

IN THE COURT OF APPEALS 3/11/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00854 COA

**JEAN ENIS, INDIVIDUALLY, MONROE COUNTY RENTALS, INC. AND ELAINE
BOYD, ALL JOINTLY AND SEVERALLY**

APPELLANTS

v.

THOMAS M. CALDWELL

APPELLEE

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

TRIAL JUDGE: HON. BARRY W. FORD

COURT FROM WHICH APPEALED: CIRCUIT COURT OF MONROE COUNTY

ATTORNEY FOR APPELLANTS:

ROBERT DON. BAKER

ATTORNEY FOR APPELLEE:

J. DUDLEY WILLIAMS

NATURE OF THE CASE: MALICIOUS PROSECUTION

TRIAL COURT DISPOSITION: VERDICT FOR THE PLAINTIFF, DAMAGES AWARDED IN
THE AMOUNT OF \$100,000.00

MANDATE ISSUED: 7/8/97

BEFORE BRIDGES, C.J., KING, AND DIAZ, JJ.

BRIDGES, C.J., FOR THE COURT:

Thomas M. Caldwell ("Caldwell") sued Monroe County Rentals, Jean Enis, and Elaine Boyd (collectively referred to as "Monroe") for malicious prosecution after he was arrested and charged with felony larceny for illegally retaining a car he had rented from Ugly Duckling Rentals. A jury in the Circuit Court of Monroe County returned a verdict for Caldwell and awarded him damages in the amount of \$100,000.00. It is from that judgment that Monroe appeals.

FACTS

On Saturday, April 16, 1988, Caldwell rented a car from Ugly Duckling Rentals in Aberdeen, Mississippi. Caldwell's copy of the rental contract showed no due date for the return of the automobile, and he informed Monroe's agent, Elaine Boyd, that he would have the car back on Tuesday or Wednesday. Caldwell also agreed and attempted unsuccessfully to call Boyd on Monday to tell her when he was going to return the car.

On Tuesday, April 19, 1988, Boyd became concerned about the car and sought advice from her superior, Jean Enis. Enis told Boyd to go to the Aberdeen Police Department to find out what could be done to retrieve the car. Boyd went to the police department and signed an affidavit containing the facts of the situation. Based on the affidavit, the Aberdeen Police obtained a warrant and arrested Caldwell in Blue Mountain, Mississippi. The car was parked in his carport. Caldwell was taken to Aberdeen where he was allowed to post a bond. The charges were later dismissed at the preliminary hearing.

Caldwell brought suit against Monroe for malicious prosecution in July of 1988. Subsequently, Enis and Boyd, individually, were added to the complaint. The case was not tried until May 11, 1994, and on May 12, 1994, the jury returned a verdict against Monroe in the amount of \$100,000.00. On July 8, 1994, a hearing was held and Monroe's motions for judgment notwithstanding the verdict and new trial, or in the alternative for remittitur was taken under advisement. These motions were not denied until July 24, 1995. It is from the denial of these motions that Monroe appeals to this Court.

STANDARD OF REVIEW

Our standard of review of a denial of a motion for judgment notwithstanding the verdict was stated in the case of *Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith*, 523 So. 2d 324 (Miss. 1988). In *Fitzner*, the supreme court opined that:

Our scope of review in such contexts is as limited as it is familiar. We consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may reasonably be 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. (citations

omitted).

Fitzner at 326.

Furthermore, a jury verdict may not be set aside unless it is against the overwhelming weight of the evidence and credible testimony. *Gifford v. Four-County Elec. Power Ass'n*, 615 So. 2d 1166, 1171 (Miss. 1992). The supreme court gives the trial court great deference in determining whether a new trial should be granted. *Odom v. Roberts*, 606 So. 2d 114, 118 (Miss. 1992). With regard to the denial of the motion for remittitur, our supreme court has stated that:

Motions challenging the quantum of damages and seeking a remittitur are by their very nature committed to the sound discretion of the trial judge. Where the trial judge acts upon these matters, we reverse only if he has abused or exceeded his discretion.

