

**IN THE COURT OF APPEALS OF TENNESSEE, WESTERN SECTION
AT NASHVILLE**

**AMANDA HOFFMAN b/n/f,
KAREN BUCHANAN,**

Plaintiff/Appellant.

**BLUE CROSS/BLUE SHIELD
OF TENNESSEE,**

Intervening Plaintiff,

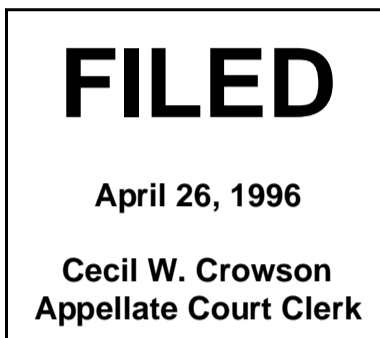
VS.

JOSEPH E. WILKINS,

Defendant/Appellee.

)
) Davidson County
) Circuit Court No. 92C-3425
)
)

) C. A. No. 01A01-9510-CV-00473
)
)



From the Circuit Court of Davidson County at Nashville.
Honorable Barbara N. Haynes, Judge

Lucien Dale, Nashville, Tennessee
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Attorneys for Plaintiff/Appellant.

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WHITE & REASOR, Nashville, Tennessee
Attorney for Defendant/Appellee.

OPINION FILED:

REVERSED AND REMANDED

FARMER, J.

CRAWFORD, P.J., W.S. : (Concurs)

HIGHERS, J. : (Concurs)

This is an appeal by Appellant, Amanda Hoffman, b/n/f Karen Buchanan, from the trial court's grant of summary judgment in favor of the appellee, Joseph E. Wilkins.

Appellant's father, George Briggs Hoffman, died on July 9, 1992, at the age of 28 years, as a result of injuries sustained from a vehicular accident in Nashville. This wrongful death action is pursued against Mr. Wilkins, the driver of the vehicle. The complaint alleges the following:

That on or about July 9, 1992, at approximately 12:40 a.m., Joseph E. Wilkins was operating his 1987 Jeep Wrangler southerly on Heritage Drive when he began to stop his automobile in order to allow the deceased to enter the vehicle. At this time, the deceased was walking southerly on Heritage Drive enroute [sic] to his automobile. However, before the deceased was able to completely enter the vehicle, the Defendant Joseph E. Wilkins accelerated his vehicle which caused the deceased to fall from the vehicle. At the time of this accident, George Briggs Hoffman received serious and painful injuries which ultimately resulted in his death

Appellant alleged that Wilkins' actions violated both statutory and common law and were negligent.

Wilkins answered the complaint, denying any liability, and setting forth the affirmative defenses of assumption of risk and Hoffman's own negligence in attempting to enter the vehicle while in an intoxicated condition.¹ He also moved for summary judgment, submitting his own deposition as well as that of Bryan Christopher Hempel in support thereof. In response, Appellant submitted the affidavits of two police officers who investigated the incident, Jeff Ball and Sergeant J. Hooper of the Nashville Metropolitan Police Department.

The events preceding this incident, which remain undisputed, are as follows: On the eve of the accident, the deceased accompanied Mr. Wilkins, by traveling as a passenger in Wilkins' 1987 Jeep Wrangler, to the home of Wilkins' friend, Chris Hempel, arriving around 10:00 in the evening. The three, along with Hempel's roommate, Rodney Pruitt, played cards at the Hempel residence until the early morning hours, around 12:30 a.m., when Hoffman expressed a desire to leave. He requested that Wilkins drive him back to his own vehicle parked approximately one-half

¹On appeal, the parties do not dispute application of the comparative fault principles established in *McIntyre v. Balentine*, 833 S.W.2d 52, (Tenn. 1992), to this case.

mile from the residence. When Wilkins refused, Hoffman exited the home, sprinting southerly on Heritage Drive towards his own vehicle. Minutes later, Wilkins and Hempel attempted to catch up with him in Wilkins' Jeep.

