 in damages. On March 16, 1994, Miller moved the court to amend her complaint to conform with the jury verdict. On April 21, 1994, the trial court overruled Blossman's post-trial motions and Miller's motion to amend complaint. Additionally, the trial court amended its judgment to reduce the jury verdict from $1,141,000 to $750,000 to conform to Miller's monetary demand in her complaint.

> 1. WHETHER THE TRIAL COURT ERRED BY DENYING BLOSSMAN'S MOTIONS FOR DIRECTED VERDICT, PEREMPTORY INSTRUCTION, AND JNOV?

Blossman contends that the trial court erred in submitting this case to the jury and/or not granting a JNOV. Blossman argues that the evidence offered by Miller was insufficient to lead to a conclusion that it was negligent or that such negligence, if any, was a proximate cause of Miller's injuries. Citing *McConnell v. Eubanks*, 193 So. 2d 425, 430 (Miss. 1966), Blossman explains that the jury verdict was based on nothing more than speculation, guesswork or conjecture and should be reversed. Blossman asserts that the only testimony adduced to support the verdict was Entrekin's testimony, which was contradicted by its three eyewitnesses.

A motion for a directed verdict or a JNOV "tests the legal sufficiency of the evidence supporting the verdict." *Goodwin v. Derryberry Co.*, 553 So. 2d 40, 42 (Miss. 1989) (quoting *Stubblefield v. Jesco*, 464 So. 2d 47, 54 (Miss. 1984)).

> It is a well-established rule that when a trial court, or the [Court of Appeals] in this case, considers such a motion, it must do so 'in the light most favorable to the party opposed to the motion.' The non-movant must also be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point so overwhelmingly in favor of the defendant (movant) that reasonable men and women could not have arrived at a verdict for the plaintiff (non-movant), granting the motion is required. The burden on the movant in such cases is great, for if there is 'substantial' evidence opposed to the motion, which would allow reasonable and fair-minded men and women to reach differing conclusions, the motion must be denied.

Green Acres Farms, Inc. v. Brantley, 651 So. 2d 525, 528 (Miss. 1995) (citations omitted).

In the instant case, there is no dispute that Holder, the driver of a yellow Dodge automobile traveling in the southbound lane, hit Pace, the driver of the Blossman truck, who was driving in the northbound lane. There is also no dispute that after the Blossman truck was hit, it collided with the vehicle driven by Miller. There is a dispute, as to, whether Pace was negligent in failing to keep his vehicle under control after Holder struck it and/or whether the Blossman driver was driving at a reasonable speed immediately prior to the collision with Holder.

Although Blossman argues that upon Pace's collision with Mr. Holder, he completely lost control and never regained the steering wheel, other witnesses testified that the path his truck took after impact proved that he, in fact, did have control of the steering wheel. Blossman's theory of the case centered around testimony that after being struck by Holder, Pace was not negligent and therefore, not the proximate cause of Miller's injuries. These witnesses testified that the Blossman truck was in its proper lane when it was struck by the Holder automobile; that the truck began to slide around in a counter clock-wise direction; that the back wheels went off the east shoulder of the road; that the truck came back across the northbound lane, flipping and rolling, and finally came to rest on the opposite side of the road, partially on the shoulder and partially on the southbound lane of travel, resting on two automobiles, one driven by Miller, and the other driven by Glasscock.

On the other hand, Miller's theory of the case was that the Blossman driver's negligence was the proximate cause of her injuries. Miller's eyewitness testified that as the events unfolded during the accident, she saw Pace in the Blossman truck coming toward Miller's vehicle with his hands motionless on the steering wheel and a frozen look on his face. Miller also presented evidence from which the jury could infer that Pace collided with her to avoid going off a bridge and steep embankment.

We find that the trial court in the instant case acted properly in finding that there was a jury question on the issue of whether Pace was negligent in failing to keep his vehicle under control after Holder struck it and/or whether Blossman's driver was driving at a reasonable speed immediately prior to the collision with Holder.