Ross-King-Walker, Inc. v. Henson, 672 So. 2d 1188, 1193 (Miss. 1996); (quoting *C&C Trucking Co. v. Smith*, 612 So. 2d 1092, 1106 (Miss. 1992)).

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER THE ORIGINAL COMPLAINT AGAINST THE APPELLANTS WAS DISMISSED PURSUANT TO RULE 15(C) OF THE MISSISSIPPI RULES OF APPELLATE PROCEDURE.

Monroe argues that the original complaint filed by Caldwell was dismissed when, pursuant to Mississippi Rule of Appellate Procedure 15(c), Caldwell did not apply for a writ of mandamus against the trial judge for failure to render a decision within forty five days after the expiration of six months from July 8, 1994, the date the motions for JNOV, new trial or remittitur were taken under advisement. We disagree. The relevant part of Mississippi Rule of Appellate Procedure 15(c) reads as follows:

(c) **Effect of Failure to Seek Mandamus.** *If a party who filed the original complaint fails to apply for a writ of mandamus within the time prescribed, the complaint shall stand dismissed without prejudice.* (emphasis added)

M.R.A.P. 15(c).

When read in isolation, this rule seems to permit dismissal of the original complaint. There is more to this rule, however, than just this section. The relevant portion of Mississippi Rule of Appellate Procedure 15(a) reads as follows:

(a) **When Mandamus Required.** If a trial judge in a civil case fails to render a decision on a motion or request for relief which would be dispositive of all the claims or the rights and liabilities of the parties, within six (6) months after taking such motion or request under advisement, *any party* in the case may apply to the Supreme Court for a writ of mandamus to compel the trial judge to render a decision on the matter taken under advisement or deferred. (emphasis added)

M.R.A.P. 15(a).

Clearly, either party to the litigation may seek to compel the trial judge to render a decision. Rule 15(c), however, seems to punish only the original filing party for failure to prod the trial judge into rendering a decision. This Court need not address this seeming conflict because this rule may be suspended pursuant to Mississippi Rule of Appellate Procedure 2(c) in a proper case. *Town of Lucedale v. George Co. Nursing Home*, 482 So. 2d 223, 225 (Miss. 1986). The relevant portion of Mississippi Rule of Appellate Procedure 2(c) reads as follows:

(c) **Suspension of Rules.** In the interest of expediting decision, or for other good cause shown, the Supreme Court or the Court of Appeals may suspend the requirements or provisions of any of these rules in a particular case on the application of a party or on its own motion and may order proceedings in accordance with its own direction

M.R.A.P. 2(c).

The *Town of Lucedale* case is analogous to the case *sub judice*, except for the fact that a *case* was taken under advisement in *Town of Lucedale* and *motions* were taken under advisement in the case *sub judice*. *Town of Lucedale*, 482 So. 2d at 224. In *Town of Lucedale*, a nursing home sued the town of Lucedale for improper assessments it received regarding additions to the city's existing sewer system. After being held under advisement for more than seven years, a decision was rendered in favor of the nursing home. *Id.* In that case, the supreme court used Supreme Court Rule 33 to suspend the improper use of Supreme Court Rule 47. We agree with and adopt the court's reasoning in the *Town of Lucedale* case which read in pertinent part as follows:

The case under consideration provides an example where the employment of the rule would work to counter the purpose behind the rule. If this Court holds that Rule 47 has operated to dismiss the cause, the Nursing Home would be forced to initiate proceedings de novo before the Board of Alderman of the Town (now city) of Lucedale. This would place them in the same posture as they were in prior to May 6, 1975, except that numerous obstacles (procedural and otherwise) might now be attendant. If this Court temporarily suspends Rule 47 for this case, then the matter will return to the Aldermen with the findings of the chancellor intact. Certainly judicial efficiency and economy would be better served by the latter option. The former serve, primarily, simply to allow the appellant a "second bite at the apple."

Rule 47 was intended to be used as a sword, to prod trial courts toward a timely determination of cases. Here, the Town of Lucedale is attempting to use the rule merely as a shield against an adverse decision. Rule 47 would have allowed "any party" to apply for a writ of mandamus prior to December 31, 1982. Had the Town of Lucedale wished to employ the rule properly, it could have made timely application for a writ of mandamus and, thereby, have encouraged a speedier resolution.

