IN THE COURT OF APPEALS

9/9/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00348 COA

LEE M. STEPHENS AND BOBBY RAY

MCMILLAN, A MINOR, BY ROSIE

MCMILLAN, ADULT NEXT FRIEND APPELLANTS

v.

THOMAS W. BISHOP APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

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

TRIAL JUDGE: HON. MARCUS D. GORDON

COURT FROM WHICH APPEALED: NESHOBA COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS: LAUREL G. WEIR

THOMAS L. BOOKER

ATTORNEYS FOR APPELLEE: J. TUCKER MITCHELL

W. SHAN THOMPSON

NATURE OF THE CASE: TORT -- NEGLIGENCE

TRIAL COURT DISPOSITION: JUDGMENT FOR THE DEFENDANT, THOMAS W. BISHOP

MOTION FOR REHEARING FILED: 9/18/97

MANDATE ISSUED: 11/25/97

EN BANC

COLEMAN, J., FOR THE COURT:

A collision between a log truck, which the appellee, Thomas W. Bishop, was driving, and an automobile, which the appellant, Lee M. Stephens, was driving and in which the appellant, Bobby Ray McMillan, was riding, spawned this litigation. Pursuant to the jury's verdict for Bishop, whom Stephens and McMillan had sued, the Circuit Court of Neshoba County entered judgment for Bishop. Stephens and McMillan appeal from that judgment to complain of the manner in which the jury was instructed and to argue that the jury's verdict for Bishop was against the overwhelming weight of the evidence. Nevertheless, we affirm.

I. FACTS

At approximately 7:40 a.m. on January 3, 1994, Stephens was driving his 1989 Mercury automobile north on Highway 19 when Bishop, who was driving his empty log truck north, began to pass Stephens. A collision occurred between these two vehicles during Bishop's passing maneuver, but because the two drivers' versions of the cause of the collision conflicted with each other, we recite each version.

A. Stephens' version of the facts:

Stephens and McMillan are second cousins. Stephens lived with his disabled uncle, Henry Farmer, on a road designated in the record as BIA 0024. Road BIA-0024 ran westerly from the west right-of-way of Mississippi State Highway Number 19 just north of the Tucker community in Neshoba County. Farmer's home was located 2.3 miles west of Highway 19. McMillan, then a sixteen-year-old sophomore at Neshoba Central High School, lived in a house which was located on the west side of Highway 19 about one hundred yards south of where BIA-0024 joined Highway 19. Every weekday morning, Stephens would assist his uncle into the bathroom and leave him there while Stephens drove to McMillan's house to get McMillan to take him to school. After Stephens picked up McMillan, Stephens would then return to his uncle's house to help him out of the bathroom. After he had helped his uncle to exit the bathroom, Stephens then drove McMillan to school at Neshoba Central.

Pursuant to his weekday routine, Stephens had picked up McMillan on the morning of January 3, 1994, and was driving his car north on Highway 19 to his uncle's house to assist his uncle from the bathroom. As Stephens approached the BIA-0024 road, he turned on his car's left-turn signal. Before he commenced to turn onto the BIA-0024 road, Stephens looked into his rearview mirror and saw the log truck, which Bishop was driving, approaching from the rear at high rate of speed, which Stephens estimated to have been "around 65 (m.p.h.) because it was coming so fast." However, Stephens decided not to turn onto the BIA-0024 road because, to quote his testimony at the trial, "[t] here was [sic] two oncoming cars, and we didn't have time to turn, because he wasn't slowing down." Instead, Stephens elected to continue driving north on Highway 19 for a distance of between one-fourth and three-fourths of a mile to a driveway at Mrs. Bates home, which was located west of the highway, into which he decided to make a left-turn.

Stephens did not turn off his car's left-turn signal after he passed the BIA-0024 road to get Bishop's truck "to slow down." Bishop's log trailer was jointed in the middle so that when the truck was not loaded with logs, Bishop could double it up onto his truck while he drove to where his next load of logs awaited him. Bishop's trailer was doubled-up on the truck as Bishop approached Stephens' car from the rear. When Bishop's truck was passing to the left of and was approximately even with Stephens' car, the right rear-wheel on the "doubled-up" trailer skidded around and struck Stephens' vehicle on the extreme left-side and top of the trunk. This collision broke the rear-window of Stephens' car.

