

**IN THE COURT OF APPEALS 12/17/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00254 COA**

**TODD WILLIAM MILLER**

**APPELLANT**

**v.**

**APRIL M. SHEARER**

**APPELLEE**

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

TRIAL JUDGE: HON. JAMES E. GRAVES JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANT:

AL NUZZO

H. W. WILLIAMS III

ATTORNEYS FOR APPELLEE:

JACK BENTON BRENEMEN

ORBIE S. CRAFT

NATURE OF THE CASE: PERSONAL INJURY

TRIAL COURT DISPOSITION: JUDGMENT IN FAVOR OF APPELLEE FOR \$150,920

BEFORE THOMAS, P.J., BARBER, AND McMILLIN, JJ.

McMILLIN, J., FOR THE COURT:

A jury in the Circuit Court of Hinds County returned a verdict in favor of the plaintiff, April M. Shearer, against Todd Miller for personal injuries received by Shearer in an automobile accident. Miller has appealed the judgment against him, raising the following issues on appeal: (1) whether the court erred when it refused to enforce a settlement agreement; (2) whether the court erred when it refused to grant a peremptory instruction; (3) whether the verdict was against the overwhelming weight of the evidence.

## I.

### The Facts

The essential facts of the accident that gave rise to this litigation are not in dispute. Shearer was proceeding in her vehicle along a public road in Hinds County. Miller was proceeding in the same direction behind Shearer. Shearer attempted a left-hand turn into the driveway of her sister's home. She indicated that, because of the narrowness of her sister's driveway, it was necessary for her to come to an almost complete halt before completing the turn. Miller confirmed that, after glancing at some cars parked on the right shoulder, he looked up to discover Miller's car stopped in the road. He claimed that he swung out into the left lane to pass Shearer's stopped vehicle and admitted that, by the time he observed her vehicle, it was too late for him to come to a stop before hitting her. Before Miller could complete his route around Shearer's vehicle, she continued into her left turn. As a result, the vehicles collided, and Shearer sustained personal injuries. Miller contends that Shearer did not signal her intentions to turn left. Shearer contends that she did activate her turn signal before making the left-hand turn and claims to have looked into her rearview mirror without seeing Miller's vehicle before starting her turn.

Shearer's tort claim against Miller arising out of this accident was submitted to a Hinds County jury with a comparative negligence instruction. The jury concluded that Miller was ninety-eight percent at fault, and Shearer was two percent at fault. They assessed Miller's total damages at \$154,000.00, resulting in a net award to Shearer of \$150,920.00.

## II.

### The Question of Whether the Parties Reached a Binding Pre-trial Settlement

Miller claimed at the trial level that he and Shearer, acting through their respective attorneys, had reached a binding settlement of the case and that Shearer was, by proceeding to trial, attempting to unilaterally withdraw from the agreement. Miller claims to have filed a motion seeking judicial enforcement of the settlement although there is no written motion in the record. From representations of counsel in the briefs, we are also led to believe that there was a hearing on the issue at which evidence was received and after which the trial court declined to enforce the alleged settlement.

There is no transcript of the hearing on Miller's motion. There is nothing in the record to indicate upon what basis the trial court denied relief. Miller did not attempt to reconstruct the relevant proceedings as permitted by Mississippi Rule of Appellate Procedure 10(c). "[A] party seeking

reversal of the judgment of a trial court must present this Court with a record adequate to show that an error of reversible proportions has been committed and that the point has been procedurally preserved." *Queen v. Queen*, 551 So. 2d 197, 199 (Miss. 1989) (citations omitted). We cannot consider *de novo* whether or not, in fact, a binding settlement had been reached between the parties. Our review is limited to a determination of whether the trial court committed an error of law or was manifestly in error in his determination of the facts. We can do neither without a record. We decline to grant any relief on this issue.

### III.

#### Failure to Grant a Peremptory Instruction on Plaintiff's Negligence

Miller claims the trial court erred when it refused to give an instruction that was peremptory in nature on the issue of Shearer's negligence. The exact form of the refused instruction is as follows:

The Court instructs the jury that the Plaintiff, April Michelle Shearer, is guilty of negligence by failing to comply with her duty to keep a proper lookout. Specifically, her failure to ascertain the location of Todd Miller's vehicle prior to executing the left-hand turn, and without first ascertaining whether she could do so with reasonable safety. If you further find that the Plaintiff's failure to comply with this duty was a proximate cause of her injuries, then your verdict shall be for the Defendant, Todd William Miller.

