

IN THE COURT OF APPEALS 01/30/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00580 COA

COMMERCIAL UNION INSURANCE COMPANY

APPELLANT

v.

JEANETTE M. GREEN, D/B/A G B TRUCKING

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. GORDAN

COURT FROM WHICH APPEALED: CIRCUIT COURT OF NESHOPA COUNTY

ATTORNEY FOR APPELLANT:

JIM BULLOCK

ATTORNEYS FOR APPELLEE:

C. VICTOR WELSH, III

TERRY L. JORDAN

NATURE OF THE CASE: CIVIL: DAMAGES FOR BREACH OF CONTRACT

TRIAL COURT DISPOSITION: JURY VERDICT IN FAVOR OF APPELLEE IN THE
AMOUNT OF \$150,000

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

PAYNE, J., FOR THE COURT:

Jeanette M. Green sought damages from Commercial Union Insurance Company for its failure to properly file the necessary proof of insurance with the Interstate Commerce Commission. The jury returned a verdict in favor of Green in the amount of \$150,000.00. Feeling aggrieved, Commercial Union appeals to this Court asserting three issues on appeal: (1) Whether the trial court erred in overruling Commercial Union's motion for directed verdict at the close of Green's case and again when all the parties had rested, and in overruling Commercial Union's motion for jnov; (2) Did the trial court err in allowing the testimony of William Mathison; (3) Has Green's testimony been so clearly impeached as to be disregarded? Finding no error, we affirm.

STATEMENT OF THE FACTS

Jeanette M. Green began operating a trucking business under the name of "G B Trucking" and applied to the Interstate Commerce Commission ("ICC") for permission to operate in interstate commerce. ICC granted permission upon receipt of proof of insurance on file with the ICC by way of a form BMC-34 (proof of cargo insurance) and Form BMC-91 (proof of liability insurance).

Fox-Everett Insurance Company ("Fox"), as agent, placed Green's cargo insurance with Marine Office of America Corporation ("MOAC") and The Fidelity and Casualty Company of New York ("Fidelity"). Fox placed Green's liability insurance with the Mississippi Automobile Insurance Plan ("MAIP") where it was eventually assigned to Appellant, Commercial Union Insurance Company ("Commercial Union"). Pursuant to MAIP, Commercial Union was required to file a BMC-91 form, as well as all other necessary filings with applicable state regulatory agencies.

Commercial Union submitted a Form BMC-91 under the name of "G.B. Trucking" which was returned to it by the ICC with the following statement:

The above referenced document is returned for correction and refiling, or, otherwise appropriate disposition, for the reasons indicated.

Commercial Union failed to resubmit the BMC-91, nor did it attempt to determine why it had been returned. The filing should have been under "Jeanette M. Green d/b/a G B Trucking." This same problem arose in the filing with the state of South Carolina and was corrected by Commercial Union. The South Carolina return was placed in Commercial Union's file directly on top of the ICC's return.

Green began operating her trucking business. The ICC revoked her authority because of failure to file the necessary proof of insurance and Green went out of business. It is not in dispute that MOAC/Fidelity failed to file BMC-34 with the ICC and Green settled with them after considerable discovery. Green was awarded \$150,000.00 by the jury.

ARGUMENT AND DISCUSSION OF THE LAW

I. DID THE TRIAL COURT ERR IN OVERRULING APPELLANT'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF APPELLEE'S CASE AND AGAIN WHEN ALL THE PARTIES HAD RESTED, AND IN OVERRULING APPELLANT'S

MOTION FOR JNOV?

The standard of review for a denial of a judgment notwithstanding the verdict and a direct verdict are the same. *Sperry-New Holland v. Prestage*, 617 So. 2d 248, 252 (Miss. 1993) (citations omitted). Both are procedural vehicles for challenging the sufficiency of all the evidence of Green's case. *First United Bank of Poplarville v. Reid*, 612 So. 2d 1131, 1135-36 (Miss. 1992) (citations omitted). This Court must consider:

the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inference that may be reasonably drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, [we are] required to reverse and render. On the other hand if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair minded jurors in the exercise of impartial judgment might have reached different conclusions, affirmance is required.