Blossman also argues that the trial court should have granted him a peremptory instruction on liability. In determining whether the trial court should have granted Blossman a peremptory instruction, this Court must consider all of the evidence in the light most favorable to the non-moving party, Miller. "If the facts and inferences so considered point so overwhelmingly in favor of [Blossman] 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)).

As indicated above, this argument must fail. Upon examining the record, we are convinced that the peremptory instruction was properly denied, and that the evidence was legally sufficient to sustain the jury verdict in favor of Miller. Accordingly, we find that the trial court did not abuse its discretion in denying the motion for a directed verdict, peremptory instruction, or alternatively, a JNOV.

2. WHETHER THE VERDICT IS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE?

Blossman contends that based on the evidence presented in the instant case, a reasonable jury should have found that it was not negligent. Blossman, 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, 1034 (Miss. 1990).

In the instant case, there were disputed issues of facts, including (1) whether under the circumstances then availing that the Defendant's driver, Pace was speeding; (2) whether Pace was being attentive and observant of the events as they unfolded, and maintained a proper lookout; (3) whether Pace was negligent in the maintenance of the truck; and (4) whether the force of the impact completely disabled the vehicle as Blossman's witness testified. In assessing the sufficiency of the evidence, and determining that the verdict was not against the overwhelming weight of the evidence, the trial court made the following statements:

> And, as I say, in my opinion, there was a jury issue on a question of negligence and lack of control, or maintaining control, and the issue of proximate cause. That is not to say that I would have decided the case as the jury did. I personally would have believed Mr. Pace's testimony even though his credibility was attacked in several ways. And -- but that is not my duty to weigh the evidence if there is sufficient evidence, if I weigh it to the point where I decide it's sufficient for the jury to make a determination.

After hearing all of the evidence, the jury found in favor of Miller. This Court employs the same rule as the Mississippi Supreme Court which has consistently stated that negligence is a question for the jury to determine except in the "clearest cases." *Presswood v. Cook*, 658 So. 2d 859, 862 (Miss. 1995); *Caruso v. Picayune Pizza Hut, Inc.*, 598 So. 2d 770, 773 (Miss.1992). "In determining whether the actor's negligence was the proximate cause of the injury, it is not necessary that the actor should have foreseen the particular injury that happened; it is enough that he could have foreseen that his conduct could cause some injury." *M & M Pipe & Pressure Vessel Fabricators, Inc. v. Roberts*, 531 So. 2d 615, 618 (Miss. 1988) (citations omitted). Moreover, when testimony is contradicted as in the instant case, this Court defers "to the jury, which determines the weight and worth of testimony and the credibility of the witness at trial." *Harvey*, 649 So. 2d at 188 (citing *Odom v. Roberts*, 606 So. 2d 114, 118 (Miss. 1992)).

Under the facts of this case, reasonable persons could differ as to whether Pace was negligent or one of the proximate causes of Miller's injuries. Accordingly, we find that the trial court did not abuse its

discretion in denying the motion for a new trial.

> 3. WHETHER THE TRIAL COURT ERRED IN GIVING A LIABILITY JURY INSTRUCTION TO THE PLAINTIFF?

Blossman contends that Instruction P-12 was erroneous in that it provided two improper alternative theories for the jury to find liability. Blossman contends that the first alternative theory was improper because it did not refer to specific facts and was too broadly drawn to allow the jury to determine whether it had breached its duty. Blossman explains that this instruction should have explained what steps Pace, as Blossman's driver, could have or should have reasonably taken to attempt to regain control of his vehicle. Additionally, Blossman complains that both the first and second alternative theories of liability were improper in that they was not based on credible evidence in the record. Blossman argues that in order for an instruction to be submitted to the jury regarding a disputed fact, there must be credible evidence in the record that would support the instruction and from which the jury may find that fact in favor of the requesting party.

In its entirety, Instruction P-12 provided:

> You are instructed that an operator of a motor vehicle has a duty to keep the vehicle under proper control and to drive at a speed which is reasonable and prudent under existing conditions.
>
> Therefore, if you find from a preponderance of the evidence in this case that:
>
> 1. The defendant's driver, after his truck collided with Vernon Holder's vehicle, should have been able to control his truck, but was negligent in his failure to control his truck, as a reasonable prudent person would have done under like or similar circumstances, and
>
> 2. Such failure, if any, was a proximate contributing cause of Mary V. Miller's injuries, then your verdict shall be for Mary V. Miller.

