IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

FILED

January 28, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

E1999-02518-COA-R3-CV

MILDRED WHALEY,	) C/A NO. 03A01-9904-CV-00129
	)
Plaintiff-Appellee,	)
	)
	)
	) APPEAL AS OF RIGHT FROM THE
v.	) KNOX COUNTY CIRCUIT COURT
	)
	)
	)
SCOTT GRIFFITH WOLFENBARGER,	)
	) HONORABLE HAROLD WIMBERLY,
Defendant-Appellant.	) JUDGE

For Appellant	For Appellee
GEORGE W. MORTON, JR. Morton & Morton, PLLC Knoxville, Tennessee	WILLIAM R. BANKS T. SCOTT JONES C. EDWARD DANIEL Banks & Jones Knoxville, Tennessee

O P I N I O N

AFFIRMED AND REMANDED Susano, J.

This is a suit for damages arising out of personal injuries sustained by the plaintiff, Mildred Whaley, in a two-vehicle accident that occurred at the intersection of Frontage Road and Sevier Avenue in Knoxville. The trial court granted the plaintiff a directed verdict as to the issue of the defendant's liability. The jury then reported its award of compensatory damages of $100,000. The defendant, Scott Griffith Wolfenbarger, appeals, arguing that the trial court erred in directing a verdict for the plaintiff, in that the court thereby prevented the jury from considering genuine issues touching on comparative fault.

I.

On May 20, 1994, the plaintiff, who was then 72, was a passenger in a vehicle driven by her husband, Eugene Whaley. The Whaleys were traveling north on Frontage Road, a one-way street, approaching the intersection of Sevier Avenue, a divided four-lane roadway. At the intersection, which was under construction, traffic on Frontage Road had the right-of-way, whereas traffic on Sevier Avenue was facing a stop sign. As the defendant traveled east on Sevier Avenue, he did not see the stop sign. Consequently, he entered the intersection without stopping and hit the Whaleys' vehicle in its side as it proceeded through the intersection.

The plaintiff subsequently brought suit against the defendant.[1] At trial, the defendant admitted that he had not seen the stop sign posted at the intersection and further

[1]The plaintiff's husband also brought suit, but voluntarily dismissed his claim on the day of trial and is no longer a party to this action.

admitted that his failure to stop was the cause of the accident. At the conclusion of all the proof, the trial court granted the plaintiff's motion for a directed verdict on the issue of liability.

II.

Our standard of review of a trial court's decision on a motion for directed verdict is well-settled. A directed verdict is appropriate only when the evidence is susceptible to but one conclusion. ***Eaton v. McLain,*** 891 S.W.2d 587, 590 (Tenn. 1994); ***Long v. Mattingly,*** 797 S.W.2d 889, 892 (Tenn.Ct.App. 1990). We must "take the strongest legitimate view of the evidence favoring the opponent of the motion." ***Long,*** 797 S.W.2d at 892. In addition, all reasonable inferences in favor of the opponent of the motion must be allowed, and all evidence contrary to the opponent's position must be disregarded. ***Eaton,*** 891 S.W.2d at 590; ***Long,*** 797 S.W.2d at 892.

III.

The defendant asserts that there are two issues impacting comparative fault that the jury should have been allowed to consider. First, he contends that the Whaleys' vehicle was traveling in excess of the posted speed limit of 30 miles per hour and that this constitutes negligence on the part of the plaintiff. We will address this issue before describing the second issue.

At trial, the plaintiff's husband testified that he was traveling at the posted speed of 30 miles per hour when the

accident occurred. Mr. Whaley was not cross-examined about his estimation of the vehicle's speed. The defendant later introduced the answers to interrogatories of Dr. Kyle McCoy, who examined the plaintiff in March, 1995. Attached to Dr. McCoy's answers is a report summarizing his examination of the plaintiff. In that report, Dr. McCoy briefly describes the accident and notes that when the collision occurred the plaintiff was traveling at approximately 60 miles per hour. This notation is apparently based upon statements made by the plaintiff during her physical examination. The defendant argues that this statement regarding the speed of the plaintiff's vehicle is evidence of the plaintiff's comparative negligence and her husband's comparative fault that the jury was entitled to consider in assessing the overall issue of fault.