Sperry-New Holland, 617 So. 2d at 252 (citations omitted).

Commercial Union argues that it had no duty, nor a breach of any duty. Commercial Union also argues that Green failed to show proximate cause between its action(s) (or inaction(s)) which led to the ICC's revocation. However, Green presented evidence that, according to MAIP, Commercial Union, and only Commercial Union, could make the necessary filings. Commercial Union's actions regarding the South Carolina filing indicate that there was a duty beyond merely initial submission of the BMC-91. The statement which accompanied the return of the BMC-91 is even more persuasive in that it indicated "correction and refileing, or otherwise appropriate disposition" was the reason for the return. The trial court correctly determined that Green presented sufficient evidence to find that Commercial Union had a duty to Green to take action on the returned BMC-91.

As to proximate cause, the evidence showed that the ICC revocation was due to failure to file proof of both liability insurance, by means of a BMC-91, and cargo insurance, by means of a BMC-34. "[N]egligence may be the proximate cause, where it concurs with one or more causes in producing an injury, and, although the author or authors of such cause or causes may also be liable therefor." *Cumberland Telephone and Telegraph Co. v. Woodham*, 99 Miss. 318, 54 So. 890, 891 (1910). While Commercial Union was not responsible for the cargo insurance, the record clearly indicates that enough evidence was introduced to indicate that Green's insurance would be revoked unless Commercial Union acted upon its duty to file the BMC-91 as proof of liability insurance. In fact, Leslie Williams, Senior Underwriter for Commercial Union, testified that if a BMC-91 is not properly filed with the ICC for a trucking company, then the ICC will revoke that company's authority. Clearly the trial court was correct in determining that the jury could find that Commercial Union's action and/or inaction was the proximate cause of the ICC's revocation. We find no merit in this assignment of error.

II. DID THE TRIAL COURT ERR IN ALLOWING THE TESTIMONY OF WILLIAM MATHISON?

William Mathison, a vice president of Fox, testified that Commercial Union canceled an \$18,000 policy because of a dispute of approximately \$100.00. Commercial Union argues that this was not based on personal knowledge, and that he did not have the file to substantiate his testimony. The trial court first sustained Commercial Union's objection to Mathison's testimony and then retracted the ruling. Commercial Union contends that Mathison was not competent to testify under Mississippi Rule of Evidence 602 and his testimony was not the best evidence because the file would be the best evidence. Mathison testified that his basis of knowledge was "talking with the persons who did the work directly with it and reviewing the file." As vice president of Fox and agent of Commercial Union, Mathison was amply qualified to testify as the relationship and action between Fox, Commercial Union, and Green. Thus, this assignment of error is without merit.

III. HAS GREEN'S TESTIMONY BEEN SO CLEARLY IMPEACHED AS TO BE DISREGARDED?

Commercial Union argues that Green's testimony at trial differed from a previous deposition and contradicted her own exhibits. This is not a proper issue on appeal. It is the province of the jury to weigh the evidence and to determine the credibility of the witnesses. *See Wilmoth v. Peaster Tractor Co. of Lexington, Inc.*, 544 So. 2d 1384, 1386 (Miss. 1989); *Burnham v. Tabb*, 508 So. 2d 1072, 1076 (Miss. 1987); *Jackson v. Griffin*, 390 So. 2d 287, 289 (Miss. 1980). We will not invade that province. We find no merit in this assignment of error.

