

CONNIE LOU MILLER, and husband)
JOHN G. MILLER, JR., and DARRYL)
McLEMORE, a minor, by and through)
his parents and next of friends, CONNIE)
LOU MILLER and JOHN G. MILLER,)

Plaintiffs/Appellants,)

VS.)

CECIL EDGAR BREEDEN, and the)
STEWART COUNTY HIGHWAY)
DEPARTMENT and STEWART)
COUNTY,)

Defendants/Appellees.)

Stewart County Circuit
No. 4-170-CV-94

Appeal No.
01A01-9604-CV-00160

FILED

September 18, 1996

Cecil W. Crowson
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT
OF STEWART COUNTY, TENNESSEE AT DOVER

HONORABLE ALLEN W. WALLACE, JUDGE

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AFFIRMED AND REMANDED.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:
BEN H. CANTRELL, JUDGE
WILLIAM C. KOCH, JR., JUDGE

CONNIE LOU MILLER, and husband)
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OPINION

The captioned Plaintiffs have appealed from a non-jury judgment dismissing their suit for personal injuries and property damage in a highway collision.

The judgement of the Trial Court states:

This automobile accident occurred on July 13, 1993 on Weaks County road in Stewart County, Tennessee. Weaks Cemetery Road is a very narrow gravel road, with really two (2) tracts in the middle of the road where everyone drives. (See Exhibits 1 through 13) Each vehicle approached a curve, with the curve going to the plaintiff's right and to the defendant's left. As the vehicles approached a blind curve and saw each other, the defendant went to his right, as he would do in such a curve, the plaintiff attempted to go to her right also. However, plaintiff testified her vehicle went to the left when she applied the brakes. Again, due to the curve turning to her right, by application of her brakes, she would go straight, which in effect took her into the other vehicle on his side of the road. All witnesses essentially place the point of the impact on the defendant's side of the road.

1. The Court finds, in accordance with TCA § 29-20-310, that the Defendant, employee, CECIL EDGAR BREEDEN, was not guilty of negligent acts at said time and place that was The proximate cause of the Plaintiff's injuries.

2. The proximate cause of this accident was the application

of the brakes which took the plaintiff into the opposing lane of traffic thereby causing the accident. Therefore, the Plaintiffs, CONNIE LOU MILLER and JOHN G. MILLER, JR., case is dismissed.

3. Plaintiff's minor son, DARRYL MCLEMORE by and through his parents and next friends, CONNIE LOU MILLER and JOHN G. MILLER, also bring suit against the defendant and the court finds that the defendants were not guilty of negligence which proximately caused the accident as heretofore stated and the minor's case is also dismissed.

Plaintiffs present a single issue in the following form:

The Trial Court erred in failing to analyze the proximate cause issue in the case at hand, a Governmental Tort Liability Act Case, under *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992).

A more appropriate wording of the issue would be:

Whether a trier of fact is obligated to find and state percentages of fault where the defendants are found to be not at fault. In *McIntyre v. Balentine*, (Tenn. 1992), 833 S.W.2d 52, the Supreme Court said:

In all trials where the issue of comparative fault is before the jury, the Trial Court shall instruct the jury on the effect of the jury's finding as to the percentage of negligence as between the Plaintiff or Plaintiffs and the Defendant or Defendants. 833 S.W.2d 57.

However, the same opinion contains an appendix which states:

The following instructions may be used in cases where the negligence of the Plaintiff is at issue.

- - -

1. If you find that the defendant was not negligent or that the Defendant's negligence was not a proximate cause of Plaintiff's injuries, you will find for the Defendant.

- - -

Special Verdict Form

1. Was the Defendant negligent?

Answer: _____ (yes or no)
(If your answer is "No," do not answer any further questions. - - -)

2. Was the Defendant's negligence a proximate cause of injury or damages to the Plaintiff?

Answer: _____ (yes or no)
(If your answer is "No," do not answer any further questions. - - -)

The meaning of the foregoing in its application to the present case is obvious. The Trial Judge sitting as a jury, has found that the Defendants were not guilty of negligence which proximately caused injury and damage to the Plaintiffs. Therefore, there is no occasion to consider whether the Plaintiffs or any of them were negligent or to apportion fault among the parties. Even if the Plaintiffs were guilty of no negligence, they have no right to recover from a Defendant who was likewise free of negligence.

Plaintiff's take issue with the finding of the Trial Court that Defendant driver was not guilty of negligence proximately causing the collision.

Plaintiff, Connie Lou Miller, testified:

Q. Did Mr. Breeden make any statements to you about what had happened?

A. Yes, sir. He -- when he come to the car, he was pulling the kids out, checking to see if they were all right. And he was saying I'm sorry, I'm sorry, I didn't mean to. You know, are you hurt? I didn't mean to hit you, you know, but --

Q. As you came around, you saw Mr. Breeden in his truck. As you came around the curve, his truck was sideways, looked like he had lost control of his vehicle; is that what you've told us?

