

IN THE COURT OF APPEALS 05/21/96

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00283 COA

BOBBIE STOKES

APPELLANT

v.

**MELVIN PHILLIPS AND HUGH EDWARDS D/B/A WESTERN AUTO ASSOCIATE
STORE**

APPELLEES

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

TRIAL JUDGE: HON. ROBERT LOUIS GOZA, JR.

COURT FROM WHICH APPEALED: MADISON COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

JOHN S. BARRON AND E. MICHAEL MARKS

ATTORNEYS FOR APPELLEES:

SAM S. THOMAS AND SUSAN L. RUNNELS

NATURE OF THE CASE: CLAIM OF NEGLIGENCE ARISING OUT OF AUTOMOBILE
COLLISION

TRIAL COURT DISPOSITION: VERDICT AND JUDGMENT IN FAVOR OF DEFENDANTS

BEFORE FRAISER, C.J., COLEMAN, AND SOUTHWICK, JJ.

COLEMAN, J., FOR THE COURT:

The Appellant, Bobbie Stokes (Stokes), sued Appellees Melvin Phillips (Phillips) and Hugh Edwards

d/b/a Western Auto Associate Store (Edwards) for damages caused by Phillips' negligent operation of a Western Auto service truck when it collided with the vehicle which Stokes was driving. Stokes joined Edwards as Phillips' employer. After a two day trial, the jury returned a verdict for Phillips and Edwards. Stokes made a post-trial motion for a new trial, which the trial court denied and from which she has appealed. We quote from Stokes' brief to state the one issue on which she seeks to reverse the trial court's judgment:

I. Was the jury inadequately instructed so as to cause reversible error by the trial court's refusal to inform them that violation of a traffic regulation may be negligence as a matter of law, and that they could return a verdict for the Plaintiff if they found that the Defendant failed to comply with Miss. Code Ann. Sec. 63-3-311 (2) by proceeding through the intersection without exercising caution as required by a flashing yellow light if his failure to proceed with caution was the sole proximate cause or a proximate contributing cause of the accident and the Plaintiff's injuries?

We resolve this issue adversely to Stokes' position and affirm the lower court's judgment for Phillips and Edwards.

I. FACTS

On September 30, 1990, at approximately 1:30 P.M. in Canton, a two-vehicle collision occurred on Highway 51, also known as Liberty Street, where it intersects on the west side with Martin Luther King, Jr. Drive, once known as Friars Lane, and on the east side with Sherwood Drive. The uncontroverted evidence shows that immediately before the accident, Stokes was traveling north on Highway 51 but initiated a left turn to travel West onto Friars Lane when Phillips struck Stokes' car. As a result, Stokes suffered bodily injuries.

II. TRIAL

In her complaint against Phillips and Edwards, Stokes alleged that Phillips was driving his truck south on Liberty Street when the collision happened. At trial, however, Stokes testified that Phillips approached the intersection from the east on Sherwood Drive, ran the stop sign, and thus caused the accident. Further incongruity is revealed by Stokes' response to interrogatories which asked her to explain what Phillips did wrong and how the accident happened; nothing in her response made any reference to Phillips having run a stop sign.

At trial, Stokes testified that even though no cars were heading south on Liberty Street, she nonetheless came to a complete stop before making a left turn onto Martin Luther King, Jr. Drive. Stokes' asserted that her reason for stopping at the intersection was that a school bus had turned off Liberty Street onto Martin Luther King, Jr. Drive just before the accident. When asked if she could tell whether Phillips' vehicle was half the length of a football field or a mile or ten feet up Sherwood Drive, Stokes stated that she couldn't tell.

Jessie (Sims) Porter, who was washing his car near the scene of the accident, was a witness for Stokes. Porter testified that he saw Phillips' vehicle come from Sherwood Drive and that he was sure Phillips was not going south on Liberty Street. Porter further testified that Phillips was speeding and

ran the stop sign on Sherwood Drive. He added that Stokes was already in the intersection when Phillips entered the intersection. Porter testified that he had given "a little bit of a different story" at his deposition wherein he stated that Stokes was not on Liberty Street immediately before the accident, but instead Stokes approached the intersection from Martin Luther King, Jr. Drive. Martin Luther King, Jr. Drive was the street onto which Stokes said she intended to make her left turn. Porter attributed his different story to the lawyers trying to confuse him, a death in his family, and the consumption of one can of beer just prior to his deposition's being taken. Further doubt is cast on Porter's credibility by his deposition and trial testimony wherein he stated that the damage to Stokes' car was to the driver's side. This assertion is inconsistent with his testimony at trial that Stokes was making a left turn off Liberty Street when Phillips approached from her right and struck her vehicle.