As a result of the accident, Stephens struck his head on the window and "blacked out for a few minutes." McMillan's knee was injured when it struck the car's dashboard. As soon as Stephens' car came to rest, McMillan told Stephens that he was going for help, got out of the car, and ran back to his house, where he stayed in bed for the rest of that day because his injured knee was hurting.

B. Bishop's version of the facts:

Earlier that morning, Bishop, a self-employed contract hauler of logs, had left his home in Quitman, stopped at Davis Grocery in House to get a biscuit and a drink, and drove his log truck north on Highway 19 toward Philadelphia in anticipation of picking up his first load of logs for that day. Bishop was traveling between fifty and fifty five miles per hour as he approached the Tucker community on Highway 19. Bishop saw a white Mercury with the left-turn signal blinking about a quarter of a mile in front of him traveling north on Highway 19 at a speed of approximately forty miles per hour. The driver of the car turned off the blinking left-turn signal and continued driving North on the highway as Bishop approached the vehicle from the South. We quote Bishop's testimony at the trial for his version of how the collision between his log truck and Stephens' Mercury happened:

As I started passing [Stephens], I saw him start slowing down and start coming over to the left. So, I jerked it to the left to try to keep from running into him, and as I jerked it to the left, he hit my truck up at the right front tire, right at the fuel tank up under the door, and as I pulled it to the left and he hit right there, I left the road on the southbound shoulder. I was in the passing lane and went off on the shoulder on the left side of the road, on the west side.

By him [sic] hitting the side of my truck and me [sic] turning it to the left, the trailer loaded up on the back of my truck slid over to the right, slid to the side of the truck and hit the trunk of his car up at

the [rear] windshield. It didn't hit the back of the car at the bumper, but it hit -- it's a four-door car, and it hit at the back glass and mashed the top of the trunk in.

We were side by side, and I went down the left shoulder, going down the shoulder, almost in the ditch. When I pulled it back up into the road, I pulled it over to the [east] side [of Highway 19] and stopped.

II. Trial

During the course of the trial, Stephens, McMillan, and Bishop testified about the collision of the log truck and car in accordance with the two versions which we related in the "Facts" portion of this opinion. Bishop's testimony created an issue of fact about whether McMillan was a passenger in Stephens' car when the collision occurred. Bishop testified that he had not seen McMillan in Stephens car before the collision, that at no time did he ever see McMillan in Stephens' car, and that he never saw McMillan at the scene of the collision even though McMillan had testified that after the collision, he got out of Stephens' car and ran back to his house to get help. The evidence established that no one was at McMillan's home when he left for home and that there was no telephone in McMillan's home. The record reflects that the trial of this case began at 11:00 a.m. and that the case went to the jury at 4:50 p.m. that same day. Ten minutes later, at 5:00 p.m., the jury returned into open court with a unanimous verdict for Bishop.

III. ANALYSIS AND RESOLUTION OF THE ISSUES

A. First Issue: The court erred in granting appellee Instruction D-15 especially over the objection of appellant when appellant Bobby Ray McMillan was a minor sixteen years of age and was a guest passenger and was guilty of no negligence.

Jury Instruction D-15, of which Stephens and McMillan complain, reads as follows:

FORM OF THE VERDICT

When nine (9) or more of you agree on a verdict, please place an "X" on the appropriate space or spaces.

I. NEGLIGENCE

_____ We, the jury, find for the Defendant, Thomas Bishop, on the Plaintiffs' claims of negligence.

_____ We, the jury, find for the Plaintiff, Lee Stephens, on his claim of negligence.

_____ We, the jury, find for the Plaintiff, Bobby Ray McMillan, on his claim of negligence.

If your verdict in I above is for the Defendant, Thomas Bishop, then GO NO FURTHER AND ADVISE THE BAILIFF THAT YOU HAVE REACHED A VERDICT.

If you find for either Plaintiff, the proceed to II.

II. DAMAGES

We, the jury, assess the Plaintiff Stephens' damages at $_____.

We, the jury, assess the Plaintiff McMillan's damages at $_____.

III. APPORTIONMENT OF NEGLIGENCE

(1) Do you find from a preponderance of the evidence that Plaintiff, Lee Stephens, was himself negligent and that such negligence was a proximate cause of the accident and Plaintiff Stephens' own damages?