A. It was fishtailing.

Q. So you think when he saw you, he lost control of his truck; is that what you're telling us?

A. Yes, sir.

Plaintiff, Darrell McLemore, aged 7 years, testified:

Q. (By Mr. Hicks) Now, when this accident happened, did you see the car -- the truck come around the curve or did you not, Darrell?

A. (Witness shakes head negatively.) I just looked up

when she said he's going to hit us and seen -- and then I reached back down for my fish. And the car -- and then I went up and hit my mouth.

The Defendant, Cecil Edgar Breeden, testified:

Q. Could you describe the road to us?

A. It's just a little dirt country road. Some people call them gravel roads. Dirt and gravel. One that you can slide on easy if you hit on your brakes. You can slide on any of them if you slide them hard enough.

Q. (By Mr. Nolan) Now, Mr. Breeden, I need you to tell us about the accident, and I need for you to tell it in your own words, okay?

A. Well, I say I got through filling up the machinery, and I was going back to the shop. I was driving 20, 25 maybe. And I got here in this curve, and she came in the curve between 35 and 40 probably. And when she seen me, she steered her car to the inside of the curve to miss me, but it cut her front wheels sharp, and they were sliding in place of rolling. It wasn't going to the inside of the curve. She was coming straight toward me and plowed me right in the front end. See, I was in the outer side of the curve and when it slid, it just went straight in place of going to the inside.

Q. Now, you said that she cut her wheels to the inside of the curve. Would she have been cutting her wheels to the left or to the right?

A. To the right.

Q. When you first saw her car, how was your truck positioned on the road?

A. Well, like I say, it wasn't all the way over as far as it could go, but I got it over there before she got to me.

Q. Which would have been -- would that have been to your right?

A. Yes, sir.

Q. Now, what did her vehicle do as you saw it approached you?

A. It comes toward me in place of going away from me when she locked her brakes. And it was still sitting there when the trooper got there. It was over on my side. Had about half the front end of my truck.

Q. Now, were you able to take any actions to try and

avoid the collision?

A. Nothing but just get it over there and try to stop. I might have slid a foot or two getting stopped on this gravel. She had slid a pretty good ways.

A. If I'm looking at the picture right, that's supposed to be on the side where I was driving. Like I say, when we hit, we both was on that side.

Q. Which side is that?

A. On my right side of the road, the one I was driving on.

Q. Did you say anything to Mrs. Miller at that time?

A. No. Nothing except these kids ought to be checked to see if they was hurt.

Q. Did you ever say anything to her like it was my fault or anything like?

A. No, sir.

The investigating officer testified:

Q. And while you were working, was there an accident on July 13, 1993, you were called to work?

A. Yes, sir, I did.

Q. And where was that accident?

A. It was in Stewart County on what they call Weaks Cemetery Road.

Q. What kind of road is that?

A. About a cow path.

Q. About how wide is it?

A. It's very narrow. It looks like it runs around the edge of a field.

Q. And did you have an opportunity to actually measure and see how wide the road was?

A. Yes, sir. It was fourteen feet, ten inches.

Q. Is that wide enough for two cars to pass on it?

A. Yeah, there is -- two cars can get by. It's narrow, though.

Q. How would you describe this roadway? What does it consist of?

A. It's dirt, gravel, grass.

Q. And what did your investigation reveal?

A. Well, both -- both vehicles were -- came to rest at the point of impact, or there was about maybe -- there was a little distance between them from where they hit and separated a little. The debris was laying between the vehicles clearly indicating that was the point of impact. And it would be -- the point of impact was in the northbound -- northbound lane.

Q. And the northbound lane, which lane of travel would that have been in?

A. That would have been in Mr. Breeden's lane of travel.

In a case tried without a jury, any conflict in testimony requiring a determination of the credibility is for the trial judge whose decision on credibility is binding upon the reviewing Court unless other real evidence compels a contrary conclusion. *State of Tennessee, ex rel Balsinger v. Town of Madisonville*. 222 Tenn. 272, 435 S.W.2d 803 (1968). No real evidence is found in the record to compel a conclusion on credibility contrary to that of the Trial Judge.

Non-jury findings of fact come to this Court for review de novo accompanied by a presumption of correctness unless the evidence preponderates otherwise. TRAP Rule 13(d). The evidence does not preponderate otherwise.

The judgment of the Trial Court is affirmed. Cost of this appeal are taxed against the appellants. The cause is remanded to the Trial Court for any necessary further proceedings.

AFFIRMED AND REMANDED.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

BEN H. CANTRELL, JUDGE

WILLIAM C. KOCH, JR., JUDGE