

IN THE COURT OF APPEALS OF TENNESSEE  
AT JACKSON  
September 17, 2003 Session

**JANET BURKHEAD, ET AL. v. LISA M. RODEN**

**Direct Appeal from the Circuit Court for Chester County  
No. 01-4351 Roy B. Morgan, Jr., Judge**

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**No. W2003-00697-COA-R3-CV - Filed October 22, 2003**

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This appeal arises from a personal injury cause of action in which Defendant conceded liability. The jury returned a verdict for Defendant, finding Defendant had not caused Plaintiff injury. We affirm.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; and Remanded**

DAVID R. FARMER, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and HOLLY M. KIRBY, J., joined.

Scott G. Kirk, Jackson, Tennessee, for the appellants, Janet Burkhead and Harry Burkhead.

Stephen Craig Kennedy, Selmer, Tennessee, for the appellee, Lisa M. Roden.

**MEMORANDUM OPINION<sup>1</sup>**

This dispute arises from an August 2000 automobile accident. Defendant Lisa M. Roden (Ms. Roden) struck Plaintiff Janet Burkhead's (Ms. Burkhead) vehicle from behind while Ms. Burkhead was stopped. Ms. Burkhead and her husband, Harry Burkhead (Mr. Burkhead;

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<sup>1</sup>Rule 10 of the Rules of the Court of Appeals of Tennessee provides:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION", shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

collectively, “the Burkheads”) filed this lawsuit in August 2001, seeking damages for permanent injury to Ms. Burkhead, which they allege result from the accident, and loss of consortium to Mr. Burkhead. Ms. Roden admitted liability, but denied the accident caused any injury to Ms. Burkhead. Mr. Burkhead was non-suited prior to trial.

The matter was tried before a jury in July 2002. At the close of proof, the Burkheads moved for a directed verdict, which the trial court denied. The jury returned a verdict in favor of Ms. Roden, finding Ms. Burkhead had not sustained any injury that was caused by the accident. The Burkheads now appeal to this Court.

### **Issues Presented**

The Burkheads raise the following issues, as we re-state them, for review by this Court:

- (1) Whether there is material evidence to support the jury’s finding that Ms. Roden did not cause Ms. Burkhead injury.
- (2) Whether the trial court erred in denying the Burkheads’ motion for a directed verdict.

Additionally, Ms. Roden appeals the trial court’s denial of her motion for discretionary costs.

### **Standard of Review**

Ms. Roden admitted liability, thus the initial determination for the trial court was whether the accident caused injury to Ms. Burkhead. This was a fact to be determined by the jury. *See Staples v. CBL & Assoc.*, 15 S.W.3d 83, 91 (Tenn.2000); *Anderson v. City of Chattanooga*, 978 S.W.2d 105, 107 (Tenn.Ct.App.1998). Findings of fact by a jury shall be set aside only if there is no material evidence to support the verdict. *Childress v. Union Realty Co.*, 97 S.W.3d 573, 576 (Tenn.Ct.App.2002); Tenn. R.App. P. 13(d). Upon review, this Court will not re-weigh the evidence, but will take the strongest view possible of the evidence in favor of the prevailing party, and discard evidence to the contrary. *Id.* We will allow all reasonable inferences to uphold the jury's verdict, setting it aside only if there is no material evidence to support it. *Id.*

### **Analysis**

The details of the accident giving rise to this lawsuit are undisputed. The accident occurred on August 18, 2000, on West Main Street in Henderson. Ms. Burkhead had brought her Chrysler Concorde to a stop while waiting for the vehicle ahead of her to turn. Ms. Roden was traveling behind Ms. Burkhead. As Ms. Roden traveled over a hill, she glanced down to make sure her soft-drink had not turned over. When she looked back up, she saw Ms. Burkhead’s vehicle stopped in front of her, applied her brakes, but was not able to avoid a collision. Ms. Roden’s vehicle, a Ford Tempo, struck Ms. Burkhead’s from behind.

Ms. Burkhead testified that her car did not move forward at all when struck by Ms. Roden's. She further testified that she did not recall hitting any part of her body against the interior of her vehicle, and that she did not think she was hurt immediately after the impact. Ms. Burkhead also stated that immediately after being hit, she telephoned her husband and got out of her car to speak with Ms. Roden. Mr. Burkhead arrived shortly after the accident, followed by a police officer. Ms. Burkhead testified that she began to feel pain in her head, neck and back sometime between the arrival of her husband and the police officer, and that she told the police officer that she had a dull ache in her head and a sharp pain in her neck.

An ambulance was called to the accident and Allan Maness, a paramedic, attended Ms. Burkhead. Mr. Maness testified that when he arrived, Ms. Burkhead was holding her right arm, and that she told him she had a headache and that her right arm hurt. He further testified that Ms. Burkhead denied any neck or back pain. Ms. Burkhead directed that she be taken to Henderson Prime Care rather than the hospital. Mr. Maness testified that he looked at Ms. Burkhead's car, and that there was minimal damage - "no bent place. Maybe some scratches."

Ms. Burkhead testified that when she arrived at Prime Care, she was told that they did not have x-ray facilities and that she did not receive any kind of medical treatment. Mr. Burkhead then drove Ms. Burkhead to Jackson-Madison County Hospital. Ms. Burkhead testified that en route, she began to feel a numbing sensation in both arms and hands, and that her head, back and neck began to hurt. Other than receiving some pain medication, Ms. Burkhead received no treatment at the hospital on the day of the accident.

