IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

CECELIA C. MUNSEY, As Administratrix of the Estate of Lillian E. Collins	)	HAWKINS COUNTY 03A01-9510-CV-00344
Plaintiff-Appellant	)	
v.	)	HON. JOHN K. WILSON, JUDGE
JOHN CHARLES BARRETT, JR, ALLSTATE INSURANCE, and NANCY BARKER McNUTT, as Administratrix of the Estate of Wiley O. Collins	)	
Defendants-Appellees	)	AFFIRMED AND REMANDED

THOMAS C. JESSEE OF JOHNSON CITY and THOMAS DOSSETT OF KINGSPORT FOR APPELLANT

REBECCA OTTINGER CUTSHAW OF GREENEVILLE FOR APPELLEE JOHN CHARLES BARRETT, JR.

OPINION

Goddard, P.J.

Cecelia C. Munsey, as Administratrix of the estate of her mother, Lillian E. Collins, appeals a $10,000 judgment

rendered in her favor against John Charles Barrett, Jr., and the Allstate Insurance Company, uninsured motorist carrier for the vehicle being operated by her husband, in which she was a passenger.

The jury found that the damages incident to Mrs. Collins' death were $100,000 and that her husband's negligence contributed 90 percent to the accident and Mr. Barrett's ten percent.

Mrs. Munsey raises the following three issues on appeal:

1. The defendant should have been judicially estopped from changing his sworn testimony at trial from what he testified to under oath at his deposition.

2. The Trial Judge erred in failing to charge the plaintiff's request for charge one, three and four (Collective Exhibits 15) relating to the operation of a vehicle within an intersection when an oncoming car is approaching with a signal light signaling a left hand turn.

3. The jury's verdict as it relates to the distribution of fault between the defendant James Charles Barrett and the Estate of Wiley O. Collins is not supported by the greater weight of the material evidence presented at trial.

A vehicular accident occurring at the intersection of U.S. Highway 11-W, a four-lane highway divided by a grassy median, and Silver Lake Road was the genesis of this litigation.

On June 9, 1992, Wiley O. Collins was driving his vehicle in a westerly direction on Highway 11-W, approaching its intersection with Silver Lake Road. His wife, Lillian E. Collins, was a passenger in the front seat. At the time the Defendant, John Charles Barrett, Jr., was driving his vehicle in an easterly direction on 11-W, approaching the intersection. This intersection is controlled by a traffic signal which did not, at that time, have an arrow authorizing left turns. Mr. Collins entered the left-hand turn lane of 11-W and turned in front of the vehicle being operated by Mr. Barrett, which was in the left, or inside, lane for eastbound traffic. A violent collision ensued, resulting in the death of both Mr. and Mrs. Collins and injuries to Mr. Barrett.

It is the Plaintiff's theory that Mr. Barrett was signaling for a left turn, as shown by his discovery deposition, and that Mr. Collins, notwithstanding the fact that Mr. Barrett's vehicle was not in the left turn lane, properly assumed that Mr. Barrett was turning left and that he could make his own left turn in safety.

In this appeal the Plaintiff filed a motion styled "Notice of Motion and Motion," which we shall treat as a motion for new trial, which reads as follows:

> PLEASE TAKE NOTICE that the undersigned will appear before the Honorable John K. Wilson, Judge for the Circuit Court for Hawkins County at Rogersville, Tennessee at a date and time to be agreed to by the

parties, for judgment notwithstanding the verdict or in the alternative for a new trial.

The basis for this motion are the provisions of Tennessee Rules of Civil Procedure, Rule 59.01 et.seq. The plaintiff would show that the findings of fault made by the jury are not supported by the evidence and therefore should be reassessed by the court in keeping with the evidence. In the alternative, the court should grant a new trail. Plaintiff will file a copy of the transcript of the defendant's deposition and court testimony in support of this motion.

