IN THE COURT OF APPEALS OF TENNESSEE

LARRY W. PHELPS, Plaintiff-Appellant, v. WET WILLY'S FIREWORKS SUPERMARKET OF TENNESSEE, INC. and MID AMERICAN FIREWORKS COMPANY, Defendants-Appellees.	) C/A NO. 03A01-9605-CV-00166)))))))) APPEAL AS OF RIGHT FROM THE) SEVIER COUNTY CIRCUIT COURT))))))) HONORABLE REX HENRY OGLE,) JUDGE	FILED March 14, 1997 Cecil Crowson, Jr. Appellate Court Clerk

For Appellant

JOHN M. NORRIS
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For Appellees

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O P I N I O N

VACATED AND REMANDED

Susano, J.

Larry W. Phelps[1] sued [2] Wet Willy's Fireworks Supermarket of Tennessee, Inc. (Wet Willy's) and Mid American Fireworks Company (Mid American) for damages arising out of an incident involving a firecracker. The complaint, as pertinent to this appeal, alleges a breach of the implied warranty of merchantability, T.C.A. § 47-2-314[3]; the plaintiff claims that a fireworks device--a "Whistling Gemini Missile" (Gemini Missile)--distributed by Mid American and sold to the plaintiff by Wet Willy's malfunctioned and struck his right eye, causing him to lose sight in that eye. After the plaintiff rested in this jury case, the trial court granted the defendants' motion for directed verdict. The plaintiff appealed, arguing that the trial court erred in directing a verdict for the defendants. We agree with the plaintiff.

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[1]The plaintiff Joyce Phelps, who was married to Larry W. Phelps at the time of the accident, took a voluntary nonsuit as to her suit before the presentation of evidence.

[2]The plaintiff took default judgments against other named defendants.

[3]T.C.A. § 47-2-314 provides as follows:

> (1) Unless excluded or modified (§ 47-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.
>
> (2) Goods to be merchantable must be at least such as:
> (a) pass without objection in the trade under the contract description; and
> (b) in the case of fungible goods, are of fair average quality within the description; and
> (c) fit for the ordinary purposes for which such goods are used; and
> (d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
> (e) are adequately contained, packaged, and labeled as the agreement may require; and
> (f) conform to the promises or affirmations of fact made on the container or label if any.
>
> (3) Unless excluded or modified (§ 47-2-316) other implied warranties may arise from course of dealing or usage of trade.

On July 3, 1992, the plaintiff purchased four Gemini Missiles from defendant Wet Willy's. A Gemini Missile is approximately 2-3/4 inches long measured from the top of the missile to the bottom of its base. The diameter of the missile is approximately the same as the diameter of a lead pencil. The missile's base has four legs designed to hold it in an upright position for "launching." The fuse for lighting the missile extends from the bottom of the missile down in the vicinity of the four legs of the base. A drawing of the Gemini Missile in the appellees' brief is attached as Appendix A to this opinion. The Gemini Missile has the following warning/instruction[4]:

WARNING
FLAMMABLE
USE ONLY UNDER CLOSE
ADULT SUPERVISION.
FOR OUTDOOR USE ONLY.
PLACE ON HARD, OPEN SURFACE.
DO NOT HOLD IN HAND
LIGHT FUSE AND GET AWAY.

When it was dusky dark on Independence Day, 1992, the plaintiff decided to ignite his Gemini Missiles, using the bed of his pickup truck as a base for "blast off." Mr. Phelps testified that he set the first missile in an upright position and lit the fuse. Before it ignited, the missile fell over; it was then pointing in the direction of a person standing nearby. He knocked the missile off the truck bed onto the ground and it exploded. He placed the second missile on the truck bed in an upright position and was careful to make sure it was standing up straight. He lit the fuse, whereupon it ignited and went about ten feet in the air

[4]No attempt is made in this opinion to reflect the warning/instruction to scale. This is not necessary because the issue of conspicuous display is not present in this case.

where it exploded. He placed the third missile on the truck bed in an upright position, made sure it was properly positioned, lit the fuse, turned away and started walking toward his wife, who was nearby. When he was eight to ten feet from the truck, he heard a "p-ssss" sound pass his left ear. At that time something struck him in his right eye, penetrating his eye between the pupil of the right eye and the bridge of his nose. This resulted in Mr. Phelps losing useful vision in that eye, and precipitated this litigation.

