UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7092
Summary Calendar

TERRENCE D. JOYCE,

Plaintiff-Counter Defendant-Appellant-Cross-Appellee,

VERSUS

CHARLES TYNES,

Defendant-Counter Plaintiff-Appellee-Cross-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
(CA S90-0212[G])

March 22, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In this Mississippi diversity action, Terrence D. Joyce contends, *inter alia*, that the court failed to properly instruct the jury on negligence per se. Tynes cross-appeals, requesting a new trial on his claim only in the event we grant one to Joyce. Finding no reversible error, we **AFFIRM**.

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

In October 1986, Joyce and Tynes, travelling in opposite directions on a two-lane road in Mississippi, were involved in an automobile collision as they passed through the middle of an "S" curve. There were no eyewitnesses, other than Joyce and Tynes, who presented conflicting testimony as to the cause of the collision. According to Tynes, he turned his vehicle left because Joyce had crossed the center line while rounding the curve, threatening to hit him head on; at which point, Joyce attempted to return to the proper lane, resulting in the collision. Joyce, on the other hand, denied that his vehicle crossed the center line; rather, he maintained that when Tynes's vehicle moved into his lane, he attempted to move his to the right to avoid a collision; however, Tynes's vehicle struck his left front fender, pushing his vehicle off the road.

Joyce sued, and Tynes counterclaimed. The jury concluded that neither side proved its case by a preponderance of the evidence, returning a verdict for each on the other's claim. Both parties moved unsuccessfully for a new trial and/or for judgment notwithstanding the verdict.

II.

Joyce, the plaintiff, contends that (1) the court improperly admitted testimony from the accident investigating officer; (2) it improperly instructed the jury on principles of negligence per se; and (3) the verdict was inconsistent, a compromise, and against the clear weight of the evidence, warranting a new trial.

A.

Joyce called the investigating officer, Cranford, as a fact witness during his case-in-chief and introduced Cranford's accident report into evidence. It contained a description of the accident, as reported by Tynes[2], along with a sketch of the scene that noted the presence of debris. On cross, Tynes asked Cranford, over Joyce's objection, whether a large accumulation of debris is "one indication of the point of impact". Cranford responded that, although he could not specify a point of impact, the accumulation "would be one indication".

Tynes next asked Cranford to examine two photographs of his damaged automobile and testify whether they indicated "someone making or attempting to make a sharp right in an attempt to avoid a collision". Joyce maintained that Cranford was not qualified to render an opinion and that the question assumed facts not in evidence. In response to the court requiring more predicate, Cranford testified that he had taken accident reconstruction classes, investigated several thousand automobile accident cases over sixteen years, and reviewed roughly 100 photographs as part of his investigations. Accordingly, the court overruled Joyce's objection and allowed Cranford to testify that the vehicle appeared to have been struck on "a slight inward hit from another vehicle".[3]

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[2] The report states that Joyce was "incoherent and could not make a statement".

[3] This testimony was in response to Tynes's re-stated question -- "what, if anything, do (the photographs) tell you about the directions and/or the actions of Mr. Tynes' automobile prior to the impact in question?" Cranford based his opinion on "the way the

Over Joyce's objection, Cranford was permitted to testify that, in his opinion, and based on his observation of the accident scene, the point of impact did not occur off the side of the road.[4]

Joyce premises reversible error on the admission of this testimony. We disagree. Joyce's assertion that the court did not make a preliminary ruling as to Cranford's expert status is without merit. In overruling his objection, the court implicitly found that Cranford was qualified to render an opinion. We similarly reject Joyce's contention that Cranford was not qualified, or, alternatively, that he testified to matters outside his expertise. "A trial court's ruling regarding admissibility of expert testimony is protected by an ambit of discretion and must be sustained unless manifestly erroneous". ***Christophersen v. Allied-Signal Corp.***, 939 F.2d 1106, 1109 (5th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1280 (1992).

In light of Cranford's training and experience, the court did not abuse its discretion in finding him qualified to give his limited opinion on the nature of the collision. *See* Fed. R. Evid. 702. Nor was it error to conclude that Cranford's testimony would be helpful to the jury. Moreover, Joyce's assertion that Cranford "did not obtain sufficient evidence at the scene of the accident to determine the point of impact" fails, because it does not

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metal has buckled and the tire has been driven back".

[4] Cranford explained: "[t]he side of the road was mostly dirt, grass, dust and rocks. Had the impact occurred off the side of the road ... we'd have seen big gouge marks and scrapes and non-rolling skids from the side of the tires .... There was none of that on the side of the roadway".

accurately reflect his testimony. Cranford did not determine the point of impact; rather, he testified that the presence of debris provides "one indication" of impact, that Tynes's vehicle was struck at an angle, and that the point of impact did *not* occur at the side of the road.[5] Accordingly, the court acted within its discretion in admitting the testimony.[6]

B.

