

**IN THE COURT OF APPEALS 04/23/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CA-00970 COA**

**JAMES A. TUCKER, III**

**APPELLANT**

**v.**

**DOTTIE PRESTEL**

**APPELLEE**

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

TRIAL JUDGE: HON. L. BRELAND HILBURN, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOHN S. KNOWLES, III

ATTORNEY FOR APPELLEE:

MICHAEL F. MYERS

NATURE OF THE CASE: PERSONAL INJURY

TRIAL COURT DISPOSITION: JURY VERDICT IN FAVOR OF DEFENDANT, DOTTIE  
PRESTEL

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

McMILLIN, J., FOR THE COURT:

This case is a personal injury action brought as the result of a motor vehicle accident. The Plaintiff, James A. Tucker III, who was driving his employer's truck, and the Defendant, Dottie Prestel, were

traveling in the same direction with Tucker's vehicle in front when they both stopped at an intersection. Apparently thinking that Tucker had resumed movement, Prestel took her foot off the brake, and her vehicle struck the truck which Tucker was driving in the rear. Prestel testified that she had not put her foot on the accelerator, but that the car simply rolled into the rear of Tucker's truck at a very low speed. Tucker's employer testified that he inspected the truck as soon as Tucker returned to the business, and he could detect no physical damage to the truck. Prestel testified that her vehicle received no damage as a result of the impact. Tucker claimed injuries to his lower back arising out of the accident. The jury returned a verdict in favor of the Defendant.

At the close of the evidence, the trial court granted the following instruction requested by the Plaintiff as Jury Instruction P-3:

The Court instructs the Jury to find for the plaintiff, James A. Tucker, III, and against defendant, Dottie Prestel, and assess damages in accordance with other instructions of this Court.

One issue raised on appeal involves the fact that, despite having given this peremptory instruction in favor of the Plaintiff, the trial court granted a "form of the verdict" instruction as Jury Instruction D-7 that permitted a general verdict for the Defendant. Tucker now claims that these instructions were conflicting and inevitably confusing to the jury, entitling him to a new trial. Alternatively, he claims that the verdict for the Defendant was contrary to the weight of the evidence such as to evidence bias, passion, or prejudice on the part of the jury.

#### Conflicting Jury Instructions

In *McCary v. Caperton*, 601 So. 2d 866, 869 (Miss. 1992), the Mississippi Supreme Court found it was reversible error to grant a directed verdict on the issue of negligence against the defendant and then permit a form of the verdict instruction suggesting the propriety of a verdict in favor of the defendant. The Court found two other errors in the trial of that cause that it deemed reversible; nevertheless, the majority opinion, taken in the abstract, would seem to require reversal in this case.

However, two considerations compel us to affirm the verdict in this case. First, from a procedural standpoint, we note that plaintiff's counsel did not object to the form of the verdict instruction as proposed by the Defendant. Generally, absent a contemporaneous objection, a party will not be heard to complain concerning a particular instruction on appeal. *Young v. Robinson*, 538 So. 2d 781, 783 (Miss. 1989) (citations omitted). Even Tucker's new trial motion did not properly raise the issue of the confusion these potentially conflicting instructions could cause, but addressed only the issue that the verdict, in view of the peremptory nature of Instruction P-3, was against the weight of the evidence.

We think this is a textbook example of the need for requiring a contemporaneous objection to a proposed jury instruction in order to preserve any error on appeal. One of the salutary purposes of the requirement is to permit the trial court the opportunity to consider the objection and avoid committing reversible error by correcting an erroneous instruction before the harm occurs. There is nothing in the record to suggest that, had Tucker's counsel posed the issue of the facially conflicting

instructions to the trial court, the court would not have been willing to consider such amendments as would cure the problem to the satisfaction of Plaintiff's counsel. The object of jury instructions is to properly instruct the jury as to the applicable law so that substantial justice may be accomplished at trial, and not to permit the seeds of reversible error to be planted and ignored so that they may spring to life on appeal if needed. The procedures for handling jury instructions, including the requirement of service of proposed instructions in advance of trial, and the opportunity afforded counsel, outside the presence of the jury, to voice any and all objections to the proposed instructions, very strongly suggest the necessity for vigilance on the part of counsel to prevent exactly the type of error we are asked to recognize now. We think it procedurally inappropriate and decline to do so.