_____ YES _____NO

If you answered "YES" what proportion or percentage of Plaintiff Stephens' damages do you find from a preponderance of the evidence to have been proximately caused by the negligence of the following persons?

Plaintiff, Lee Stephens _____%

Defendant, Thomas Bishop _____%

(NOTE: The total of the percentages given in your answer must equal 100%)

Stephens and McMillan's counsel objected to this instruction "on the grounds that it is misleading to the jury, and also it indicates that they should apportion damages."

Before this Court, Stephens and McMillan now contend, "The Instruction provides that the [j]ury was asked to find and requested to find that appellant Bobby McMillan, the guest passenger, would

be deprived of all rights to recover whether caused in whole or in part by appellant, Lee Stephens." They also argue that McMillan, the guest passenger, "could not have been guilty of any negligence." Bishop responds to this argument by emphasizing that the portion of Instruction D-15 which pertains to apportionment specifically applies to Stephens only. The instruction did not ask, require, or even allow the jury to reduce McMillan's damages by a percentage of his fault or negligence. Our review of Instruction D-15 confirms that Bishop's response is correct.

However, Stephens and McMillan requested, and the trial judge granted, Instruction P-8, which read as follows:

The court instructs the jury that Plaintiff Bobby McMillan is what is known by law as a guest passenger and that he was not guilty of any negligence or the cause of any injuries and damages he may have sustained in reference to the accident and if you believe from a preponderance of evidence in this case that defendant was guilty of any negligence which caused or contributed to the accident and injuries of said Plaintiff then it is your sworn duty to award Bobby McMillan the full amount of his damages and this is true even though you may further find from the evidence that both adult drivers were guilty of negligence.

Instruction P-8 clearly instructed the jury that it was their "sworn duty to award Bobby McMillan the full amount of his damages . . . even though [they might] further find from the evidence that both [Bishop and Stephens] were guilty of negligence." Thus, this Court finds that Instruction D-15 did not suggest nor require that the jury reduce McMillan's award of damages by any portion of his own negligence, but even if it did so -- as Stephens and McMillan argue -- Instruction P-8 would have clearly compensated for that error in Instruction D-15.

In *Boone v. Wal-Mart Stores, Inc.*, 680 So. 2d 844, 845 (Miss. 1996), the Mississippi Supreme Court reiterated the following standard of review for the determination of the trial court's error in granting and denying jury instructions:

On appeal, this Court does not review jury instructions in isolation; rather, they are read as a whole to determine if the jury was properly instructed. Accordingly, defects in specific instructions do not require reversal where all instructions taken as a whole fairly -- although not perfectly -- announce the applicable primary rules of law.

Our determination that Instruction P-8 compensated for the deficiency perceived by McMillan in Instruction D-15 is consistent with the foregoing standard of review in that Instruction P-8 fairly, if not perfectly, announced that applicable primary rule of law that as a guest passenger, McMillan could not be charged with negligence. Besides, this facet of this issue would require reversal of the judgment only for McMillan -- not for Stephens.

Stephens and McMillan further argue that Instruction D-15 was contrary to Rule 49 of the Mississippi Rules of Civil Procedure because the "Mississippi Rules of Civil Procedure, Rule 49 (a) makes it clear that in the usual case, the general verdict will be used and no special form of the verdict (is) required," but they cite no case or other authority to support their argument that the instruction was contrary to Rule 49.[(1)] The comment to Rule 49 explains, "The use of special verdicts

is intended to emphasize the facts, prevent the jury from acting on bias, and make the law more certain. Their use is always in the discretion of the trial judge." Mississippi Code section 11-7-157 (1972) provides:

No special form of verdict is required, and where there has been a substantial compliance with the requirements of the law in rendering a verdict, a judgment shall not be arrested or reversed for mere want of form therein.

In *Henson Ford, Inc. v. Crews,* 249 Miss. 45, 160 So. 2d 81, 85 (Miss. 1964), the Mississippi Supreme Court reiterated the test used to determine the sufficiency of a verdict. It wrote:

The basic test with reference to whether or not a verdict is sufficient as to form is whether or not it is an intelligent answer to the issues submitted to the jury and expressed so that the intent of the jury can be understood by the court. This well-established rule of law has long been recognized by this Court, and we feel that the verdict, . . . is, nevertheless, sufficient in form to comply with the said statutory requirements.