Id. at 225. This Court finds that Monroe is attempting to use Mississippi Rule of Appellate Procedure 15(c) as a shield against an adverse judgment. This use is improper and was not intended. It is the opinion of this court that the original complaint in the case *sub judice* has not been dismissed, and accordingly, we find no merit to Monroe's first issue.

II. WHETHER THE JURY WAS PROPERLY INSTRUCTED ON HOW TO FIND ENIS AND BOYD INDIVIDUALLY LIABLE FOR THE ACTS OF THE CORPORATION.

Monroe argues that the jury was not properly instructed concerning how to find Enis and Boyd individually liable for the acts of the corporation and, therefore, they may not be held liable. We disagree. The jury was given the chance to decide that neither party acted individually by way of instruction D-E1, which reads as follows:

The court instructs the jury that if from the evidence you believe that Elaine Boyd went to the Aberdeen Police Department and advised the authorities that she wanted Monroe County Rental, Inc.'s car found and returned, and that she in no way suggested or requested that Thomas Caldwell be arrested or charged with any crime and that she did not know that the document that she signed would lead to the arrest and prosecution of the plaintiff, then you must find for all of the Defendants and against the Plaintiff.

and instruction D-26, which reads as follows:

The court instructs the jury that if from the evidence you now believe that Jean Enis was never advised by any person, and did not know, nor should she have known, that the complaint of Elaine Boyd to the Aberdeen Police Department would result in the arrest and charging of Thomas Caldwell, then you shall find for Jean Enis, and against the Plaintiff.

and were further instructed in instruction 9 D-E as follows:

There are six defendants named in this case. In order to find for the Plaintiff and against any one Defendant, you must find that the Plaintiff has proved all of the essential elements of his case against that Defendant. You must make a separate such determination as to each Defendant.

You may find for or against all of the Defendants, none of the Defendants, any combination of Defendants, or a single Defendant, based upon your evaluation of the evidence in this case.

We find that the jury in this case was properly instructed and, therefore, justified in finding Enis and Boyd individually liable for damages in this case. Accordingly, we find no merit in Monroe's second issue.

III. WHETHER ENIS BREACHED A DUTY TO CALDWELL WHEN SHE SENT BOYD TO THE POLICE STATION TO RETRIEVE THE CAR.

IV. WHETHER BOYD WAS NEGLIGENT IN ATTEMPTING TO RETRIEVE THE CAR.

Issues III and IV challenge the jury's decision as it relates to the negligence of Enis and Boyd. Both challenges can be dealt by looking at the same facts. Monroe argues that Enis did not breach a duty to Caldwell by sending Boyd to the police station to seek the return of the car, and that Boyd was not negligent in going to the police station in an attempt to get the car back. It is the opinion of this Court that the jury was clearly justified in finding that Enis did breach a duty to Caldwell and that Boyd was negligent. Monroe claims that since retaining the car was illegal, Enis was justified in seeking its return by sending Boyd to the police, and Boyd was not negligent because she did not know she was signing an affidavit.

The testimony and exhibits show, however, that Caldwell's copy of the rental receipt showed no due date for return of the vehicle and evidenced no attempt to mislead Monroe as to where Caldwell could be reached. Furthermore, there was testimony refuting Boyd's claims of ignorance. All this clearly created a jury question. We cannot see that the jury was incorrect in finding that Enis breached a duty to Caldwell and that Boyd was negligent. We find this issue to be without merit.

V. WHETHER THE JURY WAS GIVEN AN ABSTRACT INSTRUCTION REGARDING NEGLIGENCE.

VII. WHETHER THE COURT'S INSTRUCTION REGARDING NEGLIGENCE WAS IMPROPER.

Monroe argues that the court's instruction C-6 regarding instruction is fatally abstract and otherwise improper. We need not address the merits of these arguments because they are procedurally barred. Monroe failed to object to any of the court's proposed instructions. "[The supreme] court has repeatedly held that if no contemporaneous objection is made, the error, if any, is waived. *Foster v. State*, 639 So. 2d 1263, 1270 (Miss. 1994).

