

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

FILED

November 29, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

GILBERT A. WORLEY, (deceased)
and SHERRY WORLEY,

Claimant-Appellant,

Vs.

Claims Commission #86494
C.A. No. 02A01-9312-BC-00267

STATE OF TENNESSEE,

Defendant-Appellee.

FROM THE CLAIMS COMMISSION, STATE OF TENNESSEE
THE HONORABLE MARTHA B. BRASFIELD, COMMISSIONER

C. Craig Fitzhugh of Ripley
For Appellant

Charles W. Burson, Attorney General and Reporter
George H. Coffin, Jr., Assistant Attorney General
For Appellee

AFFIRMED

Opinion filed:

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

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE

Plaintiff Sherry Worley appeals from the order of the Tennessee Claims Commission dismissing her claim for the wrongful death of her son, Chris Worley. Plaintiff's decedent suffered fatal injuries when he fell from a bridge that was being dismantled.

In November of 1986, the State of Tennessee contracted with Ford Construction Company to construct a new bridge connecting the eastern and western sections of the town of Ripley, Tennessee. The new bridge was built immediately adjacent to the old bridge. Both bridges were on Highway 19, the main east-west thoroughfare through the town of Ripley, and both bridges spanned a ravine containing the tracks of the Illinois Gulf Central Railroad. The construction of the new bridge was in three phases. In phase one, the north half of the new bridge, consisting of two, ten foot lanes of traffic, was built. In phase two, the north half of the new bridge was opened for traffic, the old bridge was closed and dismantled, and the south half of the new bridge was constructed. In phase three, sidewalks were added to the new bridge, and the south half of the bridge was opened to traffic.

Once phase one was completed, the north half of the new bridge was "opened" to automobile and pedestrian traffic, and the dismantlement of the old bridge began. During the construction of the south half of the new bridge, some pedestrians still used the old bridge to cross the ravine, apparently because there were no sidewalks in place on the new bridge which was only twenty feet wide and utilized by two lanes of automobile traffic. The general superintendent of Ford Construction Company, Samuel Baggett, concerned about the danger of pedestrians crossing on either the old bridge or the new bridge, mailed a letter to Frelan Holbrook, Engineering Supervisor for the Tennessee Department of Transportation, requesting that a traffic signal be

placed on the new bridge to stop traffic and allow pedestrians to cross the bridge. The request for the signal was never answered.

At some point during phase two, the construction crew placed "sawhorse" barriers and a large "type three"¹ barrier at the ends of the old bridge to close it off to pedestrian and vehicular traffic. A large crane was also present on the western end of the bridge and was used in dismantling the bridge. No "Warning," "Keep Out," or "Danger" signs were placed on or around the old bridge. On September 16, 1987, the construction crew began to dismantle the old bridge. On October 21, 1987, the crew removed the middle section of the bridge's superstructure leaving a large gap between the east and west segments of the old bridge.

On the night of October 25, 1987, Chris Worley had been out drinking beer with friends and returned to his parents' house around 10 p.m. Chris wanted to leave the house by automobile, but his mother refused to allow him to drive. Following an argument with his parents, Chris left his parents' house on foot and headed in the direction of the bridge, which was approximately 250 yards from the Worley house. He apparently was walking to his sister's house, which was a short distance away on the opposite side of the bridge. As Chris approached the old bridge, a police car pulled out of a side street and Chris "began a trot-like run." A witness who was driving in the vicinity of the bridge saw Chris running in the direction of the bridge and then suddenly disappear. Chris ran off the end of the bridge and fell 80 to 100 feet onto the rocks below; he suffered severe injuries from which he died a short time later. A blood alcohol test of Chris's blood shortly after the accident revealed that Chris's blood alcohol

¹A Type Three barricade is a freestanding barricade which is six feet high, ten feet long, and consists of three 2 X 8 wooden planks covered in reflective tape.

content was .24%.

In June of 1988, the Worley's filed this claim for wrongful death against the State of Tennessee, alleging that the State negligently created and maintained a known dangerous condition which caused the death of their son. The claim was filed in the Division of Claims Administration and pursuant to T.C.A. § 9-8-402(c) was transferred to the Tennessee Claims Commission in September of 1988. An evidentiary hearing was held on February 18, 1993, and the Commissioner entered an order on November 10, 1993, dismissing appellant's claim. This appeal ensued, and the only issue on appeal is whether the evidence preponderates against the findings of the Claims Commissioner.