(citations omitted). Rule 49(b) authorized the trial judge to grant Instruction D-15, which is in the form of a special verdict. The jury's marking the blank line beside the sentence, "We, the jury, find for the Defendant, Thomas Bishop, on the Plaintiffs' claims of negligence," clearly expressed the intent of the jury to find that Bishop was not liable to either Stephens or McMillan for their damages.

This Court previously observed that Bishop's testimony created an issue of fact about whether McMillan was a passenger in Stephens' car when the collision took place. This conflict in the evidence permitted the jury to find against McMillan even if they had found that Bishop's negligence had been the sole cause of the collision. The jury could so find against McMillan if they believed that McMillan was not an occupant of Stephens' car when the collision happened. The Mississippi Supreme Court has opined:

It is not the function of this Court to decide whether we would have reached the same conclusion that the jury did in this case. We might well have reached a different conclusion had we been trying the facts. We have said in numerous cases that where a case presents the jury a question of fact and the jury decides the case on disputed testimony the verdict of the jury will not be disturbed on appeal.

Independent Life & Accident Ins. Co. v. Mullins, 252 Miss. 644, 173 So.2d 663, 665 (Miss. 1965).

We affirm the trial judge's grant of Instruction D-15 and resolve this first issue against Stephens and McMillan.

B. Second and Fourth Issues: Appellee was guilty of negligence that caused or contributed to the cause of the accident by his own testimony, and the verdict of the jury is therefore contrary to the overwhelming weight of the law and evidence and not supported by any law or evidence.

The verdict of the Jury and the Judgment of the court is contrary to the overwhelming weight of the

law and evidence and not supported by any law or evidence, and the Jury could not have thoroughly considered the case.

We analyze and resolve these two issues simultaneously because they are essentially identical. An assertion on appeal that a jury verdict is contrary to the weight of the evidence follows the trial court's denial of an Appellant's motion for a new trial. *See* Rule 59(a) of the Mississippi Rules of Civil Procedure. In the case *sub judice,* Stephens and McMillan filed a motion for a new trial which the trial court denied, and now they argue before this Court that the jury's verdict was contrary to the overwhelming weight of the evidence presented at trial.

The Mississippi Supreme Court has a long established standard of review this Court must follow when it resolves the issue that the jury's verdict is contrary to the overwhelming weight of the evidence. The supreme court has written, "This Court will not reverse a jury verdict unless it is against the overwhelming weight of the evidence and credible testimony." *Gifford v. Four-County Elec. Power Ass'n.,* 615 So. 2d 1166, 1171 (Miss. 1992). When deciding whether a new trial should be granted, this Court will give great deference to the judgment of the trial court on the matter. *Odom v. Roberts,* 606 So. 2d 114, 118 (Miss. 1992). This Court "will not reverse the denial of a motion for a new trial 'unless we are convinced that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice.'" *Clark v. State*, 693 So. 2d 927, 931 (Miss. 1997) (quoting *Morgan v. State,* 681 So. 2d 82, 93 (Miss. 1996)). "Unless the lower court abused its discretion in finding that the verdict was not against the overwhelming weight of the evidence, we will not reverse." *James v. Mabus,* 574 So. 2d 596, 601 (Miss. 1990) (citations omitted).

Stephens and McMillan argue that Bishop did not have his log trailer properly prepared for operation on the highways and that, therefore, the doctrine of res ipsa loquitor is applicable to establish Bishop's liability to them. They cite *Peerless Supply Co., Inc. v. Jeeter*, 218 Miss. 61, 65 So. 2d 240 (1953) to support their assertion that the application of the doctrine of res ipsa loquitor to the evidence in this case renders the jury's verdict against the overwhelming weight of the evidence. However, res ipsa loquitor was not the theory on which this case was tried. Stephens and McMillan did not plead the doctrine of res ipsa loquitor in their complaint, and they did not request the trial court to grant any jury instructions which rested on that theory. Instead, Stephens and McMillan charged Bishop with ordinary negligence in the operation of his log truck, and requested jury instructions on those issues. Thus, this Court need not consider their argument which they have made for the first time on appeal. *See Rushing v. Edwards,* 244 Miss. 677, 145 So. 2d 695, 698 (1962) (holding that "a party may not change the theory of his case in the appellate court from that on which he tried it below").

