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

RONALD E. FOWLER, ET UX. v. AUGUSTINE H. HENDERSON, III, ET AL.

A Direct Appeal from the Circuit Court for Shelby County
No. CT-004618-00-9 The Honorable D'Army Bailey, Judge

Nos. W2002-02529-COA-R3-CV and W2003-02862-COA-R3-CV; Filed December 31, 2003

This is an automobile rear-end collision case resulting in alleged personal injuries. Plaintiffs' vehicle, stopped in a line of traffic, was struck from the rear by one defendant's vehicle, which had been hit from the rear by another defendant. The answer of defendants in the rear most vehicle affirmatively asserted the comparative fault of a tree service corporation causing the traffic-stop by blocking the road without warning. Plaintiffs amended their complaint to name the tree service company. The trial court granted the tree service company summary judgment and the defendants, asserting the comparative fault of the tree service company, appeal. When the case proceeded to trial as to the remaining defendants, plaintiffs voluntarily dismissed the case. The same defendants appealed the order of the trial court allowing a voluntary non-suit. Since the dispositive issue in both cases is whether the trial court erred in granting summary judgment to the tree service company, the cases were consolidated on appeal. We affirm.

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

W. FRANK CRAWFORD, P.J., W.S., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID R. FARMER, J., joined.

S. Newton Anderson, Memphis, For Appellants, Augustine H. Henderson, III and Wittichen Lime and Cement Co., Inc.

David Riley, Memphis, for Appellee, Blume Tree Services, Inc.

OPINION

The Plaintiffs, Ronald E. Fowler and wife, Barbara Fowler, allegedly sustained personal injuries and property damage when their vehicle, which was stopped in a line of traffic, was struck by a vehicle owned by Defendant, Cook's Pest Control, Inc., and driven by Defendant, Robert A. Dickerson, in the course and scope of his employment with Cook's Pest Control. The Cook's Pest Control vehicle had been struck by a vehicle owned by Defendant, Wittichen Lime and Cement

Company, Inc., and driven by Defendant, Augustine H. Henderson, II, in the course and scope of his employment with Wittichen, and the Wittichen vehicle forced the Cook's Pest Control vehicle into Plaintiffs' vehicle.

On April 15, 2000, Plaintiffs, Ronald E. Fowler and wife, Barbara Fowler ("Plaintiffs" or "Fowlers") filed their initial complaint against Defendants, Augustine H. Henderson, III ("Henderson"), Robert A. Dickerson ("Dickerson"), and Cook's Pest Control, Inc. ("Cook's") seeking damages for personal injuries and property damages.[1] On March 23, 2001, Plaintiffs filed their second amended complaint against Henderson, Wittichen Lime and Cement Company, Inc. ("Wittichen"), Dickerson, Cook's, and Blume Tree Services, Inc. ("Blume"). The complaint alleges in pertinent part that on June 14, 2000, the Fowlers, Henderson and Dickerson were driving vehicles in a southerly direction on Houston Levee Road in Shelby County, Tennessee. Henderson and Dickerson were driving vehicles in the course and scope of their employment with their respective employers, Wittichen and Cook's. The complaint avers that the Plaintiffs stopped their vehicle as a result of stopped traffic in front of them due to tree trimming being performed by Blume on or near the road. Plaintiffs aver that Blume violated its duty to the traveling public by stopping the traffic on the highway without any warning flags, lights, cones, signs, flag men, or other devices to warn the oncoming drivers, and that after Plaintiffs had stopped their vehicle, their vehicle was struck in the rear by Dickerson's vehicle and Dickerson's vehicle was struck in the rear by Henderson's vehicle. The complaint alleges that Henderson struck the vehicle driven by Dickerson and that Dickerson failed to maintain control of his vehicle after the crash and then hit Plaintiffs' vehicle. Plaintiffs assert that they sustained property damages and personal injuries as outlined in the complaint as a result of the actions of Blume, Dickerson, and Henderson. The complaint further avers that Wittichen and Cook's are liable for the actions of their respective drivers under the doctrine of *respondeat superior*, and that the drivers, in addition to their common law negligence, which was a direct and proximate cause of the collision and resulting injuries and damages to Plaintiffs, violated certain statutes of the State of Tennessee which were in full force and effect and which was negligence per se and the direct and proximate cause of the collision and resulting injuries. The complaint further avers that Blume was guilty of negligence in causing stoppage of traffic and failed to provide adequate warnings of the traffic obstructions and further violated statutes of the State of Tennessee and the Uniform Traffic Control Manual adopted by the State of Tennessee pursuant to T.C.A. § 54-5-108.