Even were we to consider the issue on the merits, we are of the opinion that this case is distinguishable from *McCary*. In *McCary*, the Court stated that the danger of these facially conflicting instructions was that "the jury could possibly have decided that McCary suffered damages but that Caperton was not liable for them." *McCary*, 601 So. 2d at 869. Five Justices in *McCary* joined in a special concurrence authored by Justice Pittman and agreed that a directed verdict on the issue of causation of an accident does not automatically compel a monetary damage award for the plaintiff for the reason that "[p]roof of damages is an essential part of a plaintiff's cause of action based on negligent conduct." *Id.* at 871 (Pittman, J., concurring). The Court suggested that "[i]f more carefully worded, instructions such as the ones *sub judice* may be permissible." *Id.* (Pittman, J., concurring). In effect, what the Court decided was that a plaintiff's verdict assessing damages at "zero" was a permissible verdict if the evidence so indicated.

There is no question but that the sole issue in this very brief trial was whether Tucker sustained any compensable injuries as a result of what was a very minor traffic accident. Tucker was his only witness called in his case in chief. He admitted that he did not seek medical services for his alleged injuries or miss any work until approximately one week after the accident. While it may have been preferable to have instructed the jury that, in the event it concluded that the Plaintiff had failed to prove this "essential part" of his case, it should return a verdict in the form suggested in *McCary*, *i.e.*, "We the jury find for the plaintiff and award \$0.00 damages," we are convinced from a review of the record and a review of the jury instructions in their entirety that the possibility of jury confusion was so small in this case that reversal is not required.

We are often reminded not to consider particular jury instructions in isolation. *See, e.g., Day v. Morrison*, 657 So. 2d 808, 814 (Miss. 1995) (citations omitted). If the jury instructions, considered as a whole, fairly and properly instruct the jury, then no reversal is required. *Potters II v. State Highway Comm'n*, 608 So. 2d 1227, 1237 (Miss. 1992) (citations omitted); *Purina Mills, Inc. v. Moak*, 575 So. 2d 993, 996 (Miss. 1990) (citations omitted). We conclude that the seeming conflict between Instruction P-3 and D-7 was, in light of the record in this case, resolved by Jury Instruction D-5. This was the only instruction given that advanced the Defendant's theory of the case, since causation of the accident had been effectively established, and, in fact, admitted. Instruction D-5 stated that:

The burden is on the plaintiff to prove to you by a preponderance of the credible evidence that he has suffered damages in this case as a proximate and direct result of the accident in question. The extent of his damages, if any, cannot be established by mere speculation, conjecture or guesswork, but must be proven by the plaintiff. *If you find that the plaintiff*

*has failed to prove his alleged damages, then you must find for the defendant, Dottie Prestel.* (Emphasis supplied).

While it might have been more proper under *McCary* to propose, instead, that the jury under these facts must find for the Plaintiff, but set his damages at "zero," we are unconvinced that the jury verdict was not responsive to the Court's instructions taken as a whole, nor are we of the opinion that, based on the record, the verdict was the result of any confusion on the part of the jury. This was clearly a single issue case: Did the Plaintiff establish by a preponderance of the evidence that he was damaged in any way as a result of the mishap? The minor nature of the incident, the Plaintiff's delay of nearly a week in seeking medical consultation, the fact that the Plaintiff went about his normal duties during that period, and the complete lack of expert medical testimony to support his claim, all combine to support a reasonable inference drawn by the jury that the Plaintiff was not, in fact, injured in his lower back when Prestel's car rolled into the rear of the truck which Tucker was driving.

#### The Weight of the Evidence

Tucker alleges as an alternative ground for reversal that "the verdict of the Jury was against the overwhelming weight of the evidence and a result of passion and bias against the Plaintiff." However, he advances no argument on this point in his brief beyond an assertion that this case is "closely akin" to *Williams v. Wiggins*, 285 So. 2d 163 (Miss. 1973). In *Williams*, the Mississippi Supreme Court found that a plaintiff's jury verdict in the amount of \$00.00 was not responsive to the trial court's instructions or to the evidence. In that case, the Court concluded that the evidence "was conclusive that the appellant was injured." *Id.* at 164. For the reasons we have previously set forth, we do not find the testimony of Tucker to be "conclusive" on the issue of his alleged injury, and, therefore, we find *Williams* to be unpersuasive.

The judgment of the trial court is affirmed.

**THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY IS AFFIRMED.  
COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

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