While this Court can perceive no nexus between these two issues and the following complaint, Stephens and McMillan's counsel protests that because "the jury was only out ten minutes," they were "evidently biased or in a hurry to leave by 5:00 p.m." Therefore, they argue that the jury could have given "[n]o fair consideration" to their claims. They cite *Parker v. State*, 454 So. 2d 910 (Miss. 1984) to support his contention that he was entitled to present his case "at a time when both counsel and the jury [were] not exhausted."

In *Parker,* a criminal case, the supreme court reversed the conviction of a defendant because the trial court forced the defendant to offer his testimony and present his case beginning at 5:00 p.m. after a long day of trial, and the court did not recess until 10:30 that night. *Parker,* 454 So. 2d at 911. The Mississippi Supreme Court ruled that such an action by the trial court, when both counsel and the jury were exhausted, deprived the defendant of his due process rights. *Id.* That court opined, "[D]ue process of law necessitates a forum for the defendant to present his case within reasonable hours and under reasonable circumstances." *Id.* at 912.

The record reflects that the trial of the case *sub judice* began at 11:00 a.m. and that the jury retired to deliberate at 4:50 p.m. that same day. Ten minutes later they returned with a verdict for Bishop, which the trial judge's polling of the jury demonstrated to be unanimous. The length of trial and lateness of the hour in *Parker* were profoundly different from the length of trial and time of conclusion in the case *sub judice.* We summarily reject the appellants' contention on this facet of their second and fourth issues.

A review of the record and exhibits reveals the following evidence which tends to support Bishop's version of how the collision between his log truck and Stephens' Mercury automobile occurred: (1) a photograph of Stephens' car which shows damage to its left front side consistent with its striking Bishop's log truck at the right front wheel and fuel tank on the right side of the log truck, (2) a photograph of the right side of the truck which depicts a bent protrusion above the fuel tank consistent with Bishop's testimony that Stephens' automobile struck the right side of his truck on the fuel tank, and (3) photographs of ruts down the west side of Highway 19 just north of Mrs. Bates' driveway consistent with Bishop's testimony that he veered his truck onto the west shoulder of the highway when he saw Stephens' car cross the centerline of the highway as if to turn west off the highway. The jury may also have been skeptical about McMillan's testimony that with a knee injured in the collision, he ran past several houses to his house to summon help when there was no telephone in his house and nobody was at home.

It was not an unconscionable injustice to allow the jury's verdict for Bishop to stand; thus, the trial judge did not abuse his discretion when he denied Stephens and McMillan's motion for a new trial. We resolve these two issues against the appellants and affirm the trial judge's denial of their motion for a new trial.

C. ISSUE 3. The court erred in refusing that portion of Instruction P-7 that it was the duty of defendant not to negligently undertake to pass the vehicle occupied by plaintiffs when a lawful signal to turn left had been given as provided by law as shown by the record on page 96 and then to give appellee Instruction D-8 that the Jury should find for appellee if he did not give a proper signal or turning left at a time when it was not reasonable to do so and under a duty not to turn his vehicle from a direct course from the highway unless and until such movement could be made through reasonable safety, and then only after giving the appropriate signal by hand, arm, or other signal device continuously for a reasonable time before making such movement as shown by Instruction D-8.

Stephens and McMillan's Instruction P-7 was a prolix instruction about Bishop's duties which he owed them while he operated his log truck. Instruction P-7 read in relevant part as follows:

The Court instructs the jury that it was the duty of [Bishop] . . . not to negligently undertake to pass

the vehicle occupied by [Stephens and McMillan] *when a lawful signal to turn left had been given as provided by law . . .*; and if you believe form a preponderance of evidence in this case that [Bishop] . . . *negligently undertook to pass* the vehicle occupied by [Stephens and McMillan] when a lawful signal had been given by [Stephens] to turn left and when it was hazardous and dangerous to do so . . . ." (emphasis added).

During the conference among the trial judge and counsel for the litigants, Bishop's counsel objected to the italicized portions of the previously quoted instruction because those portions of the instruction were "peremptory in nature." When the trial judge agreed with Bishop's counsel that those portions were peremptory, Stephens' and McMillan's counsel moved the court "to let me amend it by striking out that part." To that motion, the trial judge replied, "You just amend it as you want to and let me have it."