At the conclusion of the plaintiff's proof, the defendants moved for a directed verdict on two grounds--first, that there was no competent proof to show there had been a malfunction of the missile, and second, that there was no credible evidence that an actionable malfunction was the proximate cause of the plaintiff's injuries.

The trial judge opined that he was satisfied "that something from [the Gemini Missile] caused [the plaintiff's] damage"; but he found no evidence of a breach of the warranty of merchantability. Because of this perceived deficiency in the proof, he granted the defendants' motion, withdrew the case from the jury, and dismissed the complaint. Mr. Phelps appealed. He contends that there was evidence from which the jury could have reasonably concluded that a breach of the warranty of merchantability proximately caused the damage to his eye.

We measure the propriety of the trial court's action against the well-established standard of review:

> [the] usual rules relating to directed verdicts. . . require that the trial judges and the appellate courts take the strongest legitimate view of the evidence in favor of the [nonmoving party], allow all reasonable inferences in his [or her] favor, discard all countervailing evidence and deny the motion where there is any doubt as to the conclusions to be drawn from the whole evidence. A verdict should be directed only when a reasonable mind could draw but one conclusion. (Citation omitted).

Crosslin v. Alsup, 594 S.W.2d 379, 380 (Tenn. 1980). The ultimate question for us is whether a "reasonable mind" could *only* conclude that there was no breach of the warranty of merchantability and/or no showing of causation, even assuming a breach of the warranty.

Two witnesses, the plaintiff and his former brother-in-law, Stewart Millan, testified as to the operative facts. The following excerpts fairly present the gist of their testimony:

Plaintiff

> Q. How high is the bed on this truck?
>
> A. I'd say it's probably two-and-a-half or three foot.
>
> Q. Met you about waist?
>
> A. Just a little bit below my waistline. But I lit it and was going to the, you know, to the car to get my cup of coffee. I did -- I heard something go by my left ear, you know, just like a p-ssss, you know, and I felt something in my right eye like a -- it didn't hurt real bad like a spark or maybe a bug was flying in it, you know, and I just grabbed my eye because, like I said, it didn't hurt real bad to start off with.
>
> Q. How far were you from the truck?
>
> A. I was probably eight or maybe ten foot.

* * *

Q. Now, let’s go back for a moment. When you lit the Whistling Gemini, which direction was it pointed?

A. Straight up.

Q. Was it sitting on a flat surface?

A. It was sitting in the center of a 2 by 6 pressure treated board.

Q. Was the wind blowing or anything?

A. No, it was calm as could be that night.

* * *

Q. Let’s go back for a moment to when this occurred on July the 4th, 1992, and you mentioned that after you lit this Whistling Gemini you took a few steps away and then heard this whooshing sound near your head?

A. Yes, sir.

Q. Was that sound different or the same as the sound that the previous Whistling Gemini had made when you shot it off?

A. It sounded the same, just -- well, it’s kind of hard to explain.

Q. All right. Well, you didn’t light anything else on that truck?

A. No, sir. I only lit those three, and then they threw me in the back of the car. They didn’t even give me time to grab nothing.

Q. The whistling sound that you heard next to your head, was it -- I don’t know how else to describe it, but could it have been anything else other than that Whistling Gemini that you just lit?

A. That’s the only thing I can think of because that was the only thing at that time that was going on.

* * *

Q. Okay. Now we get to the third one, and you take it and you set it there and it’s all nice and straight?

A. Yes, sir.

Q. Okay. Your wife is over here somewhere.

And I believe after you set it up that you said that your wife said, “I’ve got you a cup of coffee”?

A. Yes.

Q. You said let me light this and I’ll come and get the coffee?

A. Yes, sir.

Q. Perfectly straight, okay?

A. Okay.

Q. So you light it and you turn and you walk towards your wife --

A. Yes, sir.

Q. -- as in this picture over her, and your back is to this?

A. Yes, sir.

Stewart Millan

A. When he was lighting it, I was about, oh, about four or five steps behind him.

Q. Where I am approximately?

A. Yes.

Q. What were you doing?

A. I was watching Larry.

Q. And did you see him light this one?

A. Yes, sir, he lit it.

Q. All right, then what?

A. The --

Q. What did he do?

A. Well, he turned around and was coming over towards Joyce.

Q. He was over here somewhere?

A. Yes. And the next thing I knew, it came around and just about hit me because I was standing next to him.

> Q. Did you start over towards Joyce also or kept where you were?
>
> A. I was standing there, and Larry was coming towards me.
>
> Q. Did you see the missile leave the truck?
>
> A. I didn't actually see it leave the truck, but it was coming from the truck right around just like it was on something. It just went right in his eye.
>
> Q. You saw it go from the truck to Mr. Phelps?
>
> A. Yes, sir.
>
> Q. And you saw it hit him in the eye?
>
> A. Yes.
>
> Q. How far were you from that?
>
> A. I was right with him. Because when he grabbed his eye and went down like that, blood started dripping, and I just grabbed him and went.