VI. WHETHER INSTRUCTION P-5 WAS CONFUSING TO THE JURY.

Monroe claims that instruction P-5 confused the jury. P-5 reads as follows:

If you find for the Plaintiff, then you may award Plaintiff such damages for mental pain and anguish without injury as you find from a preponderance of the evidence in this case to have been proximately caused by the negligent act, if any, of any Defendant, or

Defendants, if any.

"It has long been held that it is reversible error to give instructions likely to mislead or confuse the jury as to the principles of law applicable to the facts in evidence." *Puckett Machinery Company v. Edwards*, 641 So. 2d 29, 34 (Miss. 1994). We do not feel, however, that this instruction was likely to mislead or confuse the jury. In the case of *Royal Oil Company v. Wells*, an instruction much like P-5 was given to the jury. *Royal Oil Company v. Wells*, 500 So. 2d 439, 448 (Miss. 1987). *Royal*, like the case *sub judice*, contained a claim for malicious prosecution. The court, in affirming the giving of the instruction, stated that mental anguish and emotional distress are well within the nature of the tort of malicious prosecution. *Id.* In light of this, we feel that instruction P-5 was entirely appropriate and, therefore, not likely to mislead or confuse the jury. We find this issue to be without merit.

VIII. WHETHER IT WAS REVERSIBLE ERROR NOT TO INSTRUCT THE JURY REGARDING FALSE IMPRISONMENT OR MALICIOUS PROSECUTION.

Monroe argues that because no instructions were given regarding false imprisonment or malicious prosecution, the case should be reversed. We disagree. Neither party requested any instructions specifically regarding false imprisonment or malicious prosecution in this case. It is well established that each party in civil litigation equally bears the burden of submitting instructions that embrace the theory of their case. *Hester v. Bandy*, 627 So. 2d 833, 839 (Miss. 1993). This Court interprets the above law, in this case, to mean that Monroe also bore the burden of enlightening the jury as to its theory of the case as it relates to false imprisonment and malicious prosecution.

While we feel that the jury was not instructed as completely as they could have been in this case, we do not feel a reversal is warranted by this insufficiency. Our supreme court has addressed this issue before saying:

This Court has never commended the practice of relying on the issues concerning which the jury is not instructed. Many authorities have condemned it. But in this jurisdiction the jury has the right to determine the issues made by the pleadings and the evidence, notwithstanding no instruction is given on the issues. If the pleadings and the evidence justify a result reached by the jury, we will not reverse for failure of the successful party to have the jury instructed on the issues.

Medley v. Carter, 234 So. 2d 334, 335 (Miss. 1970). Accordingly, this issue is without merit.

IX. WHETHER THE JURY COULD HAVE DETERMINED THAT CALDWELL HAD ANY DAMAGES.

Monroe argues that Caldwell offered no evidence of compensable injury and, therefore, the jury's verdict should be overturned. We disagree. This issue challenges the existence of *any* damages in this case; it does not challenge the amount. The record reflects non-physical damages other than Caldwell's loss of reputation in his community, and the jury was entirely justified in believing that he was damaged by his arrest. Caldwell testified that he could not get certain loans necessary for him to pursue his farming operation. He further attributed these losses directly to the harm done to his reputation after his arrest. The supreme court has stated that "unless the reviewing court can say that no reasonable jury could have assessed the damages awarded based on the proof at trial, the award

must be left undisturbed." *Junior Food Stores, Inc. v. Rice*, 671 So. 2d 67, 75 (Miss. 1996). Accordingly, we find this issue to be without merit.

X. WHETHER THERE WAS EVIDENCE OF WANTON OR WILFUL BEHAVIOR AS NECESSARY TO AWARD DAMAGES FOR EMOTIONAL DISTRESS OR MENTAL ANGUISH.

