IN THE COURT OF APPEALS OF TENNESSEE
EASTERN SECTION AT KNOXVILLE

FILED

May 30, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

THE ESTATE OF ALBERT LEROY GUNTER,	)	McMINN CIRCUIT
Plaintiff/Appellant	)	No. 03A01-9512-CV-00448
v.	)	
GLEN SMITH,	)	
Defendant/Appellee	)	AFFIRMED AND REMANDED

Jeffrey A. Miller, Cleveland, For the Appellant

H. Christ Trew, Athens, For the Appellee

O P I N I O N

INMAN, Senior Judge

This complaint was filed by the administrator of the estate of Albert Gunter seeking damages for his alleged wrongful death as a result of being struck by an automobile driven by defendant.

The essential facts are not controverted. The defendant was driving his automobile southwardly in the outside lane of Congress Parkway in Athens on a dark, cloudy morning at about 6:30 a.m. He was approaching the intersection of Hanes Street, traveling between 35-40 m.p.h., when the deceased "appeared directly in front of his vehicle in the middle of the right-hand southbound lane, approximately 6 feet or less from his vehicle."

Congress Parkway is a four-lane highway divided by a median. There is no pedestrian cross-walk where the accident occurred, and the posted speed limit is 45 m.p.h.

During a period of time before 6:30 a.m., the deceased consumed a

substantial amount of alcohol. A blood sample taken at 8:00 a.m. on the morning of the accident revealed that he had .176% by weight of alcohol in his blood system.

Sometime before 6:30 a.m., the deceased left his residence en route to a food market. He crossed Congress Parkway at its intersection with Hanes Street and walked along the northbound side of Congress Parkway to the food market, where he purchased three malt liquor beverages, later discovered at the point of impact.

After making his purchase, he left the food market, apparently attempting to return to his residence via the same path he had traveled to the market.

The defendant filed a motion for summary judgment alleging the complete absence of any genuine issue of material fact, which the trial court granted upon a finding that reasonable minds could not differ as to the conclusions to be drawn from the evidence taken in a light most favorable to the plaintiff that the negligence of the deceased was equal to or greater than any negligence of the defendant.

Our inquiry involves a question of law with no presumption of correctness. *Carvell v. Bottoms*, 900 S.W.2d 23, 26 (Tenn. 1995).

The appellant argues that reasonable minds could differ as to whether the defendant exercised due care to avoid colliding with the deceased. TENN. CODE ANN. § 55-6-136. He argues that his decedent did not suddenly materialize, that he had walked across two northbound lanes, a median, one of the southbound lanes and that he was there to be seen. Hence, the appellant argues the trier of fact is entitled to infer that the defendant failed to keep a watchful lookout about , thus creating a genuine issue of material fact. We agree that the court must view the evidence favorably to the non-moving party, allow all reasonable inferences in favor of that party and discard all countervailing evidence. If there is any dispute as to any material fact, the motion should be barred. *Byrd v. Hall*, 847 S.W.2d 208, 210-11 (Tenn. 1993).

In the final analysis, if the appellant is entitled to recover for the death of the decedent under the circumstances present here, such recovery must necessarily be based on an inference that the defendant should have seen the decedent before the collision occurred. We do not believe that actionable negligence can be inferred from "the mere fact of the occurrence of injury alone." *Williams v. Jordan*, 346 S.W.2d 583, 586 (Tenn. App. 1961). *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn. 1994) holds that the doctrine of comparative fault, *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992) does not alter the standards which govern assessment of evidence based upon the negligence of a plaintiff, and we think the trial judge correctly held that reasonable minds could not differ as to the conclusion to be drawn in a light most favorable to the plaintiff that the negligence of the deceased was equal to or greater than any inferential negligence of the defendant.

The judgment is affirmed at the cost of the appellant.

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William H. Inman, Senior Judge

Concur:

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Houston M. Goddard, Presiding Judge

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Don T. McMurray, Judge