On June 25, 2001, Blume filed its answer to the second amended complaint admitting that it owed a duty of reasonable care to the traveling public but denied all allegations of negligence and denied that any of its actions or omissions to act directly or proximately caused or contributed to the accident involving Henderson, Dickerson and the Fowlers. The other defendants, having previously answered the original complaint, did not file an answer to the second amended complaint, but treated

[1] The first amended complaint was filed February 28, 2001 naming Wittichen Lime and Cement Co., Inc. ("Wittichen"), employer of Defendant Henderson, as a party defendant. Henderson and Wittichen's answer to the amended complaint alleges, among other things, the comparative fault of a non-party, Blume Tree Services, Inc. This resulted in the Plaintiffs' second amended complaint, adding Blume as a party defendant.

the amended complaint as an amendment to the complaint and relied upon their previous answers. These defendants deny that they were guilty of any of the acts of negligence alleged in the complaint and deny that they violated any statute as alleged and deny that any acts or omissions on their part directly and proximately caused the collision and resulting losses and damages to the Plaintiffs. The employer-defendants, Wittichen and Cook's, admitted that their respective employees were acting in the course and scope of their employment. The Defendants further aver the comparative fault of the co-defendants.

Blume filed a motion for summary judgment stating that "there exists no issues of fact which would cause reasonable minds to find that Blume Tree Services, Inc. in any way contributed to or proximately caused the motor vehicle accident which is the subject of this case." The motion is supported by a statement of undisputed facts, which state in pertinent part:

> 3. Blume Tree Service's employees had stopped the flow of traffic on Houston Levee Road on this particular day as they were cutting certain trees/limbs which were overhanging Houston Levee Road.
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> 4. On said date, Plaintiffs, Ronnie and Barbara Fowler, were traveling south on Houston Levee Road in their vehicle when they encountered stopped traffic.
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> 5. Plaintiff Ronnie Fowler was operating their vehicle with Plaintiff Barbara Fowler riding as passenger.
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> 6. Noticing the stopped traffic, Plaintiffs approached the traffic and came to a complete stop.
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> 7. Thereafter, another vehicle being operated by Defendant Robert A. Dickerson (hereinafter, "Dickerson"), while in the course and scope of his employment with Cook's Pest Control, Inc., was likewise traveling south on Houston Levee Road as he encountered the same stopped traffic; thus, he pulled to a complete stop behind the Plaintiffs' vehicle.
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> * * *
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> 9. Henderson failed to stop upon approaching the stopped traffic, causing his vehicle to rear-end the back of the vehicle being driven by Dickerson, and thereby causing the vehicle being operated by Dickerson to strike the rear-end of the Plaintiffs' vehicle.
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> * * *

> 13. Initially, there was an issue as to whether or not Blume Tree Service created a "dust cloud" in the area of the accident which allegedly caused Henderson difficulty to see the stopped traffic, therefore, in essence, allegedly causing the accident.
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> 14. It is now an undisputed fact that the "dust cloud" did not contribute in any way to the accident, as all testimony has established that if a "dust cloud" existed, it was well away from the area of the accident.
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> 15. Plaintiffs had plenty of time to come to a complete stop behind the vehicle immediately in front of them and did not have to make a sudden stop prior to them being impacted from behind.
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> 16. The roadway (Houston Levee Road) was at all times pertinent hereto a straight road, with no hills, no curves, nor any obstructions that blocked the drivers' vision of the vehicle immediately in front of them.
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> 17. The weather conditions at the time and place of the accident were sunny and windy.