Joyce contends next that the court reversibly erred by failing to instruct the jury that, pursuant to Miss.Code Ann. § 63-6-301, Tynes's failure to turn his car to the right was negligence per se. "Great latitude is shown the trial court regarding jury instructions. Appellate review looks to whether the instruction accurately states the law, and does not mislead the jury". ***Federal***

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[5] In his reply brief, Joyce asserts for the first time that Cranford's examination of photographs did not provide an adequate basis to form the opinion that Joyce struck Tynes's vehicle at an angle. Absent manifest injustice, we do not consider issues so raised. ***Najarro v. First Federal Savings and Loan Ass'n***, 918 F.2d 513, 516 (5th Cir. 1990). We find none and, therefore, decline to address this contention.

[6] Joyce also bases error on Cranford's testimony regarding notations on his accident report. He was allowed to refresh his recollection by correlating the numbers on an overlay to numbers on the report and testified that the number 0-6 signified that Joyce was driving on the wrong side of the road and the number 0-1 indicated that Tynes did not drive improperly. Cranford had relied on Tynes's statements for both notations and for the accident description, *which Joyce had read to the jury during his case-in-chief*. Accordingly, because Joyce chose to introduce the report and have Cranford read a statement from it derived from the same objectionable hearsay as the notations, we find no error. *See* ***Hood v. Oakley***, 519 So.2d 1236, 1239 (Miss.1988) (finding no reversible error where appellant, through the introduction of an accident report, invited error by opening the door for appellee's cross-examination).

Deposit Insurance Corp. v. Wheat, 970 F.2d 124, 130 (5th Cir. 1992). The court gave the following instruction:

> Mississippi does recognize the concept of negligence per se .... Both parties here allege that the other was in violation of 63-3-601 of Mississippi Code Annotated. That section provides:
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> > Upon all roadways of sufficient width a vehicle should be driven upon the right half of the roadway except as follows: when overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement; secondly, when the right half of the roadway is closed to traffic while under construction or repair; third, upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or, four, upon a roadway designated and sign post for one-way traffic
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> I instruct you that the driver of a vehicle, that when the driver of a vehicle discovers another vehicle proceeding in the opposite direction on the wrong side of the road, it is a driver's duty, if he can, to avoid a collision. If it reasonably appears that by turning to the left side of the highway he will avert a collision, it is his duty to do so and such conduct is not considered negligence per se. The sole question is what was reasonable under the circumstances. If it would be reasonable under the circumstances to turn to the right, then the motorist is under a duty to do so.

Joyce maintains that the above instruction is an inaccurate statement of Mississippi law. We disagree. Violation of a safety statute constitutes negligence per se when the injured party "is part of the class of persons which the statute was intended to protect and the harm suffered resulted from the type of risk covered by the statute". ***Detroit Marine Engineering v. McRee***, 510 So.2d 462, 466 (Miss. 1987) (internal quotation omitted). The Mississippi Supreme Court has held that "the class sought to be protected by Section 63-3-601 includes only pedestrians and drivers

who act in reliance upon the orderly flow of traffic dictated by statute". ***Haver v. Hinson***, 385 So.2d 605, 608 (Miss.1980). If Joyce improperly entered Tynes's lane of traffic, he did not "act in reliance upon the orderly flow of traffic" and therefore is not a member of the class sought to be protected by the statute. The district court did not err by instructing the jury to use a reasonableness standard.

C.

Last, Joyce maintains that the court erred in denying his motion for a new trial, given the inconsistency of the jury's verdicts against both parties. According to Joyce, "[t]he only reasonable verdicts the jury should have entered were either for the Appellant or the Appellee and not the other, or for both parties reduced by comparative negligence". In addition, Joyce contends that the jury reached a compromise verdict because of confusion over the instruction regarding lane usage, discussed *supra*, and over the principles of comparative negligence. These contentions do not rise to the level of abuse of discretion. *See* ***Deloach v. Delchamps, Inc.***, 897 F.2d 815, 820 (5th Cir. 1990) (stating that we review the denial of a motion for a new trial for abuse of discretion).

Joyce did not object to the instruction stating that the jury could find that neither party proved its case by a preponderance of the evidence. In fact, the court noted that the inclusion of this instruction "was made at the insistence of [Joyce's] counsel". The record does not contain this request. Even assuming he did not

request it, we review only for plain error and find none. *See* Fed. R. Civ. P. 51; *see also* ***Knight v. Caldwell***, 970 F.2d 1430, 1432 (5th Cir. 1992) (stating that failure to object to jury instruction results in plain error review), *cert. denied*, ***Knight v. Walker***, ___U.S.___, 1992 U.S. LEXIS 1348 (Feb. 22, 1993).

We summarily dismiss Joyce's remaining contention that the jury reached a compromise verdict due to confusion. As discussed, the court correctly stated the law regarding lane usage. That the jury requested the court to repeat this instruction does not signify confusion. Moreover, Joyce's assertions of confusion over the principles of comparative negligence are wholly unsubstantiated. The court explained to the jury that "[y]ou can decide for one party or the other party or against both parties or for both parties on their claims and then make an appropriate reduction, percentage reduction for their own negligence and contribution to this accident", and discussed the principles of comparative negligence in considerable detail. In sum, Joyce is not entitled to a new trial.[7]

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

[7] Accordingly, we reject Tynes's cross-appeal requesting a new trial in the event that Joyce was given one.