OR

> If you find from a preponderance of the evidence in this case that:
>
> 1. The defendant's driver did not use reasonable care in driving at a speed that was reasonable and prudent under the circumstances existing immediately prior to the collision with Vernon Holder, and
>
> 2. Such failure, if any, was a proximate contributing cause of Mary V. Miller's injuries, then your verdict shall be for Mary v. Miller.

This Court does not review jury instructions in isolation; rather, they are read as a whole to determine if they "announce the applicable primary rules of law." *Burton v. Barnett*, 615 So. 2d 580, 583 (Miss. 1993); *Strickland v. Rossini*, 589 So. 2d 1268, 1273 (Miss. 1991). Reversal is in order on

the basis of faulty jury instructions "where we find two or more instructions in hopeless and substantive conflict with each other." *Strickland*, 589 So. 2d at 1273. However, reversal is not proper "if other instructions clear up the confusing points." *Id.*

The jury instructions submitted in the instant case accurately reflected the rules of law applicable to a cause of action for negligence. Because the jury was properly instructed, this Court finds that this assignment of error is without merit.

4. WHETHER THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT AN APPORTIONMENT INSTRUCTION

Blossman contends that a new trial is required since the trial judge refused to grant it an apportionment instruction as to the negligence of Vernon Holder, a joint tort-feasor. In the instant case, the trial court granted Blossman's peremptory instruction as to Holder's negligence; however, it denied Blossman's apportionment instruction since Holder was not a party to the action. Relying on section 85-5-7(7) of the Mississippi Code of 1972, Blossman argues that this was error since all potential tort-feasors need not be defendants in the action for a defendant who is being sued to avail himself of the apportionment provisions.

Miller counters by arguing that section 85-5-7(7) is not applicable since Blossman did not join Holder as a party to the action. We agree. Section 85-5-7 (7) clearly provides that the "action" must involve joint tort-feasors before the trial judge or jury is required to assess the percentage of fault for each party alleged to be at fault. Miss. Code Ann. § 85-5-7 (1972). We are, therefore, precluded by the literal reading of the section from finding that the trial court erred in failing to grant the apportionment instruction as to a nonparty. This assignment of error is without merit.

5. WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ALLOWED PLAINTIFF'S WITNESS TO GIVE REBUTTAL TESTIMONY?

Blossman also claims that on rebuttal, the trial court allowed Mary Patricia Entrekin to give rebuttal testimony that during the accident she saw Pace's hands on the steering wheel and a frozen look on his face and that she had a clear view of him. Blossman argues that while Entrekin's testimony was called rebuttal, it was merely a reiteration of Entrekin's prior testimony given in Miller's case in chief. Citing *Boston Insurance Co. v. Rogers*, 154 So. 2d 139 (Miss. 1963), Blossman explains that even though the Mississippi Supreme Court has held that the trial court generally has discretion in this matter, the allowance of improper rebuttal testimony may constitute reversible error, if it resulted in prejudice to the opposing party.

Miller counters by arguing that Entrekin gave direct rebuttal testimony to Pace's testimony that there was nothing unusual about the hood of the truck as he headed toward her and that the hood of the truck did not block her vision. Miller explains that Entrekin's testimony was necessary after Pace testified that following the collision with Holder, his truck began flipping and spinning, his body was flopping around in the cab, his steering wheel was spinning clockwise, and the hood of the truck flew up in his face and covered the windshield so that he could not see. Miller further explains that during Pace's testimony at trial, he admitted on cross-examination that during his lengthy deposition, he did

not mention the hood flying up and blocking his vision, and he did not mention his chest hitting the steering wheel.

During Miller's case in chief, Entrekin gave the following relevant testimony:

Q: What was the next thing that you saw the truck do?

A: Like I said, it had jerked, the truck had jerked the rear end across the line. And the front of the truck was heading towards the embankment toward --

Q: -- Off -- Yes, ma'am. Off to which side?

