

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-CA-00195 COA**

**LARRY PRYOR AND JOHN F. KITCHENS D/B/A  
KITCHENS LANDSCAPING COMPANY**

**APPELLANTS**

**v.**

**MARY BURRIS, AS MOTHER AND NEXT FRIEND  
OF JENNIFER MOORE LYONS**

**APPELLEES**

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

DATE OF JUDGMENT:	02/05/96
TRIAL JUDGE:	HON. FRANK G. VOLLOR
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	SAMUEL DAVID HABEEB R.E. PARKER, JR.
ATTORNEYS FOR APPELLEES:	BOBBY D. ROBINSON WILLIAM M. BOST JR.
NATURE OF THE CASE:	CIVIL - PERSONAL INJURY
TRIAL COURT DISPOSITION:	THE COURT ENTERED JUDGMENT AGAINST THE APPELLANT FOR \$22,500.
DISPOSITION:	AFFIRMED - 1/27/98
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/27/98

BEFORE McMILLIN, P.J., HINKEBEIN, AND SOUTHWICK, JJ.

McMILLIN, P.J., FOR THE COURT:

This Court is presented today with a question for which there is no precedent in the past decisions of the Mississippi Supreme Court. In this case, the jury was permitted to apportion percentages of fault in a motor vehicle accident between the defendant and a non-party joint tortfeasor with whom the plaintiff had previously settled. We are asked to assess the impact of that prior settlement on the jury verdict returned against the defendant. The trial court refused to credit the verdict for any amounts received in settlement with the absent joint tortfeasor and the defendants have appealed that decision.

This Court is of the opinion that the trial court resolved the matter correctly and we affirm the judgment of that court.

## I.

### Facts

This case arose out of an automobile accident that occurred in Warren County. Jennifer Moore Lyons was injured while riding as a guest passenger in a vehicle driven by Lacey Langley when that vehicle collided with a truck owned by John F. Kitchens. At the time of the accident, Kitchens's truck was being driven by one of his employees, Larry Pryor, in furtherance of Kitchens's business interests. Lyons settled a potential claim against Langley by accepting the sum of \$65,000 from Langley's liability insurance provider. Lyons then commenced suit in the Circuit Court of Warren County against Pryor for his alleged negligence in contributing to the accident. Kitchens was named as a defendant under the doctrine of *respondeat superior*. Without objection from either side, the trial court submitted to the jury the issue of the percentage of fault attributable to Langley's negligence and that attributable to Pryor, even though Langley was not a party to the suit because of the previous settlement. This step seems to have been undertaken pursuant to the provisions section 85-5-7 of the Mississippi Code of 1972, adopted in 1989, which limits a joint tortfeasor's liability to that portion of the total damages that corresponds to the percentage of fault assigned to him by the fact-finder (subject to certain exceptions having no relevance to this case). The jury returned a verdict assessing Lyons's total damages at \$75,000 and determined that Pryor was 30% at fault in the accident and that Langley was 70% at fault.

Pursuant to this verdict, the trial court entered judgment jointly and severally against Kitchens and Pryor in the amount of \$22,500, which represented 30% of the total damages suffered by Lyons. Kitchens and Pryor moved the trial court to amend or correct the judgment, claiming that they were entitled to credit against the judgment in the amount paid by Langley in settlement; namely \$65,000, so that they only owed the balance of \$10,000. They contend that to allow Lyons to recover anything more would be improper because it would permit her to receive compensation in excess of her actual damages.

## II.

### Two Preliminary Considerations

#### A.

#### The Applicability and Effect of the State's Apportionment Statute

We observe at the outset that, if we accept Lyons's argument, the adoption of section 85-5-7 has had a profound impact on the outcome of the case. Prior to the adoption of that statute, there is little doubt that the position of Kitchens and Pryor would be the correct one. All tortfeasors who negligently contributed to a single accident were considered jointly and severally liable for all damages suffered by the injured plaintiff. *Wilson v. Giordano Ins. Agency, Inc.*, 475 So. 2d 414, 417 (Miss. 1985) (quoting *D.W. Jones, Inc. v. Collier*, 372 So. 2d 288 (Miss. 1979)). See also

*State ex rel. Richardson v. Edgeworth*, 214 So. 2d 579 (Miss. 1968); *Hutto v. Kremer*, 222 Miss. 374, 76 So. 2d 204 (1954). However, since the law contemplated that an injured party was only entitled to a single compensation for his injuries, a plaintiff's verdict against any one tortfeasor was diminished by amounts received from other tortfeasors by way of prior settlement. *See Whittle v. City of Meridian*, 530 So. 2d 1341, 1346 (Miss. 1988). It is evident that, unless section 85-5-7 requires a different result, these cases compel a finding that the liability of Pryor and Kitchens must be limited to \$10,000.