Ms. Burkhead testified that she did not seek further treatment until "a couple of weeks later," and that she continued to experience pain in her back and neck and a numbing sensation in her arms. Over the next several months, Ms. Burkhead consulted several physicians, underwent several diagnostic tests including an MRI (magnetic resonance imaging) and EMG (electromyography), and was diagnosed as having arthritis in her neck. She underwent physical therapy for a brief period. She also underwent a nerve conduction study on her left arm, the results of which were normal. Ms. Burkhead last consulted a physician for injuries allegedly related to the accident in April 2001.

In their August 2001 complaint, the Burkheads allege Ms. Burkhead sustained injury to her neck and back as a result of the August 2000 accident. At trial, Ms. Burkhead testified that she continues to experience pain in her left hand, upper back, and particularly in her left arm. She stated that she does not anticipate having surgery or treatment for her condition, however.

The only expert medical proof offered at trial was the video deposition of James Michael Glover, M.D. (Dr. Glover), an orthopedic surgeon. The Burkheads contend that Dr. Glover's undisputed testimony was that the collision caused Ms. Burkhead to sustain an injury to the C6 nerve in her neck, which has resulted in pain, tingling, and numbness in her left arm. They submit that because Dr. Glover's testimony was not refuted, there is no material evidence to support the jury's finding that the accident did not cause Ms. Burkhead injury.

Dr. Glover further testified that he first treated Ms. Burkhead in March 2001, seven months after the accident. He stated that Ms. Burkhead had a degenerative disk in her back and a large bone spur on the left side, between the 5<sup>th</sup> and 6<sup>th</sup> vertebrae, which slightly compressed the spinal cord and narrowed the left foramen at the same level. He also testified that Ms. Burkhead had a small bone spur at C6-7 that did not cause any significant compression. When asked what the likely cause of Ms. Burkhead's continued pain was, Dr. Glover responded:

Well, her symptoms that she described initially to me, as I said, was a C6 distribution. That nerve exits this foramen at this level. And, so, based on her complaints of her arm pain along that distribution of the nerve, it would correlate with the bone spur and the foraminal narrowing on the myelogram/CT scan. And I would think that she somehow, you know, injured the nerve, either through some type of hypertension mechanism, or — I mean, I don't think she had complained of any symptoms before her accident, but somehow she irritated the nerve root from whatever happened to her.

When questioned about the potential trauma of a rear-end collision, Dr. Glover testified:

[H]ow much trauma you get from that just depends on the, you know — how much force. You know, how hard. I mean, there's different degrees of trauma from it, but it just depends on how hard you're hit from the vehicle behind.

Dr. Glover testified that although the accident did not cause Ms. Burkhead's arthritis or bone spur, "the accident ... more likely than not did aggravate her arm symptoms." However, Dr. Glover also testified that the accident did not cause the degenerative changes in Ms. Burkhead's neck, but that it could have aggravated "one particular area" enough to cause pain. He further stated that Ms. Burkhead's condition should not result in any restriction on her daily activities, and that it was something that might "wax and wane" and "may get better." Dr. Glover referred Ms. Burkhead to Dr. Frank Jordan for pain treatment, but stated that Ms. Burkhead apparently "changed her mind" about seeing Dr. Jordan. Dr. Glover last treated Ms. Burkhead in April 2001, and testified that he did not know what her condition was at the time his video deposition was taken in June 2002.

The jury in this case found that the accident did not cause Ms. Burkhead injury. The Burkheads submit that there was no material evidence to support this finding because Dr. Glover's testimony that the accident could have aggravated Ms. Burkhead's condition, causing pain in her arm, was undisputed. However, the Burkheads bore the burden of proof to show, by a preponderance of the evidence, that Ms. Roden's negligence was the proximate cause of injury to Ms. Burkhead. *Wielgus v. Dover Indus., Inc.*, 39 S.W.3d 124, 131 (Tenn. Ct. App. 2000). Further, the weight to be given to all the evidence is a question to be determined by the trier of fact. *Stovall v. Clarke*, No. M2001-00810-SC-R11-CV, — S.W.3d —, 2003 WL 22038773 (Tenn. Sept. 2, 2003). Those determinations which rest on witness credibility will not be reevaluated by this Court absent clear and convincing evidence to the contrary. *See Wells v. Tennessee Bd. of Regents*, 9 S.W.3d 779, 783 (Tenn. 1999).

In light of the totality of the evidence, including the testimony of Mr. Maness and Ms. Burkhead about the accident itself, we find there is material evidence to support the jury's determination that the August 2000 accident was not the proximate cause of an injury to Ms. Burkhead. Clearly, the accident did not cause Ms. Burkhead's arthritis, the degenerative condition of her neck, or the bone spur. Although Dr. Glover's testimony indicates that it is possible that the accident could have aggravated her condition, causing the pain in her arm, whether this is credible in light of the totality of the evidence is a matter to be determined by the jury. The Burkheads simply failed to carry their burden of proof on this issue. In light of the foregoing, it is unnecessary to address the Burkheads' contention that the trial court erred in denying their motion for a directed verdict.

We next address Ms. Roden's assertion that the trial court erred in denying her motion for discretionary costs. These costs include \$296.05 for the discovery deposition of Mr. Burkhead; \$89.25 for the proof deposition of Dr. Glover; \$385.30 in trial court reporter fees for depositions; \$125 for fees of the court reporter at trial.

Discretionary costs, as the name implies, are to be awarded within the discretion of the trial court. The trial court's decision will not be overturned absent a showing of an abuse of discretion. *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 902 (Tenn. 1992). Upon review of the record, we find no abuse of discretion in the trial court's denial of Ms. Roden's motion for discretionary costs.

We affirm the judgment of the trial court in this case. Costs of this appeal are taxed to the appellants, Janet Burkhead and Harry Burkhead, and to their surety, for which execution may issue if necessary.

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DAVID R. FARMER, JUDGE