In Plaintiffs' response to Blume's motion for summary judgment, Plaintiffs assert that they take no position on whether such motion should be granted. The response further states:

> However, in the event that Dickerson and Cook's are relieved of liability, then as a matter of law the Court should also issue an order striking Henderson and Wittichen's defense of comparative fault of Dickerson and/or Cook's and an order in limine prohibiting them from presenting evidence or arguing that Dickerson and/or Cook's bears any fault and/or was a cause of the Plaintiffs' injuries and damages.

By order entered September 10, 2002, the court granted Blume's motion for summary judgment, stating "[t]hat there is no genuine issue of material fact in this cause as to the liability of the defendant Blume Tree Services, Inc." The court dismissed Blume as a defendant and, pursuant to Tenn.R.Civ.P. 54.02, directed entry of a final judgment as to Blume. Only Henderson and Wittichen have appealed.[2]

[2] On October 14, 2002, the trial court granted the Fowlers' "Motion To Strike The Defense Of Comparative Fault And Motion In Limine" as to Blume, thus prohibiting the remaining defendants from presenting evidence of the alleged comparative fault of Blume as an affirmative defense.

The only issue on appeal is whether the trial court erred in granting Blume's motion for summary judgment.

A motion for summary judgment should be granted when the movant demonstrates that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. ***See*** Tenn. R. Civ. P. 56.04. The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists. ***See Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997). On a motion for summary judgment, the court must take the strongest legitimate view of the evidence in favor of the nonmoving party, allow all reasonable inferences in favor of that party, and discard all countervailing evidence. ***See id***. In ***Byrd v. Hall***, 847 S.W.2d 208 (Tenn. 1993), our Supreme Court stated:

> Once it is shown by the moving party that there is no genuine issue of material fact, the nonmoving party must then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute to warrant a trial. In this regard, Rule 56.05 provides that the nonmoving party cannot simply rely upon his pleadings but must set forth ***specific facts*** showing that there is a genuine issue of material fact for trial.

Id. at 210-11 (citations omitted) (emphasis in original).

Summary judgment is only appropriate when the facts and the legal conclusions drawn from the facts reasonably permit only one conclusion. ***See Carvell v. Bottoms***, 900 S.W.2d 23, 26 (Tenn. 1995). Since only questions of law are involved, there is no presumption of correctness regarding a trial court's grant of summary judgment. ***See Bain***, 936 S.W.2d at 622. Therefore, our review of the trial court's grant of summary judgment is ***de novo*** on the record before this Court. ***See Warren v. Estate of Kirk***, 954 S.W.2d 722, 723 (Tenn. 1997).

"[I]n order for there to be a cause of action for common law negligence, the following elements must be established: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal cause." ***McClenahan v. Cooley***, 806 S.W.2d 767, 774 (Tenn. 1991). "Causation, or cause in fact, means that the injury or harm would not have occurred 'but for' the defendant's negligent conduct." ***Kilpatrick v. Bryant***, 868 S.W.2d 594, 598 (Tenn. 1993).

Appellants assert that Blume owed a duty of care to drivers and pedestrians traveling in the work site area as defined in nature and scope by the Manual on Uniform Traffic Control Devices for Streets and Highways ("MUTCD"). Henderson and Wittichen specifically note:

> [T]he MUTCD dictates certain standards that must be adhered to when someone might cause a disruption in the normal flow of traffic so as to properly warn the general public. The standards set forth in

> the MUTCD are published by the Federal Highway Administration under 23 CFR part 655, subpart F and have been adopted in the State of Tennessee through enabling legislation located in Tennessee Code Annotated § 54-5-108[3] and the rules of the Tennessee Department of Transportation, specifically Rule No. 1680-3-1.02[4] adoption of Manual on Uniform Traffic Control Devices, Millenium Edition.

