

IN THE COURT OF APPEALS OF TENNESSEE

CAROL T. COFFEY,) C/A NO. 03A01-9508-CV-00252
 Plaintiff-Appellant,) LOUDON COUNTY CIRCUIT COURT
)
)
)
)
)
 v.)
) HONORABLE RUSSELL E. SIMMONS,
) JUDGE
)
)
 THE ESTATE OF CLYDE L. MOORE,)
 BERNICE MOORE, EXECUTRIX,)
)
 Defendant-Appellee.) AFFIRMED AND REMANDED

FILED
 January 26, 1996
 Cecil Crowson, Jr.
 Appellate Court Clerk

MICHAEL S. PEMBERTON and ERIC S. NOWINSKI of LEWIS, KING, KRIEG,
 WALDROP & CATRON, P.C., Knoxville, for Appellant

PAUL E. DUNN of DUNN, MacDONALD & COLEMAN, P.C., Knoxville, for
 Appellee

O P I N I O N

Susano, J.

The plaintiff was injured when he lost control of his bicycle on Tellico Parkway in Loudon County. Just prior to the accident, the original defendant, Clyde L. Moore¹, had been driving his automobile to the rear of the plaintiff, proceeding in the same direction. Mr. Moore passed the plaintiff just as the plaintiff lost control of his bicycle. The critical question at trial was whether Moore's vehicle came in contact with the bicycle, causing the plaintiff to crash. The jury found for the defendant. The plaintiff appeals, arguing one issue--that there was no material evidence to support the jury's verdict. Our task is to determine if such evidence exists in the record before us. See T.R.A.P. 13(d).

The police did not investigate this incident. The alleged tortfeasor, Clyde L. Moore, died before this case was tried. Apparently, his deposition was not taken. Mr. Moore's mother was a passenger in her son's automobile at the time of the accident. She also died before trial. The only "witness" to the accident who testified was the plaintiff. The sum and substance of his testimony bearing on the subject of liability is as follows:

Q Just tell the ladies and gentlemen of the jury -- just start from the time you got there, and tell me what happened.

A Well, I parked there at the boat ramp between the two dams, right by the bridge over the canal, and began riding down the side of the road towards the Tellico Dam itself and towards the bridge. And when I was, oh, I guess, a couple of hundred yards

¹Mr. Moore died on December 27, 1992. Bernice Moore, executrix of his estate, was substituted as party defendant by order entered August 11, 1993.

from the bridge, I -- a car passed me and there was a loud ping, and my handlebars were driven out of my hands -- out of my left hand, driven to the right, and the front wheel of the bike was turned completely sideways, and I went over the handlebars onto the side of the road.

Q You said when the car passed you, did that car strike you?

A Yes.

Q We've brought a stick --

A (Interposing) Handlebar.

Q -- handlebar, whatever, just to show the ladies and gentlemen of the jury. I know it's probably a little bit longer than a handlebar normally is.

A It's about right here. I just checked it on the bike, where the bike would have been.

Q All right. Now, let me ask you this: Your handlebars, were they metal?

A They're metal, but they have a soft rubber grip over the top of them, which cushions your hand. Your hands fit on the outside, and there's very little on the outside of the handlebar, and when the car hit me, when Mr. Moore's car hit me, it turned, spun the wheel like this, and that pulled that hand, hand and thumb back like this against my wrist, and -- as well as turning the bicycle wheel sideways so that the bike stopped immediately, very abruptly, and pitched me over the handlebars.

Q Did you have any damage to your bicycle?

A The handlebar was knocked loose by the blow. It was knocked more than just ninety degrees off center. It was knocked loose, and I had no steering at that point.

Q All right. Did you go over the handlebars?

A Yes.

Q Did you have any other damage to your bicycle besides the handlebars?

A I went over the front of the bike, but the handlebar had turned, yeah.

Q Besides the damage to your handlebars, did you have any other damage to the bicycle?

A Not that I've found.

Q Okay. What happened after the accident?