Another witness for Stokes, Carrie Young, claimed to have seen the accident as she was approaching Liberty Street from Martin Luther King, Jr. Drive. Young stated that Phillips approached the intersection from Sherwood Drive and ran the stop sign before colliding with Stokes. Young testified that she was 100 to 150 feet from Liberty Street directly preceding the accident; however, Young did not see the school bus that Stokes said was on the scene and caused her to come to a complete stop before making the left turn. Young did not remember whether any vehicles were in front of her to interfere with her view of the intersection. Despite Young's contention that she watched Phillips for "two or three minutes" prior to the accident, she knew neither where the damage was located on the accident vehicles nor the condition of the accident vehicles, *i.e.*, new or old. Moreover, Young said that she witnessed the accident and then got out of her car to help; however, she did not see Porter at the scene of the accident.

Phillips testified that he was driving Edwards' Western Auto truck south on Liberty Street and that Stokes turned in front of his truck so that he did not have time to avoid the accident. Phillips testified that his speed was thirty to thirty five miles per hour when he saw Stokes' vehicle. He was thirty to forty feet from the intersection when he saw Stokes' vehicle. According to Phillips, he reduced his speed on his approach to the intersection and then Stokes pulled out in front of him when he was "very close to that intersection." Even though Phillips applied his brakes, he was unable to avoid the impact. Phillips testified that at no time was he on Sherwood Drive; instead, he was traveling south on Liberty Street when the collision occurred.

Ann Nicols was called by Phillips and Edwards as a witness because she claimed to have seen the accident. Nicols corroborated Phillips' testimony that he was heading south on Liberty Street and that Stokes was heading north on Liberty Street when she began to execute a left turn onto Martin Luther King, Jr. Drive. Nicols said that Phillips was not speeding and that he did not have time to avoid the collision because the two vehicles were "right upon each other" when Stokes turned left in front of Phillips.

Another defense witness who saw the accident was Officer Noah Smith of the Canton Police Department. Officer Smith testified that he was about three cars behind Stokes on Liberty Street as she was preparing to turn left and he was proceeding north. According to Smith, Stokes was delayed from making the left turn because of a school bus that had turned left onto Martin Luther King, Jr. Drive right in front of her. Smith further stated that as the school bus proceeded through the turn Stokes "started to make her turn and the bus stopped again but she tried to gas the car to beat the truck that was coming to her and she didn't make it." Additionally, Smith stated that at the time of

impact Stokes' vehicle was in the lane of travel of Phillips' vehicle and that there was no way for Phillips to avoid the collision.

It was established through the testimony of the witnesses that a yellow flashing caution light was in place for southbound traffic on Liberty Street. Even Phillips acknowledged in his testimony that the caution light was operating at the time of the accident.

In its explanation to the jury of the rules of law to be used in their deliberation of the verdict, the lower court stated "[y]ou are not to single out one instruction alone as stating the law, but you must consider these instructions as a whole." The lower court instructed the jury on Stokes' jury instruction P-2 which read:

The driver of a motor vehicle upon a public highway is under a duty to exercise reasonable care to avoid inflicting injury upon others who may be lawfully using the same public highway. Negligence is the failure to use reasonable care. Reasonable care is the degree of care which a reasonably prudent person would use under like or similar circumstances. Negligence may consist of either doing something that a reasonably prudent person would not do under like or similar circumstances, or failing to do something that a reasonably prudent person would do under like or similar circumstances.

In granting the above instruction, the lower court deleted the last sentence which stated "[v]iolations of traffic laws and safety statutes provided in the Mississippi Code or other applicable law may constitute negligence as a matter of law."

The lower court also deleted paragraph (d) of Stokes' jury instruction P-4 which stated:

(d) If you find by a preponderance of the evidence in this case that the Defendant approached the intersection going South on North Liberty and did fail to comply with Mississippi Code Sec. 63-3-311 (2) by proceeding through the intersection without exercising caution as required by a flashing yellow light, and if you further find that Defendant's failure to proceed with caution was the sole proximate cause or a proximate contributing cause of the accident and Plaintiff's injuries, then your verdict shall be for the Plaintiff.