Although Henderson and Wittichen fail to cite a particular provision of the MUTCD setting forth a duty of care owed by Blume to the Fowlers and Appellants as members of the traveling public, we note that Blume does not appear to dispute that it did, in fact, have a duty to ensure and provide for the safety of motorists and pedestrians traversing through the Houston Levee construction area on June 14, 2000. Therefore, we find no material issue of fact as to whether Blume owed a duty of care under the particular circumstances.

In defining the scope of Blume's duty of care, appellants rely upon the affidavit and supplemental report of Mr. David B. Daubert ("Daubert"), "a registered professional engineer specializing in the area of motor vehicle accident reconstruction, traffic engineering, and human factors related to the above." We find no objection in the record to Daubert's qualifications as an expert in motor vehicle accident reconstruction. In reconstructing and analyzing the accident at the heart of this case, Daubert reviewed the accident report, photographs of the three vehicles involved, vehicle data of said vehicles, the deposition testimony of Mr. Fowler, Henderson, and Dickerson,

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[3] T.C.A. § 54-5-108 states in pertinent part:

> (a)(1) The department has full power, and it is made its duty, acting through its commissioner, to cooperate with the federal government in formulating and adopting a uniform system of numbering or designating roads of interstate character, within this state, and in the selection and erection of uniform danger signals and safety devices for the protection and direction of traffic on such highways.
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> **********
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> (b) The department has full power, and it is made its duty, acting through its commissioner, to formulate and adopt a manual for the design and location of signs, signals, markings, and for posting of traffic regulations on or along all streets and highways in Tennessee, and no signs, signals, markings or postings or traffic regulations shall be located on any street or highway in Tennessee regardless of type or class of the governmental agency having jurisdiction thereof except in conformity with the provisions contained in such manual.

[4] Tennessee Department of Transportation Rule 1680-3-1-.02 provides:

> The United States Department of Transportation, Federal Highway Administration, ***Manual on Uniform Traffic Control Devices, Millennium Edition*** (2001), is hereby adopted in its entirety and incorporate herein by reference.

and the MUTCD.[5] Daubert's review began with an examination of the circumstances surrounding the actual collision, and concluded with an analysis of the conduct of the Blume employees.

In his report, Daubert termed the work area established by Blume on Houston Levee Road a "Temporary Traffic Control Zone." Daubert defined the five parts of a temporary traffic control zone as follows:

> [1.] The Advance Warning Area which tells traffic what to expect ahead. A high speed facility is considered to be roadways where the posted speed is 45 mph or higher. The Houston Levee had a speed limit of 45 mph. The first sign would be placed 1500 feet in advance and if the queue becomes long, the first signs are extended to the end of the queue.
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> [2.] The second area is the Transition Area where traffic is halted and diverted to the opposing lane. The motorist would have seen three signs before reaching the end of the Advance Warning Area and arriving at the Transition Area. The signs would be Road Work X feet ahead, One Lane Road X feet ahead, and Flagger Ahead. Each of these signs would be 500 feet in advance of the next sign, again based on the end of the queue.
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> [3.] The third and fourth areas are the Activity Area, separated into the buffer area and the work space.
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> [4.] The last area is the Termination area which allows traffic to resume normal driving.

The Fowler's, Henderson, and Dickerson all testified that they did not see any warning signs or cones prior to entering or approaching the Blume work area. Henderson additionally testified that he did not see a flagger directing traffic approaching the work area in the south-bound lane of Houston Levee. In direct contrast, Blume employees Smith and Henderson both testified that the Blume work crew established and maintained a temporary traffic control area that included two warning signs, the first placed approximately 1,000 feet to the north of the work site at the corner of Walnut Grove and Houston Levee Road, and the second placed approximately 1,000 feet to the south of the work site. Herndon testified that the sign placed to the north of the work site warned of a "Work Area" ahead. Both employees further testified that the temporary traffic control area included a line of ten to fifteen red warning cones set at varying distances of ten to fifteen or twenty

[5] Daubert noted that the MUTCD is recognized as the "national standard for traffic control devices on all public roads open to the public travel in accordance with 23 U.S.C. 109(d) and 402(a)."

feet apart, and two flagmen wearing orange and yellow reflective vests and holding orange flags, stationed approximately 40 to 50 feet from both ends of the job site.

