

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT KNOXVILLE

FILED

March 25, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

**IMOGENE HICKS AND HUSBAND,
CARL HICKS,**

Plaintiffs/Appellants,

VS.

PAUL MILLER,

Defendant/Appellee.

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) **Campbell Circuit No. 9593**
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) **Appeal No. 03A01-9507-CV-00243**
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APPEAL FROM THE CIRCUIT COURT OF CAMPBELL COUNTY
AT JACKSBORO, TENNESSEE
THE HONORABLE CONRAD TROUTMAN, JUDGE

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AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

DAVID R. FARMER, J.

The present appeal arises out of a multi-car automobile accident that occurred on

August 30, 1991, in Campbell County, Tennessee. Plaintiffs Imogene and Carl Hicks appeal the jury's verdict assessing equal liability to both Mrs. Hicks and the Defendant, Paul Miller, and awarding damages to neither party.

The accident in question occurred in the southbound lanes of Interstate 75. Plaintiff was traveling in the right hand, or slow, lane of I-75. Due to an earlier accident on the interstate, the traffic was moving slowly. Plaintiff testified that she was behind a tractor-trailer truck, which blocked her view. Plaintiff stated that she signaled and then moved into the left hand, or fast lane, of the interstate, in an attempt to pass the truck. Shortly thereafter, Plaintiff was struck from behind by the Defendant. Mrs. Hicks' daughter, Tanya Hicks Douglas, was in the automobile with Mrs. Hicks at the time of the collision. Both Mrs. Hicks and her daughter suffered personal injuries as a result of the accident.

Mr. Miller was accompanied by his wife, Carol Miller, and his minor sons, Paul Miller, II, and Phillip Miller, at the time of the accident. He testified that Plaintiff moved quickly and unexpectedly into the left hand lane. Mr. Miller testified that he did not see Plaintiff signal before changing lanes. Both Mrs. Miller and Paul Miller, II, suffered personal injuries as a result of the accident.

Plaintiffs raise two issues on appeal. The first issue is whether the trial court erred in failing to charge the missing witness instruction concerning Phillip Miller.

Before the accident occurred, the Millers, who live in Scotts, Michigan, were in route to Greenville, South Carolina, to take Phillip Miller to college. Mr. Miller was the only person in the Miller automobile who both witnessed the accident and testified at trial. Both Carol Miller and Paul Miller testified that they had not seen the accident occur. Phillip Miller was not present at trial. Mr. Miller testified that he did not know whether Phillip, who was sitting in the back seat, on the driver's side, witnessed the actual collision. On cross-examination, Paul Miller, II testified that he did not know whether Phillip saw the accident. This testimony was in conflict with Paul's earlier deposition testimony, in which he stated that his brother

Phillip had seen the accident. In the course of the trial, counsel's recitation of Paul Miller's conflicting deposition testimony was the only indication that Phillip Miller witnessed the accident. Based on that testimony and Phillip Miller's absence from trial, Plaintiffs argue that it was error for the trial judge not to include a "missing witness" instruction in his charge.¹

Under Rule 51 of the Tennessee Rules of Civil Procedure, a party may object to the trial court's delivery of jury instructions. Error may be predicated upon either the judge's omission of a requested instruction or upon the court's misstatement of a requested instruction. Rule v. Empire Gas Corp., 563 S.W.2d. 551, 553 (Tenn. 1978). Counsel may object to the court's jury instructions at trial, or the objection may be made for the first time in the motion for a new trial. Tenn. R. Civ. P. 51.02 (Michie 1995). However, in order to appeal the trial court's failure to give the jury a specific instruction, counsel must have requested the specific instruction during the course of the trial. Rule, 563 S.W.2d at 554. In Rule, the court stated:

When a party is of the opinion the instructions given by the court do not cover all phases of the case, he should call the attention of the trial judge to that fact and tender other and fuller instructions; otherwise, he cannot predicate error upon omissions in or meagerness of the charge as given.

Id.

In the present case we cannot find, nor does counsel cite us to any place in the record, where Plaintiffs requested a missing witness instruction. Had Plaintiffs' counsel

¹Plaintiffs argue that T.P.I.--Civil 2.03 should have been given. That instruction states:

Absence of Witness or Evidence--If a party to this case has failed to produce a witness within his power to produce, you may infer that the testimony of the witness would be adverse to that party if you believe each of the following elements:

1. The witness was under the control of the party and could have been produced by the exercise of reasonable diligence.
2. The witness was not equally available to an adverse party. The witness was likely to be biased against the adverse party because of his relationship to the party who would be expected to produce the witness.
3. A reasonably prudent person under the same or similar circumstances would have produced the witness if he believed the testimony would be favorable to him.
4. No reasonable excuse for the failure has been shown.

8 Tenn. Practice, T.P.I.--Civil 2.03, at 29 (2d ed. 1988).

submitted a missing witness instruction, and the trial judge decided to omit that instruction, counsel would not have been required to object to the court's omission at trial.² However, where counsel failed to request a special instruction at trial, he cannot now claim error because the trial court did not give the desired instruction.

Plaintiffs' second issue on appeal is whether the trial court erred in admitting evidence of injuries sustained by Mrs. Hicks prior to the accident.

In April 1991, Mrs. Hicks was involved in an altercation with her son-in-law which resulted in stab wounds to her left arm. In July 1991, Mrs. Hicks sought medical attention from Dr. Schaumburg, in Knoxville, Tennessee, due to pain resulting from these injuries. The automobile accident occurred on August 30, 1991.

During pretrial motions, Plaintiffs' counsel argued that Mrs. Hicks' earlier injuries were solely to her left arm and were therefore unconnected, and irrelevant to, the existence of the back and neck injuries she sustained in the August 30, 1991 collision. Plaintiffs' counsel argued that evidence of the prior injury was inadmissible pursuant to Tenn. R. Evid. 401, 403 (Michie 1995). Defendant's counsel argued that Mrs. Hicks' prior injuries were relevant to the present case because they tended to establish a preexisting injury. The lower court permitted the evidence about the prior stabbing injury, but permitted counsel to refer to the prior incident only as an "altercation."

Although we agree with Plaintiffs' counsel that there is tenuous relationship, at best, between injuries which resulted from the stabbing incident of April, 1991, and the automobile accident of August 30, 1991, we find that the trial court's admission of evidence relating to the prior "altercation" constituted harmless error and did not affect the jury's verdict. Lea v. Gentry, 167 Tenn. 664, 675, 73 S.W.2d 170, 174 (1934).

²We express no opinion as to whether Plaintiffs would have been entitled to a missing witness instruction had it been properly requested. However, even if the court had given a missing witness instruction, we emphasize that "[n]o presumption or inference from the non-production of evidence is potent enough to supply independent evidence of a fact which is wholly unproved by other evidence." Nat'l Life & Accident Ins. Co. v. Eddings, 188 Tenn. 512, 521, 221 S.W.2d 695, 698 (1949).

For the reasons stated herein, we hereby affirm the judgment of the trial court.
Costs on appeal are taxed to Plaintiffs, for which execution may issue, if necessary.

HIGHERS, J.

CONCUR:

CRAWFORD, P.J., W.S.

FARMER, J.