Monroe alleges that its behavior did not warrant the awarding of damages for emotional distress or mental anguish. The supreme court has opined that:

In general, damages for mental anguish or suffering are recoverable when they are the natural or proximate result of an act committed maliciously, intentionally, or with such gross carelessness or recklessness as to show an utter indifference to the consequences when they must have been in the actor's mind.

Lyons v. Zale Jewelry Company, 150 So. 2d 154, 157 (Miss. 1963). The court has more recently held that:

In Mississippi, to determine if a defendant acted with malice in instituting a criminal proceeding, we must look to the defendant's state of mind. 'Malice' in the law of malicious prosecution is used in an artificial and legal sense and applied to a prosecution instituted primarily for a purpose other than that of bringing an offender to justice. Circumstantial evidence may prove the element of malice, or the jury may infer from the facts of the case. This Court has also held that the absence of probable cause for a prosecution is circumstantial evidence of malice, and the jury may infer malice from a finding that the defendant acted in reckless disregard of another person's rights.

Junior, 671 So. 2d at 73. We find that the evidence clearly supports at least an inference of malice in this case and; therefore, we shall not overturn the jury's verdict.

XI. WHETHER REMITTITUR SHOULD HAVE BEEN ORDERED BECAUSE THE JURY WAS INFLUENCED BY BIAS AND PREJUDICE IN THEIR AWARD OF DAMAGES AND WHETHER THE AWARD WAS AGAINST THE OVERWHELMING WEIGHT OF THE EVIDENCE.

In reviewing this question,

[this Court] can disturb a jury verdict if the court finds that the damages are excessive or inadequate for the reason that the jury was influenced by bias, prejudice, or passion, so as to shock the conscience or that damages awarded were contrary to the overwhelming weight of credible evidence. This Court is not authorized to disturb a jury verdict as to damages because it "seems too high" or "seems too low."

Id at 76. This Court recognizes the attendant difficulty in quantifying damages in a case such as this.

We recognize equally, however, the danger of substituting our judgment for the judgment of the jury with an issue clearly left up to them. Monroe has failed to show this Court that the jury was influenced by bias, prejudice, or passion. Furthermore, this award of damages does not shock the conscience of this Court. It is the opinion of this Court that we are forbidden by the law of this state from disturbing the jury's verdict in this case. Accordingly, this issue is without merit.

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

BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, KING, AND PAYNE CONCUR. SOUTHWICK, J., DISSENTS WITH SEPARATE WRITTEN OPINION. MCMILLIN, P.J., AND HERRING, J., NOT PARTICIPATING.

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SOUTHWICK, J., dissenting.

In many respects I agree with the majority's opinion. The evidence in this case made a jury question regarding whether the defendants breached a legal duty owed to the plaintiff, that proximately resulted in damages. However, in awarding \$100,000.00 in damages to the plaintiff, the jury had

virtually no relevant liability and damage instructions. I would reverse and remand for a new trial.

What is startling about this case, a case that started with a complaint for malicious prosecution, to which were added claims for false imprisonment, false arrest, intentional infliction of emotional distress, outrageous conduct, humiliation and suffering, etc., is how few instructions were given to the jury. In summary form, this is the entirety of what the jury was told regarding their obligations:

Court's instructions C-1, C-2, C-3, C-4, C-5, and C-5A, consisted of general instructions regarding the jury's responsibilities, such as reliance only on evidence introduced in the case, not to rely on the arguments of counsel as evidence, to make their decision based on the defined meaning of "preponderance of the evidence," and the need that nine members of the jury agree.

Court's instruction C-6 defined "negligence."

Plaintiff's Instruction P-1 established what was required for Elaine Boyd to be found an agent for Ugly Duckling Rent-A-Car.

Instruction P-5 said that if the jury found for the plaintiff, damages could be awarded for mental pain and anguish proximately caused by the defendants.

Several instructions proposed by Ugly Duckling Rent-A-Car attempted to establish the relationship between Ugly Duckling and the other defendants, and the right of indemnity that Ugly Duckling held. Ugly Duckling also obtained an instruction that punitive damages against the defendants were not warranted.

The other defendants requested instructions regarding their defenses.