Tennessee Rule of Civil Procedure 8.05 states in pertinent part:

> (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required. Every pleading stating a claim or defense relying upon the violation of a statute shall, in a separate count or paragraph, either specifically refer to the statute or state all of the facts necessary to constitute such breach so that the other party can be duly apprised of the statutory violation charged. ***The substance of any ordinance or regulation relied upon for claim or defense shall be stated in a separate count or paragraph and the ordinance or regulation shall be clearly identified***. The manner in which violation of any statute, ordinance or regulation is claimed shall be set forth.

(emphasis added).

We note that appellants failed to identify the precise section or sections of the MUTCD allegedly violated by Blume in their Answer to the Fowler's Amended Complaint, in which Henderson and Wittichen asserted, as an affirmative defense to the plaintiffs' claims, the comparative negligence of Blume. We note further that Daubert's affidavit and supplemental analysis also fail to specify the MUTCD section or sections that apparently set forth the five required parts of a temporary traffic control zone. However, despite the shortcomings of the aforementioned pleadings, Blume failed to file a Motion to Strike Daubert's affidavit. Therefore, the opinions and factual allegations asserted by Daubert in his affidavit and supplemental analysis will be considered as evidence in this matter.

Taking the strongest legitimate view of the evidence in favor of appellants as the nonmoving parties, we find that a genuine issue of material fact exists as to whether Blume breached its duty of care by failing to properly establish and maintain a temporary traffic control zone in compliance with the requirements set forth in the MUTCD. It is apparent from our review of the Blume employees' testimony and Daubert's supplemental report, that there is evidence in the record sufficient to lead reasonable persons to disagree as to whether the temporary traffic control zone established by appellee on Houston Levee Road failed to comply with the signage requirements allegedly mandated by the MUTCD. As such, we find that reasonable persons could disagree as to whether Blume breached its duty of care in its alleged failure to comply with the dictates of the MUTCD.

We next consider appellants' assertion that the trial court erred in granting Blume's Motion for Summary Judgment where a genuine issue of material fact exists as to whether Blume's alleged breach of its duty of care was the proximate cause of the accident. We note that Tennessee courts generally hold that summary judgment is inappropriate in negligence cases. ***Roe v. Catholic Diocese of Memphis, Inc.***, 950 S.W.2d 27, 31 (Tenn. Ct. App. 1996) (citing ***Gonzales v. Alman Constr. Co.***,

857 S.W.2d 42, 45 (Tenn. Ct. App. 1993)). "Proximate causation is a jury question unless the uncontroverted facts and inferences to be drawn from them make it so clear that all reasonable persons must agree on the proper outcome." ***Id***. (citing ***McClenahan v. Cooley***, 806 S.W.2d 767, 775 (Tenn. 1991)).

In ***Kilpatrick v. Bryant***, 868 S.W.2d 594 (Tenn. 1993), the Court said:

> Causation and proximate cause are distinct elements of negligence, and both must be proven by the plaintiff by a preponderance of the evidence. ***Bradshaw*** [***v. Daniel***], 854 S.W.2d [865, 869 (Tenn.1993)]; ***McClenahan v. Cooley***, 806 S.W.2d 767, 774 (Tenn. 1991); ***Smith v. Gore***, 728 S.W.2d 738, 749 (Tenn. 1987). "Causation (or cause in fact) is a very different concept from that of proximate cause. Causation refers to the cause and effect relationship between the tortious conduct and the injury. The doctrine of proximate cause encompasses the whole panoply of rules that may deny liability for otherwise actionable causes of harm." King, ***Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Injuries and Future Consequences***, 90 Yale L.J. 1353, 1355 n. 7 (1981). Thus, proximate cause, or legal cause, concerns a determination of whether legal liability should be imposed where cause in fact has been established. ***McKellips v. Saint Francis Hosp.***, 741 P.2d 467 (Okla. 1987). "Cause in fact, on the other hand, deals with the 'but for' consequences of an act. 'The defendant's conduct is a cause of the event if the event would not have occurred but for that conduct.'" ***Id***. at 470 (quoting Prosser and Keeton, ***The Law of Torts*** 266 (5th ed. 1984)).