The failure to give an instruction essentially identical to this was found to be reversible error in the case of *Conner v. Harris*, 624 So. 2d 482 (Miss. 1993), a case involving an accident of somewhat similar facts. It seems questionable as to whether the facts of this case, though similar, are so closely related to those in *Conner* that a peremptory instruction on Shearer's negligence is compelled by the *Conner* decision. In any event, we need not reach that question because the instruction as requested is improper in this case for another reason. It instructs the jury that, if it concluded that Shearer's negligence was "*a proximate cause* of her injuries" then it was required to return a defendant's verdict. In this case, the trial court had concluded that legitimate issues of fact existed from which the jury could determine that both parties were negligent and that, therefore, it was appropriate to submit the case to the jury with a comparative negligence instruction. Thus, Shearer's negligence would have been a complete bar to her recovery only if the jury concluded that Miller was not negligent at all. Had the instruction stated that if the jury found that Shearer's negligence was *the sole proximate cause* of her injuries it must return a defendant's verdict, it would have been a more accurate statement of the applicable law. However, it is not the duty of the trial court to redraft particular instructions for the attorneys. The court's sole responsibility is to see that the jury is properly instructed. Viewing the instructions as a whole, we conclude that the jury was informed as to the applicable law of this case, including specifically the proposition that, if it concluded Shearer was solely at fault, its duty was to return a verdict for the defendant. This issue we conclude to be without merit.

### IV.

## Excessive Damages

Miller urges this Court to conclude that the jury determination of Shearer's damages at \$154,000.00 based on the evidence presented is a clear indication that the verdict is based upon bias, passion, or prejudice. He asserts that such a large award is against the weight of the evidence. He points out that there is no evidence that Shearer will need future medical treatment, and that her injuries were primarily limited to her shoulder and wrist, and that the proof showed that she would likely have no permanent impairment of her shoulder and only a twenty-one percent permanent impairment of her wrist. He says the evidence indicates that even this impairment could have been reduced but for Shearer's unwillingness to undergo recommended physical therapy.

The Mississippi Supreme Court has said that it will set aside a jury verdict if it concludes that the damages awarded are excessive as the result of the influence of bias, passion, or prejudice on the jury, to the extent that the verdict shocks the conscience or that the damages awarded are against the overwhelming weight of credible evidence. *Junior Food Stores, Inc. v. Rice*, 671 So. 2d 67, 76 (Miss. 1996). However, it has also said that this Court is not authorized to disturb a jury verdict as to damages because it "seems too high" or "seems too low." *C&C Trucking Co. v. Smith*, 612 So. 2d 1092, 1106 (Miss. 1992) (citation omitted).

The evidence showed that Shearer had medical bills attributable to this accident in excess of \$15,000.00. Shearer testified that she had undergone three surgeries and that her injuries and the surgical procedures have caused her pain. She reported that she has permanent scarring as a result of the surgeries. She said that she has problems writing because of the injuries to her wrist, and that these limitations interfere with her career as a school teacher. Shearer also testified as to limitations in her everyday activities resulting from her injuries. She explained that pain symptoms had prevented her from participating in physical therapy as was ordered by her doctor.

We find, after a review of all of the evidence, that the jury award was not so excessive as to shock the conscience. There is nothing in the record that would indicate any particular evidence introduced or any event occurring during the trial that could be said to have inflamed or prejudiced the jury against this defendant. The determination of the amount of damages suffered by a person who has incurred a physical injury is not a mathematical science. Our judicial system entrusts such decisions to the sound discretion of the jury, and there must inevitably be fairly wide divergent limits, both on the high side and the low side, that fall within the grant of that discretionary authority. This verdict does not, in the opinion of this Court, exceed those limits.

**THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS AFFIRMED. STATUTORY DAMAGES AND INTEREST ARE AWARDED TO APRIL SHEARER. COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT, TODD MILLER.**

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