

**IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON**

<p>LELA CUMMINGS (SWINDLE), Plaintiff/Appellee,</p> <p>vs.</p> <p>CITY OF MEMPHIS and MEMPHIS LIGHT, GAS & WATER DIV., Defendant/Appellant</p> <hr/> <p>CITY OF MEMPHIS, Plaintiff/Appellee</p> <p>vs.</p> <p>WHITE CONTRACTING, INC., Defendant/Appellant.</p>	<p>) From the Shelby County Circuit Court) at Memphis, Tennessee)) Hon. James E. Swearingen, Judge)) Shelby Circuit No. 40317-4 T.D. and) No. 40347-4 T.D.) Appeal No. 02A01-9506-CV-00122)) REVERSED)) Monice Moore Hagler) City Attorney) Dorothy Osradker) Sr. Asst. City Attorney) For Appellant City of Memphis)) M. Scott Willhite) Attorney for Appellant White Contracting)) Reed L. Malkin) Attorney for Appellee, Lela Cummings) (Swindle))) Yvonne Chatman-Johnson) Attorney for Appellee MLGW</p>
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MEMORANDUM OPINION¹

HIGHERS, J.

FILED

September 25, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

In this action for personal injury, defendants appeal from the trial court's judgment holding the defendants, City of Memphis ("City") and White Contracting, Inc., 100% negligent.

In 1989, the City and White Contracting, Inc. entered into a contract for the renovation of Ontario Street, which involved constructing sidewalks and curbs, and installing drainage and gutters.

¹Rule 10 (Court of Appeals). Memorandum Opinion. -- (b) The Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied upon for any reason in a subsequent unrelated case.

Plaintiff, Lela Cummings Swindle, lived on Ontario Street. Due to the construction, Ontario Street and the adjacent yards were “all torn up” for a period of several months. Plaintiff testified that the yards were “[a] total mess. Pipes and bricks and just anything, you know, laying in the yards.” According to plaintiff, there were “big holes” in the yards, and the area was excessively muddy. The construction inspector for the City stated that “[t]here was pipe, gravel and concrete, broken concrete, all sorts of debris . . . all up and down the street.” At various times, residents of Ontario Street were unable to park their cars in their driveways due to obstructions.

On March 21, 1990, plaintiff walked across her neighbor’s yard in an attempt to find a construction manager to assist in clearing a path to her driveway. In order to avoid walking through a muddy area, plaintiff chose to walk through a pile of debris, which consisted of pipes, wire, and bricks. Plaintiff fell when her foot slipped on some “blue turquoise” colored pipes.

As a result of the accident, plaintiff suffered torn ligaments in her feet and a fractured bone in her right foot. She claimed medical expenses in the amount of \$571.07, lost wages in the amount of \$828.00, and \$150.00 for housekeeping services.

Plaintiff brought suit against the City and Memphis Light, Gas and Water Division (“MLGW”) in the General Sessions Court for Shelby County. The City then filed suit for indemnification against White Contracting, Inc. Following a hearing, the general sessions court held in favor of all defendants on the basis that the plaintiff’s negligence exceeded that of the defendants. On appeal to the circuit court, judgment was rendered in favor of plaintiff against the City in the amount of \$20,000.00. The trial court subsequently amended its judgment to reduce the amount of damages to \$15,000.00, and to attribute 50% negligence to White Contracting and 50% negligence to the City.

The City and White Contracting have raised several issues on appeal. However, we will address only one of defendants’ contentions, as we find it to be dispositive of this

case. That issue is whether the plaintiff was negligent to a sufficient degree to preclude recovery.

If the plaintiff was fifty percent or more negligent, she is barred from recovery under the doctrine of comparative negligence. McIntyre v. Balentine, 833 S.W.2d 52 (Tenn. 1992). In Perez v. McConkey, 872 S.W.2d 897 (Tenn. 1994), our Supreme Court held that issues involving implied assumption of the risk should be analyzed under the principles of comparative fault. The Court explained that “[a]ttention should be focused on whether a reasonably prudent person in the exercise of due care knew of the risk, or should have known of it, and thereafter confronted the risk; and whether such a person would have behaved in the manner in which the plaintiff acted in light of all the surrounding circumstances, including the confronted risk.” Id. at 905.

It is uncontroverted that the area was torn up and scattered with debris during construction. This fact is the sole evidence from the record upon which defendants’ liability may be predicated.

However, there is more pervasive evidence of plaintiff’s negligence evinced in the record. Plaintiff admitted that she knew of the existence and location of the pipes, yet she chose to walk over them. She stated that there was clear visibility and that nothing obstructed her vision. Thus, she was not encountering an unknown or hidden risk. She also testified that she recognized and understood that the construction caused a potentially dangerous condition and that she should thus use extra care. Consequently, plaintiff understood the danger that the pile of debris presented, but disregarded such danger and voluntarily exposed herself to it. Owen v. Arcata Graphics/Kingsport Press, 813 S.W.2d 442 (Tenn. App. 1990). She conceded that there were alternate paths that she could have chosen, even though they were less convenient. Plaintiff testified that White Construction “did their best” to provide access to the road by placing gravel and helping to clear the walks. Forbes, the construction manager, testified that White Construction erected warning signs and barricades around potentially hazardous areas.

It is inescapable that a construction project of this nature will yield a certain amount of debris and disorder. In the absence of additional or more persuasive evidence that the state of the subject construction site was unreasonable, we cannot conclude that defendants' negligence exceeded that of the plaintiff.

Accordingly, we reverse the judgment of the trial court and hold that the evidence preponderates against the trial court's finding that defendants were 100% at fault. Instead, we find that plaintiff was at least 50% negligent and is thereby precluded from recovery. Costs on appeal are adjudged against plaintiff, Lela Cummings (Swindle), for which execution may issue if necessary.

HIGHERS, J.

CONCUR:

FARMER, J.

LILLARD, J.