According to Wilkins' deposition, Hoffman had consumed approximately 14 short beers prior to the incident. He, thus, believed Hoffman "very" drunk and wanted to catch up with his friend to prevent him from driving. Wilkins' intentions were then to drive Hoffman to his own residence. Wilkins described the resulting encounter with the deceased as follows:

A. So we hopped in the Jeep, proceeded to go down the street to get him. And he was running on the left side of me, and I asked him to get in the Jeep and -- because he was drunk, and he said, "I'm not drunk yet," and dashed at my Jeep.

Q. Were you stopped?

A. I was in the process of stopping.

....

Q. How fast were you going?

A. Ten to fifteen miles per hour.

Q. And tell us whether or not Briggs Hoffman made contact with your Jeep.

A. I would say he did.

....

A. Well, I didn't ever see. All I saw was him make the motion toward my Jeep. I don't know what happened after that.

Q. And as you saw him make the motion toward your Jeep didn't you continue to look at him?

A. No. I continued to slow down. I was in the process of shifting gears. Gearing down, put it that way.

Q. Okay. And so you let your eyes stay forward toward the windshield?

A. Yes, sir.

Q. And did not look to see what he was doing?

A. Yes, sir.

Q. Do you know whether or not he ever got a foot on your running board?

A. Yes, sir, he did.

Q. How do you know that?

A. There was a big footprint there.

Q. And how do you know that it was his?

A. Well, it matched tread on his tennis shoes.

Q. Okay. Do you know which foot he got there, the right or the left?

A. I believe it was his left.

....

Q. Okay. Do you know whether or not he got his hands on the Jeep in any way?

A. No, sir.

Wilkins described the Jeep as a 5 speed with two front seats, and a back seat sufficient to transport “[t]wo small people.” Entry into the back seat could be accomplished from either side of the vehicle “[b]y lifting the front seat up (using a release lever) and stepping into the back seat.” There was also a running board or step, approximately one and a half feet long, located directly in front of the door. He opined that Hoffman could have entered the vehicle from either side, but he “just anticipated [Hoffman] giving [him] time to stop and get in the Jeep.” He “didn’t care which side [Hoffman] got in on.” Wilkins commented that Hoffman never would have had to step on the running board, if he had given Wilkins “time to slow down.” Wilkins “expected” Hoffman to give him time to bring the vehicle to a complete stop. Wilkins estimated that the Jeep moved another 10 feet after he observed Hoffman move or dash toward the vehicle. At this time, he was gearing down from second to first gear. After the Jeep came to a stop, Wilkins observed Hoffman lying approximately 5 feet behind it. Wilkins stated that he first knew something had happened when “Chris . . . slung his hand across my chest and said ‘Stop.’ ” Wilkins then “hit the brakes.” The incident occurred approximately two and a half blocks from the Hempel residence. Wilkins stated that prior thereto, he had consumed 3 short beers.

The deposition of Mr. Hempel adds that the Jeep was open all around the back and the top was off at the time of the accident. When Wilkins requested that Hoffman enter the Jeep, Hoffman was running out in front of the Jeep on the opposite side of the street. Hempel described

the incident as follows:

A. . . . Well, he darts across the street, and I seen him coming across the street. I seen him jump up. I knew what he was fixing to do. Well, I throwed my arm out trying to tell [Wilkins] to go ahead and stop. I couldn't even get my arm out before he had already fell.

. . . .

A. He was trying to jump up on the side of the Jeep and enter through the back of the Jeep, grabbing ahold of the roll bar, put one foot on the wheel well, one foot on the door flare down at the bottom of the door, and he was trying to pull himself in the Jeep.

Q. Was this on the driver's side?

A. Yes, sir.

Q. Putting one hand on the roll bar?

A. Uh-huh, which is in the back seat of the Jeep.

Q. And one foot on the fender?

A. One foot was on the wheel well.

. . . .

A. It's got a little rubber wheel well that's about two inches, sticks out about two inches. He put one foot up there, and the other foot he put down on the flare down at the bottom of the door.

Q. Now, do you know whether he put the right foot on the wheel well?

A. That would be correct, I believe, yes, sir.

Q. And the left foot on -- what did you call that place?

A. The door flare down at the bottom.

. . . .

A. . . . I actually seen him do that. And the whole time, you know, [Wilkins] is coming to a slow stop. Well, when he jumped up and grabbed it, I seen him slip back. . . . I did see his hand slip off the roll bar and him go backwards.