A: It would be the northbound side. He was, I thought, heading towards the ditch. It was a heavy embankment and the bridge not too far ahead of him. And I was just really worried that he was running -- that truck was going to run off the -- into the ditch and possibly hit that bridge. I was really frightened for -- for him, not for us, because we were stopped and thought that we were out of the way.

Q: Okay. What's the next thing that -- that you saw?

A: Well, I watched the truck coming closer, straight-- you know, the road had curved, and the truck was coming on and heading --like he was fighting on that embankment. And I seen [sic] his I'll never -- I mean, he was sitting at the wheel like this and trying to, you know -- and then all at once the truck turned like he was -- and it pulled onto our -- it came onto his lane, and then it came on into our lane. And Mama and I said, "That truck is going to hit us." And-- and then for some reason the truck went to [sic] flipping, and turned over, and landed on top of us.

Q: As you saw this truck turn back toward you and head toward you, were you able to see the driver of the truck from where you were?

A: Yes. I saw the truck driver because I -- I thought he was fixing to go off the ditch and hit -- and blow up possibly. And it -- just that look on his face, that will be branded there forever, I guess. But, yeah, I saw him very clearly.

Q: Okay. Did you see him as he crossed the center line into your lane coming at you?

A: As he came on closer -- the truck was high up. And it -- and so I don't know at what point I lost eye contact with the driver. But it -- then it went into its -- it -- it flipped.

Q: Was anything obstructing your view of the truck driver as you watched him head toward you?

A: No. No. I had a clear view of the driver at the wheel.

Q: Was anything blocking the windshield of this truck driver?

A: No.

Q: Okay. After you saw the -- the truck flip, what -- what happened next?

A: From our windshield, you could see it falling down towards us. And the rear tanks it was a -- the -- where the propane was, it was coming down. And I --I didn't know whether to grab my head or --like I said, I was pregnant so I would -- I was bouncing trying to know how to do as he came in on us. This -- that was really fast.

During Blossman's case in chief, Pace testified that after his vehicle was struck by Holder, the hood of his truck flew up and obstructed his vision and that there was nothing that he could have done to control the truck. Blossman complains that the following testimony offered by Miller through Entrekin only reiterated that given during Miller's case in chief:

Q: All right. You testified, I believe, that after the Blossman truck -- well, after you saw a car spin what happened to the Blossman truck? What did it do?

A: The -- the rear tire was -- had heavy smoke. Is that what you wanted?

BY MR. YERGER: Your Honor, this is repetitious.

BY THE COURT: Yes, sir. Don't be repetitious.

BY MR. OTT: Okay. I'll try to get -- I'll try to get right to the point.

BY THE COURT: ALL RIGHT.

A. Okay. Excuse me.

Q: Excuse me. When you saw the Blossman truck you had testified headed [sic] back toward you --

A: -- Yes, sir.

Q: Head back toward [sic] you, was there anything obstructing your view of the driver you said you saw?

A: No, sir, I saw--

BY MR. YERGER: -- Object. It's repetitious. He's just putting her on--

BY THE COURT: -- Overruled. Overruled. Move along.

Q: Okay. Was there anything blocking your vision, anything between your -- your face and his face?

A: No, sir. I saw the driver very clearly. I saw him at the wheel.

Q: Okay. Was there -- was there any hood or anything like that up over his windshield covering his windshield?

BY MR. YERGER: Your Honor, this again is -- we've been over this in her

first testimony.

BY THE COURT: Overruled.

A: I saw nothing unusual about the hood or the truck except for the smoke at the tire. That's the only thing unusual I saw about the truck.

BY MR. YERGER: -- Same objection.

BY THE COURT: Overruled.

Q: Was there?

A: No, sir.

An abuse of discretion standard applies to this Court's review of the trial judge's decision to allow or not to allow rebuttal testimony. *Gilmore v. Luther McGill, Inc.*, 491 So. 2d 863, 866 (Miss. 1986). While it is true that Entrekin gave testimony that there was nothing blocking the truck's windshield, she did not specifically address the condition of the truck's hood. It was only on rebuttal that reference to the hood surfaced. We are of the opinion that the testimony was admissible, and we reject this assignment of error.