However, the lower court modified Stokes' jury instruction P-4. The pertinent portion of the modified jury instruction reads as follows:

(c) If you find from a preponderance of the evidence in this case that the defendant, Melvin Phillips, failed to reduce his speed to a safe and reasonable speed for the circumstances then existing at the intersection or failed to proceed toward and through it with caution and that said failure was the sole proximate cause or a proximate contributing cause of this accident and plaintiff's injuries, then your verdict shall be for the plaintiff.

In regard to the modification of jury instruction P-4, the lower court expressed concern that Stokes' version of P-4 was couched in terms that Stokes was "under some sort of duty not to proceed with caution and to yield the right of way. . . ." Therefore, the lower court deleted Stokes' version of P-4 which attempted to use the flashing yellow light statute as imposing a heightened level of caution to be used by Phillips. The trial judge noted that the flashing yellow light was only to warn drivers that they are entering a speed zone and, therefore, Phillips "was under no more duty to proceed with caution through this intersection than he would have been if there had been no light there."

Basically, the trial judge was concerned that the wording of Stokes' P-4 instruction appeared to make the caution light impose a special duty on persons traveling south on Liberty Street even though they have "the right of way over people turning left off of North Liberty or proceeding through it, even off of Friar's Lane or Sherwood." As a result, the trial judge ruled that the submission of Stokes' version of P-4 would create a false issue in the case. Furthermore, the lower court's modification of P-4 "already covered" Phillips duty to proceed toward and through the intersection with caution. At the beginning of his argument, Stokes said to the jury:

When we started this, I told you that the evidence would prove as Ms. Stokes approached this intersection she had no traffic control devices restricting her entry. I also told you, and if what Mr. Phillips said is true and he came south on North Liberty, he had a caution light, a flashing yellow light. He admitted that on the stand. Some witnesses deny that. Mr. Thomas [defendants' trial counsel] told you in the very beginning that was not true. He told you that the defendant had a caution light and so did the plaintiff. The photographs prove that he had a caution light and that she didn't.

The jury returned a verdict in favor of Phillips and Edwards, and then the lower court entered a final judgment for Phillips and Edwards. Stokes moved for and was denied a new trial by the lower court, and subsequently she perfected this appeal.

III. ISSUES AND THE LAW

I. Was the jury inadequately instructed so as to cause reversible error by the trial court's refusal to inform them that violation of a traffic regulation may be negligence as a matter of law, and that they could return a verdict for the Plaintiff if they found that the Defendant failed to comply with Mississippi Code Ann. Sec. 63-3-311 (2) by proceeding through the intersection without exercising caution as required by a flashing yellow light, if his failure to proceed with caution was the sole proximate cause or a proximate contributing cause of the accident and the Plaintiff's injuries.

Stokes relies on Mississippi Code Ann. § 63-3-311(2) which states:

When a yellow lens is illuminated with rapid intermittent flashes, drivers of vehicles may proceed through the intersection or past such signal only with caution.

Miss. Code Ann. § 63-3-311(2) (1972). Stokes contends that this statute imposes upon motorists a duty to exercise a greater standard of care in approaching and proceeding through intersections marked by such a signal as opposed to intersections that lack such a signal. As a result of this argument, Stokes asserts that the trial court committed reversible error in deleting a sentence from Instruction P-2 which stated "[v]iolations of traffic laws and safety statutes provided in the Mississippi Code or other applicable law may constitute negligence as a matter of law."

As to Stokes' contention that the lower court committed reversible error in its deletion of the above sentence, we disagree. We find that the trial judge properly disallowed the sentence because "it does not direct the jury to do anything" and is, therefore, an abstract instruction. *T. K. Stanley, Inc. v. Cason*, 614 So. 2d 942, 952 (Miss. 1992). Instead, the sentence merely states a general principle of law and does not guide the jury to apply the controlling law to the facts of this case. Therefore, the lower court properly deleted this abstract sentence "because, although such instructions may be correct in principle, they require legal training to properly interpret." *Freeze v. Taylor*, 257 So. 2d 509, 511 (Miss. 1972).