THE JUDGMENT OF THE CIRCUIT COURT OF NESHOPA COUNTY IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, AND KING, JJ., CONCUR. MCMILLIN, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., AND SOUTHWICK, J.,

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McMILLIN, J., DISSENTING:

I must respectfully record my disagreement with the decision of the majority in this case. It is my opinion that the appellant, Commercial Union Insurance Company, was entitled to a directed verdict at the close of the proof. In order to prevail on Green's theory of the case, Green was required to show (1) Commercial Union's duty to file an insurance certificate with the Interstate Commerce Commission (hereafter called "the ICC"); (2) a breach of that duty by failing to file the certificate; (3) that the breach resulted in the ICC canceling Green's authority to operate her business; and (4) that the ICC cancellation proximately caused or was a contributing cause to the failure of Green's business.

Green's case fails because she was unable to prove the third element set out above. ICC regulations regarding insurance dictate that a carrier must have on file two separate proofs of insurance on separately designated forms; (a) a Form 91 showing existence of liability coverage, and (b) a Form 34 showing existence of cargo coverage. 49 C.F.R. § 1043.1(a)-(b) (1987); 49 C.F.R. § 1043.7 (1987). Failure to have either certificate on file is ground for termination of the authority.

In this case, Green procured the necessary insurance from separate carriers, and Commercial Union provided only the liability insurance coverage. The record reflects that, shortly before placing her liability insurance with Commercial Union, Green had obtained liability coverage from Travelers Insurance, and Travelers had filed the required Form 91 with the ICC before coverage was changed to Commercial Union. Once that Form 91 was filed with the ICC, it remained a valid insurance filing under ICC regulations until either (a) thirty days after written notice of cancellation or withdrawal on a Form BMC-35 was submitted to the ICC's Washington office, or, (b) a replacement certificate had been filed and accepted by the ICC. 49 C.F.R. § 1043.7(d)-(e) (1987).

Commercial Union, in this case, proved the filing of the Form 91 by Travelers. Green offered no proof and apparently does not claim that Travelers ever sent a Form BMC-35 cancellation notice. Therefore, insofar as the ICC was concerned, the requisite proof of liability insurance was always on file from the time of its acceptance of the Travelers certificate on December 31, 1986.

On the other hand, the cargo carrier, which is not a party to this litigation, never filed the required Form 34, and it was this form that was not on file with the ICC when it sent its notice of revocation of authority on June 9, 1987. Unfortunately but not surprisingly, the ICC, in sending out the authority

revocation notice, used a generic form which simply stated, in pertinent part, that "[t]he authority . . . is revoked for failure to file insurance, pursuant to 49 C.F.R. 1043," and did not specify the exact form (or forms) which were missing.

Nevertheless, simple logic compels the conclusion that in June 1987, when the ICC conducted the file review which prompted the revocation notice, there was on file an uncanceled Form 91 showing proof of liability insurance, but that there was not a Form 34 showing proof of cargo coverage, a coverage not provided by Commercial Union. Therefore, it is logically impossible to conclude that Commercial Union's failure to file its own Form 91, whose only purpose would be to replace the already accepted Travelers form, was the proximate cause of the ICC cancellation notice. It simply could not have been the cause and it is absurd to suggest that it could.

Admittedly, the failure of Travelers to cancel its Form 91 was, insofar as Commercial Union was concerned, a fortuitous event. Nevertheless, it must be the law that one, though irretrievably embarked on a negligent course of conduct destined without question to injure a third party, but who is stopped strictly by chance by an intervening circumstance, cannot be said to be liable for the injury that otherwise would certainly have arisen. This proposition is not altered simply because the intervening event was a serendipitous occurrence insofar as the negligent party was concerned.

The injury in this case, without doubt, arose out of the lack of a Form 34 cargo insurance certificate. That form was not the responsibility of Commercial Union. In fact, the record indicates that Green has already settled a damage claim against the cargo carrier for its failure to file the necessary form. Had Commercial Union not had the good fortune to benefit from the uncanceled Travelers form, there would appear to be joint responsibility on both the liability carrier and the cargo carrier for the ICC revocation. That, however, is simply not the case. The absence of a Form 91 was not the proximate cause of the injury for which Green seeks recovery in this case.

I would reverse and render.

FRAISER, C.J., AND SOUTHWICK, J., JOIN THIS OPINION.