This is a direct appeal from the Tennessee Claims Commission and is governed by the Tennessee Rules of Appellate Procedure. T.C.A. § 9-8-403(a)(1). Our review of the Commissioner's findings is de novo upon the record of the Commission with a presumption of the correctness of the Commissioner's factual findings. We must affirm the decision of the Commissioner, unless there is an error of law or the evidence preponderates against the findings of the Commissioner. T.R.A.P. 13(d); *Sanders v. State*, 783 S.W.2d 948 (Tenn. App. 1989).

T.C.A. § 9-8-307(a)(1)(l)(Supp. 1995) provides the Tennessee Claims Commission with exclusive jurisdiction

to determine all monetary claims against the state . . . [arising from] [n]egligence in planning and programming for, inspection of, design of, preparation of plans for, approval of plans for, and construction of, public roads, streets, highways, or bridges and similar structures, and negligence in maintenance of highways, and bridges and similar structures, designated by the department of transportation as being on the state system of highways or the state system of interstate highways.

T.C.A. § 9-8-307(a)(1)(C) provides that a party suing under this subsection "must establish the foreseeability of the risks and notice given to the proper state

officials at a time sufficiently prior to the injury for the state to have taken appropriate measures." The State's liability "shall be based on the traditional tort concepts of duty and the reasonably prudent person's standard of care." T.C.A. § 9-8-307(c)(Supp. 1995). To prevail in a suit for negligence, a plaintiff must establish a duty of care owed by the defendant to the plaintiff; conduct falling below the applicable standard of care amounting to a breach of that duty; injury; causation in fact; and proximate causation. *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993)).

In the instant case we need not address the issues of whether the injury was foreseeable or whether the State had notice of the danger "at a time sufficiently prior to the injury for the state to have taken appropriate measures," because the claimant cannot establish a prima facie case of negligence on the part of the State. On the issue of whether the claimant established the elements of a negligence case, the Commissioner's order stated:

The State owed a duty to the public to conform to a standard of conduct to protect the public against risks associated with the construction and demolition of the bridge; element one is met. Further, element . . . [three] is met by the unfortunate death of Chris Worley. The issues are: (1) did the State fail to conform to the required standard to protect the public? and (2) was there a causal connection between the failure to conform to the standard and the death of Chris Worley?

The claimant alleges that the State did not properly protect pedestrians during the Construction in that (1) it failed to provide a traffic light on the new bridge which would have allowed only one lane of traffic over the bridge at one time (2) it failed to provide sidewalks on the new bridge during phases one and two of construction and (3) it did not properly warn or adequately barricade the old bridge for the benefit of pedestrians using the bridge even though State officials knew that this bridge was the main crosswalk over the railroad.

The commission has considered the arguments that the State was negligent in not erecting a traffic light to direct one lane of traffic at a time across the new bridge and that it failed to build a sidewalk during phase one and phase two of the construction. However, it appears that the failure to erect a traffic light or to build the sidewalk does not provide a close "causal connection" between the failure to construct these items and the death of Christopher Worley. The claimants argue that citizens of Ripley did not want to walk on the new bridge because it was too narrow to provide for two lanes of traffic and pedestrian traffic. However, according to the Blackwells, they saw no other traffic at the time they first saw Chris to the time when they returned to the bridge. As there was no traffic on the bridge [sic], it would not have been dangerous to have walked [sic] across it. Also, it must be considered that Chris Worley was very intoxicated at the time of his death

The Commissioner correctly found that the State owed a duty and that there was injury in this case. The Commissioner also correctly found that, therefore, the claimant must establish that the State breached this duty and that this breach of duty was the factual and legal cause of Chris Worley's death. We agree with the Commissioner that neither the State's failure to erect a traffic light on the new bridge during phase two of the construction, nor its failure to provide sidewalks on the new bridge during that same time, provide a basis for holding the State liable in negligence, because neither of these inactions was the proximate cause of Mr. Worley's death. See *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991)(discussing three-pronged test for proximate causation).