Once all the extraneous, even if important, instructions are pulled aside, the jury was given an abstract definition of negligence, and also told "if they find for the plaintiff," then they could award damages for mental pain and anguish. The majority allows that "the jury was not instructed as completely as they could have been in this case" However, the majority finds that any deficiencies in that regard to be the mutual obligation of all parties at trial. I do not believe that is the law, and that disagreement forms the basis for my dissent.

The majority says "it is well established that each party in civil litigation equally bears the burden of submitting instructions that embrace the theory of their case. *Hester v. Bandy*, 627 So. 2d 833, 839 (Miss. 1993)." What *Hester* appears actually to mean, however, is that each party has the burden of submitting instructions that embrace *that party's* theory of the case. *Hester*, 627 So. 2d at 839. *Hester* relies on a case much like the present one. *Pulliam v. Ott*, 246 Miss. 739, 150 So. 2d 143 (1963). In that case, the jury was given no instruction for "what was necessary to make out the plaintiff's claim for malicious prosecution alleged in the declaration. . . ." *Pulliam*, 246 Miss. at 747. The court did not even discuss that the defendant might have had an obligation to supply the missing instruction. Instead, the court reversed.

The majority also relies on a statement in another case, which held that "if the pleadings and the evidence justify a result reached by the jury, we will not reverse for failure of the successful party to have the jury instructed on the issues." *Medley v. Carter*, 234 So. 2d 334, 336, (Miss. 1970) (quoting *National Surety Corp. v. Vandevender*, 235 Miss. 277, 284, 108 So. 2d 860, 863 (1959)). This may

be a situation reflective of the sentiment that is sometimes stated that a case on almost any proposition can be found. Nonetheless, the two positions are not necessarily inconsistent. In *Medley*, the court found that all the instructions read together adequately instructed the jury on the issues. *Medley*, 234 So. 2d at 336. *Pulliam* quite readily can be read to mean that the instructions, read as a whole, did not adequately inform the jury of its task. The most recent of the authorities, *Hester v. Bandy*, clearly makes it the obligation of each party to submit its own instructions embracing that party's theories. *Hester*, 627 So. 2d at 839.

The majority's reading would mean that after both sides had rested in a case, if the plaintiff submitted no instructions setting out its theory of the case, the defendant would have to submit the plaintiff's instructions or else could not complain on appeal from an adverse judgment. Though the modern rules of procedure have eliminated some of the hoary rules of practice, I think we go too far in making each party responsible for more than its own case.

Since I would hold the plaintiff responsible for failure to have the jury instructed on the law necessary for a plaintiff's verdict, it is then necessary to determine whether the jury had enough to rule in the plaintiff's favor. The following are the only two relevant instructions:

"The Court instructs the jury that the word 'negligence' means the doing of something which a reasonably prudent person would not have done under the same or similar circumstances, or the failure to do something which a reasonably prudent person would have done under like or similar circumstances." Instruction C-6.

"If you find for the plaintiff, then you may award plaintiff such damages for mental pain and anguish without physical injury as you find from a preponderance of the evidence in this case to have been proximately caused by the negligent act if any of any defendant or defendants, if any." Instruction P-5.

The first observation that seems unavoidable is that no theory of liability was ever given the jury. The instruction on "negligence" was only a definition. The other instruction starts with the premise that the jury has found for the plaintiff, on some basis that should be set out in another instruction, but is not. There is also no attempt to inform the jury of when damages for mental anguish are recoverable. The majority gives the definition, and it requires malicious, intentional or gross carelessness. Not the first hint of that is given the jury. Instructions C-6 and P-5 are not wrong, but there needed to be other instructions.

In summary, my difference with the majority is simply this: I would hold it the plaintiff's responsibility to ask for an instruction to define the theory of liability and define when damages for mental anguish are recoverable; the majority finds it a mutual obligation to seek such instructions, and therefore waived as an issue here. The defendant's obligation is to object to erroneous instructions, not to supply missing ones. Since I do not believe it is a defendant's obligation to define the plaintiff's cause of action to the jury, I would reverse and remand for a new trial.