6. WHETHER THE TRIAL COURT ERRED IN GIVING PLAINTIFF'S DAMAGES INSTRUCTION PERMITTING PYRAMIDING OF DAMAGES?

Blossman argues that Instruction P-15 regarding damages was improper in that elements 2 and 3 authorizing recovery for "Past, present and future physical pain and suffering," and "Past, present and future mental anguish and emotional distress" are duplicative and thus authorized the pyramiding of damages, a double recovery for the same injury. P-15 provided:

> Damages is the word which expresses in dollars and cents the injuries sustained by a plaintiff. The damages to be assessed by a jury for personal injury cannot be assessed by any fixed ruled, but you are the sole judges as to the measure of damages in any case.
>
> Should your verdict be for Mary V. Miller, you may consider the following facts in determining the amount of damages to be awarded as may be shown by a preponderance of the evidence:
>
> 1. The type of injuries to Mary Miller and the length of their duration,
>
> 2. Past, present and future physical pain and suffering,
>
> 3. Past, present and future mental anguish and emotional distress,
>
> 4. Reasonable medical expenses incurred, if any, and

> 5. Any future disability of Mary Miller that is reasonably certain to remain or occur.

In *Gillis v. Sonnier*, the Mississippi Supreme Court stated:

> The instructions must be so framed as not to mislead the jury into a duplication of the elements of recovery, or into an award of damages twice for the same loss, although instructions enumerating different items of recovery, even if redundant or repetitive in character, are not objectionable if so worded that no reasonable jury would construe them as permitting double or duplicate recovery for single items, as where the alleged duplicating language is used merely in apposition to, and in explanation of, what preceded, and, in determining whether or not a double award has likely been made, the appellate court will consider the whole charge, evidence, and verdict.

Gillis v. Sonnier, 187 So. 2d 311, 314 (Miss. 1966).

Although P-15 may not have been perfect in its form and verbiage, we cannot say that reasonable jurors could have been mislead into believing that the court was advising them they could return two sums for the same thing. We fail to find that the instruction constituted a pyramiding of damages or that there is a double assessment of damages for the same item. *See T. K. Stanley, Inc. v. Cason*, 614 So. 2d 942, 953-54 (Miss. 1993); *Flight Line, Inc. v. Tanksley*, 608 So. 2d 1149, 1162 (Miss. 1992).

> 7. WHETHER THE JURY VERDICT AND THE JUDGMENT THEREON ARE GROSSLY EXCESSIVE?

As its seventh assignment of error, Blossman argues that the jury verdict of $1,141,000, as reduced to $750,000 to conform to the amount requested in Miller's complaint, is so shocking and outrageously excessive as to show that the jury was influenced by passion, partiality, prejudice, sympathy, or corruption. Blossman explains that the Plaintiff, Miller, is a sixty-year-old woman who offered medical and hospital bills totaling only $35,087.71. Blossman further explains that as a result of the accident, Miller sustained only minor injuries, including, (1) a comminuted open displaced fracture of the distal left radius and the ulna bone of the left forearm and (2) a comminuted displaced open fracture of the distal left tibia and the fibula.

In response, Miller argues that because of the accident, she has had to have (1) several operations in order to place metal rods in her left arm, (2) several operations to repair shattered bones in her left leg; (3) her left wrist is deformed, with very limited usage; (4) her left foot and ankle are deformed and swollen with limited usage; (5) she suffered fractured ribs and a concussion; (6) she suffered from internal derangement of the left temporomandibular joint and (7) is currently totally disabled. At trial, Miller testified to the emotional distress she experienced while pinned in her vehicle. Miller presented medical bills in the amount of $35,087.71, and testimony, without objection, that her doctor has informed her that there is nothing else that can be done about her condition. Blossman did

not present medical expert or other evidence to dispute Miller's disability. Additionally, neither Blossman nor Miller argued specific figures to the jury.