The plaintiff will rely on the provisions of Tennessee Rules of Civil Procedure, Rule 30 concerning depositions. The plaintiff would show that the defendant gave conflicting testimony in court from the earlier testimony he gave in his deposition. That testimony was critical as to the issue of fault and under the provisions of Monroe County Motor Co. v. Tennessee Odin Ins. Co., 231 S.W 2d 386 (Tenn. App. 1950) and related cases, the defendant should be judicially estopped from changing his sworn testimony. For the reasons stated herein, the court should reassess the evidence as a thirteenth juror or, in the alternative, grant the plaintiff's motion for a new trial.

The thrust of the Plaintiff's argument is that because Mr. Barrett testified in his discovery deposition, which was introduced in evidence, that his left signal light was turned on, he is judicially estopped from testifying at trial that he did not know whether it was turned on or not.

Our review of the record discloses that when first asked on discovery relative to his left-turn signal, Mr. Barrett stated that he did not know whether it was on or not. Upon being pressed by counsel for the Plaintiff he conceded that it could have been on, and later that it indeed was on. At trial,

however, he testified in accordance with his first answer at discovery that he did not remember.

It is arguable that under Rule 803(1.2)[1] as interpreted by the Advisory Commission,[2] Mr. Barrett's evidence at trial would be admissible notwithstanding his previous statement to the contrary in his discovery deposition, and that his explanation of his inconsistent statements made the doctrine of judicial estoppel in this context--even if it survived the enactment of Rule 803(1.2)--inapplicable. Sturkie v. Bottoms, 203 Tenn. 237, 310 S.W.2d 451 (1958); D.M. Rose & Co. v. Snyder, 185 Tenn. 499, 206 S.W.2d 897 (1947). However, we need not reach these questions because counsel for the Plaintiff never objected to the reception of Mr. Barrett's testimony on the ground that he was judicially estopped to so testify. In light of this we will not put the Trial Court in error for not excluding the testimony when he was not requested to do so either by objection at the time it was introduced or by a motion to strike thereafter.

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[1] (1.2) Admission by Party-Opponent.--A statement offered against a party that is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement in which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by an agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship under circumstances qualifying the statement as one against the declarant's interest regardless of declarant's availability, or (E) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy, or (F) a statement by a person in privity of estate with the party. An admission is not excluded merely because the statement is in the form of an opinion. Statements admissible under this exception are not conclusive.

[2] The final sentence is intended to abolish the distinction between evidentiary and judicial admissions. Unless made conclusive by statute or another court rule, such as T.R.C.P. 36.02 on requests for admission, all party admissions are simply evidentiary, not binding, and are subject to being explained away by contradicting proof. (Emphasis supplied.)

The other two issues raised by the Plaintiff must fail. The first because the motion for a new trial does not in any way mention the failure to give the charges requested by the Plaintiff,[3] and the second because this Court does not reweigh the preponderance of the evidence in jury cases where the verdict has been approved by the trial court, Shelby County v. Barden, 527 S.W.2d 124 (Tenn. 1975); England v. Burns Stone Co., Inc., 874 S.W.2d 32 (Tenn. App. 1993), it being the appellate court's duty when the issue is properly presented to determine whether there is any material evidence to support the verdict.

Moreover, even if the Plaintiff's third issue had asserted lack of material evidence rather than preponderance of the evidence, we would be constrained to affirm because in our view there is ample material evidence to support the jury's verdict.

For the foregoing reasons the judgment of the Trial Court is affirmed and the cause remanded for collection of the judgment and costs below. Costs of appeal are adjudged against Ms. Munsey as Administratrix and her surety.

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Houston M. Goddard, P.J.

[3] Under Rule 3(e) of the Tennessee Rules of Appellate Procedure, no issue "presented for review shall be predicated upon error in the admission or exclusion of evidence, . . . unless the same is specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."

CONCUR:

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Herschel P. Franks, J.

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Charles D. Susano, Jr., J.