Taking the strongest legitimate view of the evidence favoring the defendant and disregarding all evidence contrary to his position, we nevertheless find that the trial court did not err in directing a verdict for the plaintiff as to the first issue raised by the defendant. We have reviewed the record and have found no evidence of any kind showing or tending to show that the speed of the Whaleys' vehicle –- be it 30 or 60 miles per hour –- contributed in any way to the accident. In order to prove the actionable negligence of a plaintiff, a defendant must present some material evidence that the conduct of the plaintiff was a proximate cause of the accident. A defendant has the same burden as to the comparative fault of a third party. "In Tennessee, proximate cause has been described as that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another which, if it had not happened, the injury would not have been inflicted."

Tennessee Trailways, Inc. v. Ervin, 438 S.W.2d 733, 735 (Tenn. 1969). Having found no evidence in the record that the speed of the plaintiff's vehicle was in any way a proximate cause of the accident, we find that there is no issue to be submitted to the jury regarding the comparative negligence of the plaintiff or the comparative fault of her husband. The mere showing of speed, without more, is not sufficient to present a jury with a question of the plaintiff's comparative negligence or her husband's comparative fault. This issue is found adverse to the defendant.

IV.

As a second issue, the defendant contends the jury was entitled to consider "comparative fault for the negligent maintenance of the confusing intersection." The defendant argues that the construction and the detour signs erected at the intersection "diverted attention from an unexpected stop sign," and that this "dangerous condition" should have been considered by the jury in assessing his proportion of fault.

If a defendant intends to assert the affirmative defense of comparative fault, he or she must comply with the requirements of Rule 8.03, Tenn.R.Civ.P., which provides, in pertinent part, as follows:

> a party shall set forth affirmatively facts in short and plain terms relied upon to constitute...*comparative fault (including the identity or description of any other alleged tortfeasors)*....

(Emphasis added). Thus, in order to allege the comparative fault of another, a defendant must identify or describe the other alleged tortfeasor. "Failure of the defendant to identify other potential tortfeasors would preclude the attribution of fault against such persons and would result in the defendant being liable for all damages except those attributable to the fault of the plaintiff." ***Ridings v. Ralph M. Parsons Co.,*** 914 S.W.2d 79, 84 (Tenn. 1996).

In his amended answer, the defendant asserts the following:

> In addition to the alleged negligence of Eugene Whaley and Scott Griffith Wolfenbarger, this accident occurred at an intersection while road construction was incomplete. A stop sign was erected to halt traffic on a four lane roadway and allow priority to traffic...crossing a two lane road. The stop sign was obscured at a distance because of other signs and/or construction directions. It was reasonably foreseeable that a person travelling [sic] in the four lane roadway would not anticipate a stop sign for a two lane roadway. *The decision to create this dangerous condition was negligence and under the rules of comparative negligence, this defendant is not liable for such.*

(Emphasis added). The defendant alleges in his answer that the intersection was, in so many words, a confusing situation. He does not identify, by name, the individual or entity responsible for the work at the intersection. Furthermore, he does not really attempt to "descri[be]...any other alleged tortfeasors." *See* Rule 8.03, Tenn.R.Civ.P. Is the defendant pointing the finger of blame at the City of Knoxville within whose confines the accident occurred, and/or a contractor and/or some other individual or entity? We simply do not know from the answer.

Against whom is a jury to report a finding of comparative fault? While Rule 8.03 clearly permits a defendant to allege the comparative fault of another even if the defendant cannot identify the target by name, a defendant must, at a minimum, give the plaintiff and the jury some descriptive material from which the identity -- a name -- can be ascertained. In the instant case, the defendant basically says that the roadway was in a confusing state. He relies upon the dangerous condition caused by the confusing state of the construction as the basis for his defense of comparative fault; he does not even explicitly allege that the individual or entity responsible for the dangerous condition, whoever that is, should be assigned fault. The answer seeks to assign fault to a condition rather than to an individual or entity. The defendant's pleading is simply too vague to properly allege the defense of comparative fault. Rule 8.03 was not satisfied in this case.

Because he did not properly identify or describe who was responsible for the alleged dangerous condition, the defendant was not entitled to have the jury consider the comparative fault of another. *See* ***Ridings,*** 914 S.W.2d at 84.

For all of the foregoing reasons, we find and hold that the trial court did not err in granting the plaintiff a directed verdict on the issue of the defendant's liability.

V.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant. This case is remanded to the

trial court for enforcement of the judgment and collection of costs assessed below, all pursuant to applicable law.

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Charles D. Susano, Jr., J.

CONCUR:

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Houston M. Goddard, P.J.

_____
D. Michael Swiney, J.