In the instant case, the trial court found that there was sufficient evidence to justify the amount of the jury award. The trial court, however, denied Miller's petition to amend her complaint to raise damages to the amount awarded by the jury. Instead the amount was reduced to conform to the amount requested in Miller's complaint.

We find that the jury award was not so excessive as to evince bias, prejudice or passion on the part of the jury, or to shock the conscience, in view of the evidence of Miller's health prior to the accident and in view of the permanent injuries in the record. *See Jesco, Inc. v. Shannon*, 451 So. 2d 694, 705 (Miss. 1984). This assignment of error is without merit

CROSS APPEAL

> WHETHER THE TRIAL COURT ERR IN GRANTING THE REMITTITUR OF THE JURY VERDICT?

Finally, we must address the issue of Miller's cross appeal. Miller claims that the trial court committed error in granting the remittitur of the jury verdict. After the jury returned a verdict in favor of Miller in the amount of $1,141,000, the trial court reduced the award to $750,000.

This assignment of error is without merit. Here, Miller claims that the trial court's reduction of the jury award was a "remittitur." We disagree. Had the trial court intended to grant a remittitur, it would have had to find that the jury's award was so shocking to the conscience that it evinced bias, passion, and prejudice on the part of the jury or that the verdict was against the overwhelming weight of the credible evidence. *McIntosh v. Deas*, 501 So. 2d 367, 368-69 (Miss. 1987); *see also* Miss. Code Ann. §11-1-55 (1972). In reducing the award, the trial court indicated in its findings that the award was reduced to conformed to the amount by Miller in her complaint. Because we find that the trial court acted properly in reducing the jury award to conform to the amount requested in the complaint, we find no merit in Miller's cross appeal.

For the above mentioned reasons, the judgment of the trial court is affirmed.

THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS ARE ASSESSED TO THE APPELLANT.

BRIDGES, P.J., BARBER, COLEMAN, DIAZ, AND PAYNE, J., CONCUR.

MCMILLIN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., THOMAS, P.J., AND SOUTHWICK, J.

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McMILLIN, J., DISSENTING:

I respectfully dissent. In my opinion, the overwhelming weight of the evidence supports the position that this accident was caused by an approaching vehicle suddenly swerving into the path of the Blossman Gas truck, striking it a blow of such violence that, before the driver could regain control, the truck had overturned. It was only after the truck had overturned that it struck the plaintiff's vehicle.

The plaintiff advances two apparent theories of liability. One is that the Blossman Gas truck was going too fast. The proof is uncontradicted that the truck was traveling within the posted speed limit. There is no proof that, had it been going any slower, it would not have been struck by the approaching vehicle. There is no rule of the road that requires a driver to slow down in anticipation that an approaching driver may, without warning, swerve into the wrong lane. Were that the case, traffic flow on any two-lane road would be almost impossible.

The only other theory is that the driver of the Blossman truck was under a duty to the plaintiff to steer his truck after the impact off the right shoulder of the highway rather than attempting to regain control of the truck. This, in essence, charges the driver with anticipating that his badly damaged vehicle would flip over if he attempted to steer back onto the roadway. The purely reflexive actions

of a driver in an accident not the fault of that driver cannot, by any legitimate standard, be deemed negligence.

In my mind, the sole real issue in this case is whether the case should be reversed and rendered or reversed and remanded. *See, e.g., Jones v. Shaffer*, 573 So. 2d 740, 743 (Miss. 1990) (citations omitted) (When jury verdict is against the overwhelming weight of evidence, the result of bias, passion and prejudice, does not respond to uncontradicted evidence or is inadequate, the court will reverse and render.); *Wilmoth v. Peaster Tractor Co.*, 544 So. 2d 1384, 1386 (Miss. 1989) (The court will reverse the jury verdict and render judgment when the facts considered in the light most favorable to the appellee point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict.). I would conclude, viewing the evidence in the light most favorable to the plaintiff, that this verdict is against the overwhelming weight of the evidence, and would reverse and remand for a new trial.

FRAISER, C.J., THOMAS, P.J., AND SOUTHWICK, J., JOIN THIS DISSENT.