

us but they were tried together and are before us on a joint record and will be treated as having been consolidated both at trial and on this appeal.

The Plaintiffs-Appellants, Terry Jarnigan and wife, Kathy Jarnigan, and Arlie Stuart and wife, Sherry Stuart, filed suits against Defendant-Appellee City of Newport Utilities Board. In their complaints, they alleged that on April 22, 1993, the Defendant was performing sewer line construction work on Main Street in the City of Newport and on the same date at approximately 11:30 p.m., Plaintiff Terry Jarnigan was operating his vehicle in an easterly direction on Main Street when it struck a manhole cover which had been removed from its proper location by Defendant. They alleged the manhole cover had been left in the roadway, or adjacent to the roadway, by Defendant in a negligent manner, without precautions being taken to see it would not become a hazard to traffic on Main Street. As a proximate result of Defendant's negligence, Plaintiff's vehicle struck the manhole cover, causing the vehicle to leave the roadway and strike an embankment adjacent to the roadway, resulting in personal injuries and property damage to Plaintiff Terry Jarnigan and personal injuries to Plaintiff Arlie Stuart who was riding in the automobile as a guest passenger.

Plaintiffs Terry Jarnigan and Arlie Stuart each asked for \$75,000 for their personal injuries and Kathy Jarnigan and Sherry Stuart each asked for \$10,000 for loss of consortium.

The complaints of Jarnigans and the Stuarts, as pertinent, contained the same allegations as to acts of negligence of the Utility Board and resulting injuries, except Arlie Stewart

alleged he was riding as a guest passenger with Terry Jarnigan. Each of the Jarnigans and Stuarts sought the same damages.

The Utilities Board, for answer, admitted it was a branch of the city government of Newport and that the claims of Plaintiffs were governed by the Tennessee Governmental Torts Liability Act, TCA § 29-20-201, et seq. It denied all acts of negligence alleged by the Plaintiffs. It said the accident and resulting injuries were due to the negligence of Terry Jarnigan. As an affirmative defense, it averred Plaintiffs' complaints were tort actions against a governmental entity and the complaints failed to state the torts were committed by a governmental employee within the scope of his employment and failed to state a claim upon which relief could be granted.

Upon the trial of the case, neither of the Plaintiffs knew what caused their automobile to leave the paved portion of the street on which they were traveling and crash into a railroad retaining wall, resulting in their injuries.

The proof showed the City of Newport was in the process of paving Main Street on the day of the accident. Also, the Utility Board was putting new manhole covers on the sewer line manholes to raise the manhole covers to the level of the new pavement. In doing so, the employees of the Utility Board would remove the old manhole covers and place them next to the railroad retaining wall which ran parallel with Main Street and across a drainage ditch about three feet from Main Street, the street on which the Plaintiffs' car was traveling at the time of the accident.

After the accident, the right front wheel of the car in which the Plaintiffs were riding came to rest either on or adjacent to one of the old manhole covers. Upon seeing the proximity of the manhole cover to the front wheel of his car, Plaintiff Terry Jarnigan concluded he struck the manhole cover on the street and that was the cause of his accident. Mr. Jarnigan's testimony, as pertinent to the accident, was as follows:

"Q. As you were going west on Main Street, how fast were you going, do you recall?

"A. Twenty, maybe twenty-five, somewhere around that area.

"Q. Did you have your headlights on?

"A. Yes, sir.

"Q. Did your headlights work?

"A. Yes, sir.

"Q. As far as the lighting conditions where this accident happened, were there street lights right there?

"A. There is a street light....I mean, there was a light there but it's not where the wreck happened, it's back a little bit further towards some kind of a garage now that they use.

"Q. Now...how was the pavement there at the time?

"A. The pavement was rough. I mean, there wasn't no holes in it....You can drive on it, it's no problem, it's a little shaky, but I mean there's no big humps or holes in it.

"Q. Were you having any problem staying on the road or anything?

"A. No.

"Q. Had you traveled this roadway few or many times?

"A. Many times.

"Q. Okay. As you were going down through there were you keeping a lookout ahead of you for anything that might be on the roadway?

"A. Well, I was looking, keeping my eyes ahead of me....

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"Q. As you were going down through there did you see anything in the roadway?

"A. No, sir.

"Q. Can you tell the Court exactly what happened?

"A. Yeah. Well, we were really talking and driving....I didn't see anything in the road. Really, the only thing I remember was my car getting loose from me and hitting the railroad track.

"Q. How would you describe the force of hitting that railroad track?

"A. Very hard.