In the case at bar, we note that "other instructions adequately set out the applicable law under which the jury could find for [Stokes on a negligence theory.]" *T. K. Stanley, Inc.*, 614 So. 2d at 952. Because "[i]nstructions should be tied to the specific facts of the case" and not "given merely in the abstract," we find no error in the lower court's deletion of the Stokes' last sentence in Instruction P-2. *Id.*

Stokes further contends that the lower court's modification of instruction P-4 was reversible error. The portion of Stokes' version of instruction P-4 which she feels should have been submitted to the jury reads as follows:

(d) If you find by a preponderance of the evidence in this case that the Defendant approached the intersection going South on North Liberty and did fail to comply with Mississippi Code Sec. 63-3-311(2) by proceeding through the intersection without exercising caution as required by a flashing yellow light, and if you further find that Defendant's failure to proceed with caution was the sole proximate cause or a proximate contributing cause of the accident and Plaintiff's injuries, then your verdict shall be for the Plaintiff.

Stokes argues that the exclusion of this paragraph precludes her from presenting a "legitimate theory of liability" to the jury. As we understand Stokes' argument, the deletion of the above quoted paragraph thwarts the jury's ability to decide whether Phillips proceeded through the intersection with *caution*. According to Stokes, the lower court effectively denied her the opportunity to have the jury find that Phillips failed to exercise caution as required by the flashing yellow light and is, therefore, liable for the accident.

In response to Stokes' argument that the jury was precluded from deciding the issue of whether Phillips exercised caution, we quote a portion of the lower court's modification of instruction P-4 with our emphasis added:

(c) If you find from a preponderance of the evidence in this case that the defendant, Melvin Phillips, failed to reduce his speed to a safe and reasonable speed for the circumstances then existing at the intersection or *failed to proceed toward and through it with caution* and that said failure was the sole proximate cause or a proximate contributing cause of this accident and plaintiff's injuries, then your verdict shall be for the plaintiff.

Our examination of Stokes' deleted paragraph and the lower court's modified version reveals nominal substantive changes. Most noticeably, the jury is instructed to find Phillips liable if he failed to exercise caution while proceeding through the intersection. Therefore, we find that Stokes' main point of contention is vitiated by the lower court's modified version of P-4.

We agree with the trial judge that the reference in P-4(d) to Section 63-3-311(2) might have raised a false issue in the case. It seems that Stokes intended for Section 63-3-311(2) to convey to the jury that Phillips held a greater duty to exercise caution when he traveled through the intersection than did Stokes because of the presence of the yellow flashing light visible to motorists like Phillips who were traveling southbound on Liberty Street. While we acknowledge that the presence of a yellow flashing light necessitates the exercise of caution, we do not agree that it can be used by Stokes to imply that Phillips is the only party who had the duty to exercise caution when he drove the Western Auto van into the intersection of Liberty and Martin Luther King, Jr. Drive. Stokes also bore a responsibility to exercise caution when she drove her vehicle into that same intersection.

Regardless of the foregoing, we point to the fact that the lower court "enjoys considerable discretion regarding the form and substance of jury instructions." *Splain v. Hines*, 609 So. 2d 1234, 1239 (Miss. 1992). We find that the trial judge was correct in using his "considerable discretion" to delete a sentence from instruction P-2 and modify a paragraph from instruction P-4. *Id.*

We earlier noted that instruction P-4 as modified by the trial court sufficiently explained Phillips' duty to exercise caution when he proceeded toward and entered the intersection of Liberty and Martin Luther King, Jr. Drive. Consequently, we are satisfied that instruction P-4 as modified by the trial court properly informed the jury about Phillips' duty to use caution. The Mississippi Supreme Court has held that "trial courts need not grant duplicitous instructions simply to satisfy each party's desire for emphasis." *Allen v. Blanks*, 384 So. 2d 63, 65 (Miss. 1980). Additionally, we are not inclined to reverse the lower court on the basis of its modified jury instruction because "we will not reverse for failure to grant proffered jury instruction where all of the instructions taken together fairly announce the applicable law." *Carmichael v. Agur Realty Co.*, 574 So. 2d 603, 613 (Miss. 1990). Clearly, the trial court's jury instructions reflected the applicable law in the case at bar; and Stokes commented during his closing argument about the relationship of the yellow flashing light and Phillips' duty to enter with caution the intersection of Liberty and Martin Luther King, Jr.,

Drive as instruction P-4 defined that duty for the jury. We therefore find no error in instructions P-2 and P-4 as the trial court modified them and submitted them to the jury.

**THE JUDGMENT OF THE CIRCUIT COURT OF MADISON COUNTY IS AFFIRMED.
ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, DIAZ, KING, McMILLIN,
PAYNE, AND SOUTHWICK, JJ., CONCUR.**