The affidavit of Jeff Ball states that his investigation of the incident revealed "scuff marks that came from a tennis shoe that would indicate Mr. Hoffman had his right foot on the jeep and was dragging his left foot on the ground." Officer Ball made a written report at the scene of the accident which was attached to his affidavit. It reads, as here pertinent:

Driver of Veh. 1 [Wilkins] states they found [Hoffman] on Heritage Dr. and he told him to come and get in the jeep. He states he was slowing to a stop when [Hoffman] jumped on the left side of the Jeep and said "I'm in let's go." [Wilkins] states as he proceeded [Hoffman] fell out of the Jeep.

The report also indicates that Wilkins passed a field sobriety test at the scene and the results of his blood alcohol test were .03. It denotes that the investigation uncovered a tennis shoe print on the step of the vehicle indicating that Hoffman was on the left side of the jeep. The report states that the roll bar and bikini top of the vehicle "had just been armor-all[ed] and had a slick finish" and that "[t]his may have hampered [Hoffman] from gripping and swinging his body up inside [the vehicle]." Finally, the report discloses that Ball reviewed the clothing of the deceased and noticed that the left shoe was scuffed with asphalt and that the deceased's left ankle was injured.²

Appellant's sole issue on appeal is whether the trial court erred in entering summary judgment for Wilkins. Our review of this matter is in accordance with Rule 56.03 T.R.C.P., which provides that a summary judgment is to be rendered if the pleadings and discovery materials, as therein set forth, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. We are to review the evidence before us in the same manner as a motion for a directed verdict made at the close of the plaintiff's proof - all evidence must be viewed in a light most favorable to the motion's opponent and all legitimate conclusions of law must be drawn in their favor. *See, e.g., White v. Methodist Hosp. South*, 844 S.W.2d 642 (Tenn. App. 1992).

On appeal, Appellant argues that there are inconsistencies between Wilkins' and Hempel's depositions and the statement given by Wilkins to Officer Ball at the time of the accident which clearly create genuine issues of material fact. She further points to the evidence of the left foot being dragged by the deceased which she contends is indicative of Hoffman hanging on to the Jeep while Wilkins failed to stop. It is her contention, therefore, that there is evidence from which a jury could reasonably conclude that Wilkins drove away in his Jeep, an open vehicle, without first ascertaining whether his passenger, Hoffman, was seated.

²The affidavit of Sergeant Hooper merely corroborates Ball's testimony.

We are inclined to agree. Whether intentional or not, we do find some discrepancies between Wilkins' deposition testimony and his statement to Officer Ball at the scene of the accident. We find these discrepancies to go to the heart of this matter: Whether Wilkins was negligent in the operation of his vehicle so as to proximately cause the death of Mr. Hoffman. For example, viewing the evidence in a light most favorable to Appellant, we find that a reasonable inference can be made that Wilkins never intended to stop his vehicle, once Hoffman proclaimed, "I'm in, let's go." According to the officer's report, Wilkins thereafter proceeded, never fully stopping or determining whether Hoffman was seated when he fell out of the Jeep. This is at least one reasonable interpretation of the events as presented here. Another is that Hoffman attempted to enter the Jeep without allotting sufficient time for Wilkins to properly stop, although he was in the process of doing so, and simply fell out of the vehicle. These are matters which are proper for jury resolution. We also find material the evidence indicating that Hoffman was dragging his left foot. We believe that a jury could reasonably conclude that Wilkins never intended to completely stop his vehicle or failed to properly do so and was, thus, negligent.

Under the principles espoused in *McIntyre*, summary judgment is proper in this case only if we are able to conclude as a matter of law that the deceased was more negligent than Wilkins or that Wilkins was not negligent. *See, McIntyre*, 833 S.W.2d at 57. In light of the evidence before us, viewed most favorably to the appellant, we cannot do so.

We conclude that genuine issues of material fact exist in this matter appropriate for jury resolution. The summary judgment entered in favor of the appellee is, therefore, reversed and this cause remanded to the trial court for a trial on its merits. Costs are assessed against Joseph E. Wilkins, for which execution may issue if necessary.

FARMER, J.

CRAWFORD, P.J., W.S. (Concurs)

HIGHERS, J. (Concurs)