On the issue of whether the State's failure to "properly warn or adequately barricade the old bridge" breached the State's duty to protect against the unreasonable risk of pedestrian injury or death due to the dismantlement of the old bridge, the Commissioner stated:

There is no question that the dismantling of the bridge constituted a dangerous condition. The question is whether or not the public was properly warned of the dangerous condition. The Commission has considered

(1) that there was only one crane and only one type three barricade with blinking lights and reflector strips on the old bridge, (2) that there were no specific signs which said "Danger--Keep Out", and (3) that these barricades were placed in such a manner that Chris could walk around them and that Mr. Clay Newman, the first officer at the scene, was able to maneuver his vehicle around the barricades. Even in light of these facts, the commission cannot find that the State was negligent in not placing barricades on the bridge. It was obvious upon simple observation that the bridge and the surrounding area comprised a construction area and that the bridge was being dismantled. There was a large crane and a barricade [on the bridge]. This was a specific warning that this area was dangerous and that only those who were involved in the construction and demolition of the bridge should walk or ride behind the barricade.

As stated above, the appellant's argue that the State breached its duty to guard against the unreasonable risk of a pedestrian being injured as a result of the bridge's dismantlement, because the State failed to adequately barricade the bridge or post signs warning that the bridge was out. The appellant's further argue that the State failed to take any action to prevent injury to pedestrians, even though the state knew that pedestrians continued to cross the old bridge during phase two of the construction project.

We do not think it was necessary for the State to post warning signs or place an impenetrable perimeter of barricades around the bridge,² because the danger presented by the bridge dismantlement would have been obvious to a person exercising ordinary and reasonable care. We agree with the Commissioner that the presence of the crane and the barricades sufficiently alerted the public that construction activities were taking place on the bridge and that the area was dangerous. Moreover, the record establishes that Chris

²In addition, the State offered proof that fixed barriers would be impractical and impede progress on the bridge project because of the need to constantly move men and machinery in and out of the construction area.

was severely intoxicated and running when he came upon the old bridge. We do not think a reasonable person would run into a dark and dangerous construction area. Considering the record as a whole we do not believe that the evidence preponderates against the Commissioner's finding that the State sufficiently warned the public to avoid the area.

In her complaint, the claimant asserts that the State had actual or constructive knowledge that pedestrians crossed the old bridge during phase two of the construction, yet the state did not take adequate steps to prevent a pedestrian from being injured during its dismantlement.³ The Commissioner did not address this assertion in her order, however, this assertion is not supported by the record.⁴ In support of her argument that the State had knowledge pedestrians were crossing the old bridge during phase two, the claimant has offered only a letter written by, and the testimony of, Samuel Baggett, the general superintendent of Ford Construction Company.

The letter which claimant argues provided the State with notice that pedestrians were continuing to cross the old bridge was written by Mr. Baggett to Frelan Holbrook, an engineering supervisor for the Tennessee Department of

³The claimant is apparently arguing that State's knowledge of this alleged fact expanded the scope of the State's duty to warn the public of, and protect the public from, the danger presented by the bridge.

⁴Steve Flowers, an engineering supervisor for the Tennessee Department of Transportation testified that once phase one was completed and opened to both vehicular traffic and pedestrian traffic, no pedestrian or vehicular traffic was allowed on the old bridge. Mr. Flowers testified that he was on the construction site almost every day, and that no pedestrians were allowed to cross the old bridge; rather, pedestrians were directed to cross the new bridge along with automobile traffic. Reverend Jessie Kiestler, a resident of Ripley during the construction who often drove across the new bridge during phase two of the construction, testified that if pedestrians crossed the old bridge, they crossed at night or early in the morning when the construction crew was not present and could not forbid them from crossing.

Transportation. The letter was a request to install a traffic light on the new bridge to stop traffic on one lane of the new bridge, and thereby provide a crossing for pedestrians. The letter never expressly or impliedly stated that pedestrians were crossing the old bridge nor does it in any way prove that the State had knowledge that pedestrians were crossing the old bridge during phase two of the construction. The letter only proves, at most, that Mr. Baggett believed a traffic light was necessary for pedestrian safety on the new bridge.