A Well, I looked up and saw the car moving away, and he stopped maybe fifty, a hundred yards away, and I waited for him to come back, and he didn't come back, so I followed him because I wanted to get his license number.

Q When you say you followed him, what do you mean you followed him?

A I ran down the side of the road to try to catch him and see his license number.

* * *

Q And you were riding on the right-hand side of the road.

A Yes, sir.

Q Now, you did not see this other automobile, did you?

A Not until it passed me and hit me.

Q And you told me in your deposition that you did not remember turning either to the left or to the right, right before this accident happened.

A No, sir.

Q And but you did -- you tell us here today, that you very definitely heard metal against metal somewhere.

A I heard a loud ping. I don't know that it was metal against metal. The handlebar is metal, and I assume whatever hit me on the car was metal.

Q And then you fell off your bike.

A Fell over the front of the bike, yes.

* * *

Q Is there any doubt in your mind that Mr. Clyde Moore was driving the vehicle that struck your bicycle?

A Absolutely none.

The executrix of Mr. Moore's estate did not see the accident; however, she did examine his vehicle shortly after the accident:

Q Now, do you recall in April of 1990 your brother-in-law coming to your house over there? You're going to have [to] answer yes or no, or I don't know because --

A (Interposing) Yes.

Q Now, again, not what he said, but as a result of a conversation that you had with him, did you go out and look at his automobile?

A Yes, I did.

Q Was someone else there with you that morning?

A My husband.

Q And when you went out to look at his automobile, did you look to see if there was any damage on it?

A Yes, we did.

Q And did you look on the right side of it?

A Yes.

Q Now, in addition to damage, did you look for any foreign marks at all on it?

A Yes.

Q Did you observe any marks at all?

A None whatsoever.

Q Now, automobiles from time to time develop dust on them just sitting out. Did you see the dust or anything disturbed on the right side of that vehicle?

A No.

Q Anything at all?

A No.

Q Were there some photographs taken?

A Yes.

Two photographs were taken of the right side of Mr. Moore's car following the accident. They were received into evidence. Neither seems to reflect any damage to the right side of the vehicle.

The plaintiff's testimony that the Moore vehicle struck his bicycle was susceptible to two different interpretations. On the one hand, a person could conclude that the plaintiff actually observed the vehicle strike his bicycle; on the other hand, one could also reasonably conclude that he just *assumed* a collision. This latter conclusion is a fair--but obviously not the only--interpretation of the results of defense counsel's cross-examination. In other words, the jury could have reasonably concluded that the plaintiff based his conclusion of a collision on the circumstances as he experienced them--a noise, movement of the bicycle, and the proximity of the passing vehicle.

The photographs introduced by the defense were some (but again, not conclusive) evidence that the automobile and bicycle did not come in contact with one another as the automobile passed to the left of the bike. These photographs bolstered the testimony of the executrix and her husband that there was no evidence of damage to the right side of the Moore vehicle.

The plaintiff charged common law negligence of failing to keep a proper lookout ahead, of failing to keep the vehicle under proper control, and something he referred to as failing to "give due regard to rights and safety of others." He also charged a violation of T.C.A. § 55-8-124 (following too closely) and T.C.A. § 55-8-117 (overtaking a vehicle on the left). He had the burden of proving that the deceased was guilty of one or more of these acts of common law or statutory negligence that proximately caused the plaintiff to lose control of his bicycle and crash. **Freeman v. Felts**, 344 S.W.2d 550, 554 (Tenn. 1961). Based upon the evidence presented to it, the jury could have reasonably concluded that the plaintiff did not carry his burden. We find that there was material evidence to support the conclusion that there was no impact between the automobile and the bicycle. In this case, absent contact, there was no proof of any negligence. The jury opted for the defendant's theory of no contact. There was material evidence to support that theory.

The judgment of the trial court based on the jury's verdict is affirmed. This case is remanded to the lower court for the collection of costs assessed there pursuant to applicable law. Costs on appeal are taxed against the appellant.

Charles D. Susano, Jr., J.

CONCUR:

Houston M. Goddard, P.J.

Herschel P. Franks, J.