

IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION

FILED
May 23, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

ELENA TURNER SMITH)	BLOUNT COUNTY
)	03A01-9609-CV-00311
Plaintiff - Appellant)	
)	
v.)	HON. W DALE YOUNG,
)	JUDGE
)	
DAVID E. PARTRIDGE and)	
BEVCO PARKING COMPANY)	
)	
Defendants - Appellees)	AFFIRMED AND REMANDED

SHANNON D. FAULKNER, III, OF KNOXVILLE FOR APPELLANT

WILLIAM A. YOUNG and MARY ELIZABETH MADDOX OF KNOXVILLE FOR APPELLEES

O P I N I O N

Goddard, P. J.

This is an appeal from a judgment pronounced on a jury verdict dismissing a suit by Plaintiff Elena Turner Smith against Defendants David E. Partridge and his employer, Bevco Parking Company. The suit sought damages as a result of a vehicular accident occurring on September 28, 1990, about 9:00 a.m. The jury verdict found the fault in the accident should be attributed

75 percent to M. Smith and 25 percent to M. Partridge. The jury's verdict was implicitly approved by the Trial Court in overruling the motion for a new trial, which raised the preponderance of the evidence issue.

Upon appeal she raises the following issue:

WHETHER THE JURY VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE TO INDICATE PASSION, PREJUDICE OR CAPRICE OR THAT THE JURY ACTED UNREALISTICALLY BASED ON THE EVIDENCE.

At the outset we point out that an issue on appeal raising the question of preponderance of the evidence as to a jury verdict approved by the trial court presents no issue that an appellate court may consider. Shelby County v. Barden, 527 S.W2d 124 (Tenn.1975); England v. Burns Stone Co., Inc., 874 S.W2d 32 (Tenn.App.1993). The proper issue to raise under these circumstances is that there is no material evidence to support the jury verdict. We accordingly will treat this appeal as raising that issue.

Only the drivers of the two vehicles involved testified, and their testimony is in stark contrast. It is M. Smith's insistence that she was driving in a southerly direction on a 26-foot-wide access road parallel to the Alcoa Highway in Blount County, near the airport, approaching the exit of McDonald's restaurant as she was proceeding to her place of employment, a steak house some short distance south of the exit.

She saw the vehicle operated by Mr. Partridge, a one-half-ton truck, at the drive-in window of McDonald's, and saw it begin to move toward the access road. She did not continue to look at the truck, but rather straight ahead, when suddenly the truck exited from the McDonald's property into the access road and struck her vehicle in the driver's side door. At the time, her vehicle was entirely on the right side of the imaginary center line of the access road, which had no painted line.

On the other hand, it is Mr. Partridge's insistence that he proceeded to the intersection of the exit from McDonald's restaurant and the access road, that he stopped, looked to his left, saw no vehicles in that direction, and then, because bushes were obscuring his vision to a degree to the right, pulled six to seven feet into the access road. He then observed the Smith vehicle about the instant the two vehicles collided. At that time, Mr. Smith vehicle was several feet to the left of the center of the access road and his truck was never across the center, the front being only six or seven feet into the access road.

We conclude, in light of the foregoing, that there is material evidence from which the jury could apportion the fault of the parties as it did.

In conclusion, we note that Mr. Smith, when asked to identify any witnesses to the accident, named her supervisor at

the Steak House and stated that "he evidently was behind me."
This witness, however, was never called to testify, nor was his
absence explained.

For the foregoing reasons, the judgment of the Trial
Court is affirmed and the cause remanded for collection of the
costs below. Costs of appeal are adjudged against M. Smith and
her surety.

Houston M Goddard, P. J.

CONCUR:

Herschel P. Franks, J.

Don T. McMurray, J.