Mr. Baggett's testimony at the Claims Commission hearing likewise fails to establish that the State had knowledge of pedestrians continuing to cross the bridge during phase two of the construction. At the hearing, Mr. Baggett testified that he informed the Mayor of Ripley of the problems presented by pedestrians, and that he (Mr. Baggett) "believed" that the Mayor conveyed these concerns to an engineer for the State of Tennessee. Even if we assume Mr. Baggett's "belief" came to fruition, and that the Mayor did in fact contact State officials regarding "concerns" about pedestrians, it is clear from the testimony that the concerns which the State officials would have been notified of, were Mr. Baggett's concerns for pedestrian safety on the new bridge, not the old bridge. There is nothing in his testimony to indicate that he informed any State officials that pedestrians were in fact crossing the old bridge.⁵ Mr. Baggett's testimony indicates that he spoke with State officials in regard to a request for a traffic light to reduce the danger pedestrians faced crossing the new bridge, not the old. Moreover, as stated above, the State's action or

⁵Mr. Baggett did testify that pedestrians continued to use the old bridge as a walkway even after the new bridge was built, however, it is unclear from his testimony at what point in phase two pedestrians stopped using the old bridge as a walkway. In any event, the record is void of any evidence indicating that pedestrians continued to use the bridge as a walkway once the dismantlement process began on September 17, 1987.

inaction regarding pedestrian safety on the new bridge is irrelevant in this case, because the State's failure to install a traffic light on the new bridge was not the proximate cause of Chris Worley's death.

Even if the appellant could establish a *prima facie* case of negligence on the part of the State, under the law of comparative fault she must establish that the percentage of fault attributable to Chris Worley is less than the combined fault of all the torfeasors. *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992). In her order dismissing the appellant's cause of action, the Commissioner ruled:

The actions of Chris Worley must be considered in this claim. Mrs. Worley testified that Chris did not appear to be intoxicated; however, Chris had been drinking beer with his friends who were so concerned about his condition that they took his keys and did not allow him to drive home and called to warn his mother; his blood alcohol reading was .24%. . . . Chris passed the type three barricade, the crane and the construction area. He simply failed to recognize or respond to the danger.

The Commission has considered all the claimant's arguments and has determined that even if there were a finding that the State were negligent in this claim, the negligent actions of the deceased, Christopher A. Worley, were grater [sic] than any negligent actions of the State; the negligence of the deceased exceeded fifty percent and, thus, the deceased's negligent actions preclude an award in this claim.

We agree with the Commissioner that Mr. Worley's intoxication was a proximate cause of his death, and therefore, he should be attributed a percentage of fault for his death. Regardless of how intoxicated Chris Worley was on the night of his death, his voluntary intoxication did not excuse him from exercising reasonable care under the circumstances. *Louisville & Nashville R.R. v. Hall*, 5 Ct.Civ.App. 491, 502 (Tenn.App. 1915); see *Kirksey v Overton Pub, Inc.*, 739 S.W.2d 230, 235 (Tenn.App. 1987)("Voluntary intoxication does not relieve

one of his own negligence."). The standard of care which Mr. Worley will be held to is that of an ordinary and reasonable person not that of an ordinary and reasonable drunk person. *Louisville & Nashville R.R.*, 5 Ct.Civ.App. at 502.

The record establishes that Chris started running across the old bridge after he was apparently startled by a police cruiser. When Chris saw the police car he ran past the crane and barricade and then suddenly "disappeared." He obviously had notice of construction activity but heedlessly proceeded to run past the barricade into a darkened area. A reasonable person would not have acted in this manner under these conditions. We think Chris's severe intoxication either eliminated or severely reduced any chance that he would be able to recognize the danger presented by the bridge and thereafter proceed in a reasonable manner. However, in the absence of any proof concerning the negligence of other parties involved in the bridge construction project, we cannot agree that Chris's negligence exceeded 50% as found by the Commissioner.

The judgment of the Claims Commissioner dismissing the appellant's wrongful death cause of action is affirmed. Costs of appeal are assessed against the appellant.

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

CONCUR:

ALAN E. HIGHERS, JUDGE

DAVID R. FARMER, JUDGE