"Q. What did it do to you in the car?

"A. Well, it totaled the car.

* * *

"Q. Was there anything about the pavement that caused you to go off to the side of the road?

"A. No, sir.

"Q. The pavement had nothing to do with it?

"A. No, sir.

"Q. Now this retaining wall that's along the railroad tracks, there's some distance between the retaining wall and the edge of the roadway, is that correct?

"A. Yes, sir.

"Q. A few feet?

"A. Yeah, a couple of feet anyway.

"Q. Does that area slope down toward the roadway or it is level with it?

"A. There is a ditch, sort of a trench that runs down through there, not real deep. It's level and then sinks off and then goes up against the bottom of the railroad.

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"Q. Now, after [the officer] left did you look around the car?

"A. Yeah, I went around the car, because I really didn't know at the time, you know, what had happened. I thought an A frame might have jerked me out of the road. So, I went around with Officer Shults, I didn't have a light, he had a flashlight, when we went around my front tire was setting in between big old forks of this manhole and I said, 'There, it wasn't the A frame, it was the manhole cover.' And the picture shows where it scooted the manhole cover from the pavement plumb out into the ditch. There's marks on the road that shows where the manhole cover and the tire scooted over into the ditch."

The Plaintiffs called Officer Lynn Shults, a patrolman for the City of Newport, as a witness. Officer Shults testified he was on duty at the time the accident occurred and came upon the scene of the accident shortly after it occurred. He testified the right front portion of Plaintiff's car was up against the railroad retaining wall. He testified: "There was a manhole cover to the right front wheel of Mr. Jarnigan's vehicle. I don't recollect if it was up on it, I know it was against it because we worked his vehicle back away." Officer Shults's testimony was in contradiction to the testimony of Mr. Jarnigan concerning skid marks from the pavement to the point where the car came to rest. His testimony on cross-examination was as follows:

"Q. Mr. Shults did you see any marks on the pavement which would indicate that a manhole cover had been pushed, pressed, slid across the pavement toward where you found it at rest against the railroad track?

"A. No sir, not at the time that I was investigating this accident, no.

"Q. And did you find any marks in the loose, in the soil, in the grassy area that would have indicated that a manhole cover had been pushed along by an automobile up to the point where you found it at rest against the railroad?

"A. No, sir.

"Q. But you did find tire tracks in that soft area, in the grassy area, that led up to the manhole cover?

"A. To the point where the front tire was up against or on the manhole cover.

"Q. All right. The manhole cover that was in place in the street.

"A. Yes, sir."

Mr. Doyle Lynn Barnes, who was foreman of the Utility Board work crew who were removing the old manhole covers and replacing them with new ones on the day the accident occurred, was called as a witness. He testified that when an old manhole cover was removed, it was placed adjacent to the railroad retaining wall and directly opposite the manhole from which it had been removed. The purpose of locating the old manhole covers in this exact position was to make it easy to find them when they were to be removed from the premises. He was shown a picture of the manhole cover here at issue and its location in relation to the manhole from which it had been removed. He testified that in his opinion the manhole cover was in the same location where it had been placed when removed from the manhole.

The testimony of Plaintiff Stuart was to the effect that he had no idea as to how or why the accident at issue occurred.

His testimony relating to the accident, as pertinent, was as follows:

"Q. As you were driving or riding with him down Main Street that night was anything about his driving that was out of the ordinary?

"A. No, sir.

"Q. Was he speeding?

"A. No, sir.

"Q. Was he driving recklessly at all?

"A. No, sir.

"Q. Do you remember exactly what happened there at the accident scene or what you remember and if you can just tell the Court?

"A. Just like he said, a big jerk and hit, you know, and that was it, it was that fast."

The trial court, in his determination of the case, as pertinent, said: "Well, the plaintiffs...they say they don't know what happened. The burden of proof is on the plaintiffs to prove that this company [sic] was negligent, careless, did something an ordinary cautious person wouldn't do under the circumstances and that that was the cause of this accident. Now something happened, I don't know what happened.

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"There's too much speculation for me to say that this company [sic] was negligent and I hesitate to dismiss lawsuits but it's guesswork, it's speculation, nobody is sure what happened. The burden of proof is on the plaintiff to prove by a preponderance of the evidence and I don't think there's anything in the record to show that."

We concur with the trial court and affirm. The cost of this appeal is taxed to the Appellants and the case is remanded to the trial court for any further, necessary proceedings.

Clifford E. Sanders, Sp.J.

CONCUR:

Herschel P. Franks, J.

Charles D. Susano, Jr., J.