Id. at 598.

In Tennessee, there is a three-pronged test for proximate causation: (1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence. ***McClenahan v. Cooley***, 806 S.W.2d 767, 775 (Tenn. 1991). We are particularly concerned with the first factor; whether Blume's alleged failure to erect or maintain an adequate temporary traffic control zone was a substantial factor in the accident.

The deposition testimony in this case is undisputed that at the time of the accident the weather was clear and the roadway was straight and level. The Fowlers testified that they had no problem with seeing the stopped traffic in front of them, brought their vehicle to a stop, and had been so stopped for several minutes before Dickerson's vehicle was forced into their vehicle by the impact from the Henderson vehicle. Dickerson testified that he had been stopped for several minutes before

his vehicle was struck by the Henderson vehicle. Although Blume's employees testified that flag men were present and warning signs and cones were present, the other parties testified that they did not see the flag men and the warning devices. It is uncontroverted, however, that there was a long line of traffic stopped in front of the Fowlers extended down to or near the work area where traffic was to be diverted. While Henderson's testimony that Dickerson stopped suddenly is disputed by Dickerson's testimony that he had been stopped two to three minutes before the accident, this is not the deciding factor for the purposes of summary judgment. We assume, for the purposes of summary judgment, that Dickerson did stop suddenly as testified to by Henderson. There is nothing in the record to indicate that he was compelled to stop suddenly, because visibility was clear and the Fowler vehicle had been stopped for some several minutes. It is undisputed that the Henderson vehicle propelled the Dickerson vehicle into the Fowler vehicle. Henderson testified that he started to brake ten to fifteen feet from the Dickerson vehicle, even though he concedes that it was a clear and sunny day. He also concedes that at the time he hit the Dickerson vehicle, it was stopped, but that he never saw the Fowler vehicle prior to the accident. Henderson further concedes that the first time that he saw the Dickerson vehicle was "right before I hit him."

In summary, the simple facts are that the Fowlers, driving on a straight, level stretch of highway on a clear day were compelled to stop in a line of traffic. Although they did not see any warning signs or flag men to require them to stop, they could just as easily have been stopped by a flag man or a warning sign. Dickerson's testimony is that he, likewise in this area and on such a beautiful day, was able to bring his vehicle to a stop and had been so stopped for two to three minutes prior to the collision. However, disregarding Dickerson's testimony and considering Henderson's testimony, giving it every inference possible, that he was driving along the same level stretch of highway, in the same beautiful weather when he started braking his vehicle after first seeing the Dickerson vehicle "stopped suddenly" ten to fifteen feet away. There is nothing in this record to indicate that Dickerson was forced to stop suddenly because of the Fowler vehicle. As previously noted, the Fowler vehicle could have been stopped in compliance with flag men working for Blume or a sign that required a stop or any similar warning device; thus, it can be said from Henderson's testimony that there may be a disputed issue of fact as to whether the allegedly sudden stop by Dickerson was a cause in fact and proximate cause of the collision. While this dispute may be an issue on a motion for summary judgment in favor of Dickerson, there is nothing in the record to establish that Blume caused Dickerson to make a sudden stop. To the contrary, the undisputed proof is that the Fowler vehicle had been stopped three to five minutes before it was struck by the Dickerson vehicle. Moreover, the undisputed proof is that the stopped Fowler vehicle was plainly visible to anyone approaching and would have the same visibility if it had been stopped by a warning sign or flag man placed by Blume. Therefore, it is undisputed that Blume's action or inaction was not the cause in fact nor the proximate cause of the collision at issue.

Accordingly, the order of the trial court granting summary judgment to Blume Tree Services, Inc., is affirmed. Costs of the appeal in the consolidated cases are assessed to Appellants, Augustine H. Henderson, III and Wittichen Lime & Cement Co., Inc., and their sureties.

W. FRANK CRAWFORD, PRESIDING JUDGE, W.S.