We note that, in at least two reported cases decided after adoption of section 85-5-7, the Mississippi Supreme Court has continued to recognize the practice of subtracting previous settlements from the jury's determination of total damages to determine the proper judgment amount. One such case is *Robles v. Gollott & Sons Transfer and Storage, Inc.*, 697 So. 2d 383 (Miss. 1997), where the supreme court said that "if the jury returns a judgment in excess of the settlement the judge can simply adjust the judgment by the amount of the settlement." *Robles*, 697 So. 2d at 385. In the other case, *McBride v. Chevron*, 673 So. 2d 372 (Miss. 1996), the supreme court did not deal directly with the issue now facing us. That case dealt with the question of whether a prior settlement amount would be subtracted from the total damages before apportioning the remainder between the defendant and the contributorily-negligent plaintiff, or whether the damage award would be apportioned before the settlement was subtracted from the reduced damage figure. *McBride*, 673 So. 2d at 376. In either instance, it was clear that the entire settlement amount would be credited against the judgment in some manner--the same credit that Pryor and Kitchens seek in this case.

We, however, find the *Robles* and *McBride* cases to be distinguishable from the one now before us. In neither of them does it appear that the jury was called upon to make a division of responsibility among the various alleged tortfeasors, one of whom was not present as a party. Even in *McBride*, the sole apportionment of blame was between the defendant actually present in the case and the plaintiff, based on the plaintiff's alleged contributory negligence. *McBride*, 673 So. 2d at 375-78. No separate apportionment was made as to the percentage of fault attributable to the settling defendant. *Id.* at 378. We, thus, face a different situation in this case since the jury *was* permitted to make an apportionment of liability to a person not a party to the litigation. Though such an apportionment was not done in either *McBride* or *Robles*, there is no explicit prohibition from doing so in either opinion and we do not read them as making such apportionment clear error by implication.

## B.

### The Applicability of Section 85-5-7 to Non-Party Joint Tortfeasors

As a second consideration, we do not reach the fundamental question of whether it is appropriate to permit a jury to assign a percentage of fault for an accident to a person who is not a party to the litigation in this case. We decline to consider this question since the parties allowed the issue to be submitted to the jury without objection and none of them raise the issue on appeal. We note that there is a sharp split of authority in other jurisdictions on this question. Some states hold that it is improper to require the jury to assess the degree of negligence of a person not a party to the litigation. *See, e.g., Michigan Dep't of Transp. v. Thrasher*, 521 N.W.2d 214 (Mich. 1994); *Plumb v. Fourth Judicial Dist. Court*, 927 P.2d 1011 (Mont. 1996); and *Eberly v. A-P Controls, Inc.*, 572 N.E.2d 633 (Ohio 1991). Others, however, permit the jury to undertake such an

assessment of blame even as to persons not present in the lawsuit. *See, e.g., Benner v. Wichman*, 874 P.2d 949 (Alaska 1994); *Perez v. Community Hosp. of Chandler, Inc.*, 929 P.2d 1303 (Ariz. 1997); *Barton v. Adams Rental, Inc.*, 938 P.2d 532 (Colo. 1997); *Nash v. Wells Fargo Guard Services, Inc.*, 678 So. 2d 1262, 1263 (Fla. 1996). The statutory scheme adopted by the Mississippi Legislature does not directly answer the question of whether, over the objection of the plaintiff, a defendant may require the fact-finder to apportion a part of plaintiff's right of recovery to non-parties. Our opinion today should not be interpreted as attempting to answer that question. The issue is not directly before us and we decline to raise it on our own motion.

### III.

#### Discussion

This Court holds that, due to the form of the jury's verdict, Pryor and Kitchens are not entitled to any credit for amounts received by Lyons in her settlement with the driver of the vehicle in which she was a passenger. Section 85-5-7(3) provides that, with certain exceptions having no application to this case, "the liability for damages caused by two (2) or more persons shall be several only, and not joint and several and a joint tort-feasor shall be liable only for the amount of damages allocated to him in direct proportion to his percentage of fault." **Miss. Code Ann. § 85-5-7(3) (1991)**. Once the jury was permitted to make a division of fault between Langley on the one hand, and Pryor on the other, Pryor's liability for 30% of Lyons's total damages assessed by the jury became the separate obligation of Pryor and Kitchens. (The statute specifically provides that "an employer and the employer's employee . . . shall be considered as one (1) defendant" in situations such as this. **Miss. Code Ann. § 85-5-7(3) (1991)**).

Within the framework of this litigation, the remaining 70% of Lyons's damages was the separate liability of someone other than Pryor and Kitchens. It can readily be seen by a simple mathematical computation that, at least in the eyes of this jury, Lyons negotiated a favorable settlement of her separate claim against Langley, since 70% of \$75,000 comes to only \$52,500 and Lyons settled with Langley's insurer for \$65,000. However, since that liability was the sole obligation of Langley under the statute, there is no legal or equitable claim that can be made against those funds to satisfy the separate liability of Pryor and Kitchens--just as there would be no right on Lyons's part to have had the verdict against Pryor and Kitchens increased had she settled with Langley for an amount less than \$52,500.

The jury's verdict may be some indication that Lyons extracted a favorable settlement of her separate claim against Langley, but it cannot, by any principle of law or logic, result in a credit against the judicially-determined separate liability of Pryor for his negligent acts--acts for which Kitchens may also be required to answer in his capacity as Pryor's employer. The judgment is affirmed.

**THE JUDGMENT OF THE WARREN COUNTY CIRCUIT COURT IS AFFIRMED.  
STATUTORY DAMAGES AND INTEREST ARE AWARDED. COSTS OF THIS APPEAL  
ARE ASSESSED TO THE APPELLANTS.**

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