The copy of Instruction P-8 filed among the clerk's papers has the portions of Instruction P-8 to which Bishop's counsel objected deleted by a line's having been drawn through them. It would appear that Stephens and McMillan's counsel responded to the trial judge's suggestion that he amend the instruction as he wanted and then re-submit it to the judge. The word "given" appears written in script at the bottom of this instruction, so the trial judge gave Instruction P-8 as Stephens and McMillan's counsel amended it.

In their brief, Stephens and McMillan make but a one sentence argument in support of their position on this issue, which is, "It was the duty of defendant not to negligently undertake to pass the vehicle occupied by plaintiffs when a lawful signal to turn left had been given." Their argument, as did their Instruction P-8 in its original form, begs a question of fact material to whether Bishop was negligent. The question of fact is whether Stephens had given "a lawful signal to turn left." Bishop testified that when he first approached Stephens from behind, Stephens had his car's left-turn signal on. Bishop responded by slowing his log truck. However, Stephens "turned his left-turn signal off and continued on up the road." When Bishop began to pass Stephens' car in a long, straight, passing lane, Stephens did not have his car's left-turn signal on. Stephens had testified that he did have his car's left-turn signal on before he began to turn into the Bates' driveway north of the BIA-0024 road.

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 *Miller Transporters, Ltd. v. Espey*, 253 Miss. 439, 176 So. 2d 249, 253 (1965) 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.* Whether Stephens had turned on his car's left-turn signal before he commenced his left-turn into the Bates driveway became a question for the jury to resolve. There was no error in granting Instruction P-8 as it was amended.

Stephens and McMillan's criticism of Bishop's Instruction D-8 is similarly misplaced because Instruction D-8 contains no peremptory language. It properly instructed the jury about Stephens' duty to operate his car in a safe manner by giving the proper signals when required. Nowhere in the instruction does it say that Stephens did or did not have his signal on at the time of the accident. It

simply instructed the jury that if they believed from a preponderance of the evidence that Stephens failed to give the proper signal prior to turning, then his failure to give the signal was negligence. Instruction D-8 contained no peremptory language.[(2)] We resolve the appellants' third issue against them and affirm the trial court's giving instructions P-8 as amended and D-8.

IV. SUMMARY

A careful perusal of Instruction D-15 discloses that McMillan's criticism that it affected his recovery of damages because it allowed the jury to reduce those damages proportionate to McMillan's negligence is unwarranted. Instruction D-15 authorized only the reduction of Stephens' damages proportionate to Stephens' negligence, if the jury found that Stephens was at all negligent. Rule 49(b) of the Mississippi Rules of Civil Procedure authorized the trial judge to submit Instruction D-15 as a form of special verdict, which the jury employed to return a verdict for Bishop. The jury's verdict was not against the overwhelming weight of the evidence, and there was no unconscionable injustice in the trial judge's denial of Stephens and McMillan's motion for a new trial on the ground that the jury's verdict was against the overwhelming weight of the evidence. Neither did the trial judge err when he gave both Instruction P-8, as it was apparently amended, and Instruction D-8. Thus, this Court affirms the judgement of Neshoba County Circuit Court for Bishop, the defendant in that court.

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

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

1. Rule 49(b) provides:

(b) Special Verdict. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

M.R.C.P. 49(b).

2. Instruction D-8 read in full as follows:

The Court instructs the jury that Plaintiff, Lee Stephens, in operating his vehicle was under a duty to keep a proper lookout, to be on the alert for other vehicles using the highway and under a duty not to turn his vehicle from a direct course from the highway unless and until such movement could be made with reasonable safety, and then only after giving the appropriate signal by hand, arm or other signal device, continuously for a reasonable time before making such movement. The Court instructs the jury that if you find from a preponderance of the evidence in this case that Plaintiff Lee Stephens breached his duty by failing to keep such a proper lookout, by failing to be alert for other vehicles or by turning to the left without giving a proper signal or turning left at a time when it was not reasonably safe to do so, then Plaintiff Lee Stephens was negligent.

You are further instructed that if you find from a preponderance of the evidence that the negligence, if any, of Lee Stephens was the sole proximate cause of the accident, then it will be your sworn duty as jurors to find in favor of Defendant Thomas Bishop both on the claim of Lee Stephens and the claim of Bobby Ray McMillan.