As previously indicated, the trial court found that there was evidence from which the jury could have concluded that the Gemini Missile or some part of it struck the plaintiff's right eye, causing him to lose sight in that eye. The defendants take issue with that finding, contending that the plaintiff's testimony presented a factual scenario that is at variance with established rules of physics and therefore should not be considered as credible evidence. They contend that the plaintiff's testimony was to the effect that the missile came from behind him, shot by his left ear, and then reversed direction and came back and hit him in the right eye. They rely upon the following exchange between the plaintiff and counsel for the defendants during cross examination:

> Q. Going back to the laws of physics, you're not making any claim, are you, that you're

> walking this way and the Whistling Gemini goes by the side of your head and instantly turns around and comes back and hits you in the eye, are you?
>
> A. That's the only thing that I can figure out because there was nobody else shooting anything, and that was the only thing that was done.
>
> Q. That would be a complete violation of all the laws of physics, wouldn't it?
>
> A. Well, yeah.[5]

The defendants are correct that impossible testimony is not credible evidence and cannot be used to resist a motion for directed verdict. The pertinent principle is well stated in ***Nelms v. Tennessee Farmers Mutual Insurance Company***, 613 S.W.2d 481 (Tenn. App. 1978):

> [The material evidence rule in a jury case] does not mean that the appellate courts must accept as credible evidence the impossible. Our courts recognize and follow the "physical evidence rule." Courts may disregard impossible or palpably improbable testimony and treat it as no evidence. Further, testimony of facts inherently impossible and absolutely at variance with well-established and universally recognized physical laws is not credible evidence. (Citation omitted).

Id. at 483. However, even if the plaintiff's testimony is viewed as presenting an impossible factual scenario, that does not close our inquiry. We must discard all evidence inconsistent with the plaintiff's theory of recovery. Furthermore, we are required to look at the totality of the evidence, not just the plaintiff's

[5]Other than what might be inferred from his response to the question, there is nothing in the record to indicate that Mr. Phelps is an educated man or otherwise conversant with the "law of physics."

testimony.

Mr. Millan testified unequivocally that the Gemini Missile hit the plaintiff's right eye. He said he was facing the pickup truck from which the missile came, saw it while it was in flight, and, most importantly, saw it strike the plaintiff's right eye. We do not understand his testimony to recite a set of facts contrary to the law of physics. He simply stated the missile left the truck and struck the plaintiff's eye. This is what he observed from his vantage point close to the plaintiff.

In ***Harvey v. Wheeler***, 423 S.W.2d 283 (Tenn. App. 1967), the defendant claimed that he was entitled to a directed verdict because the plaintiff admitted that she got into his vehicle when "she believed him to be intoxicated." *Id*. at 285. In that case, the plaintiff complained that she was injured when the defendant lost control of his vehicle, skidded off the highway, and turned over. Under the law in effect at the time of the ***Harvey*** case, a plaintiff was guilty of contributory negligence, and hence barred from recovery, if he or she "*knew or should have known of the driver's intoxication at the time the guest-passenger volunteered to ride in the automobile*." *Id*. (Emphasis in ***Harvey*** opinion).

The Court of Appeals in ***Harvey*** opined that the defendant's motion for directed verdict would have been well taken "if the plaintiff's testimony was all the evidence in the record," but pointed out that "it [was] not." *Id*. The court observed that two other witnesses had testified and their testimony "place[d] in issue the question of whether or not the defendant was under the

influence of an intoxicant at the time the accident occurred." *Id*. The Court of Appeals affirmed the jury's verdict for the plaintiff, and rejected the defendant's argument that he was entitled to a directed verdict at the close of the plaintiff's proof. In the course of its opinion, the Court of Appeals, quoting from other cases, stated the relevant principle of law:

> "The rule is well established in this state that where an interested party in his testimony make [sic] a material statement of fact negativing his right of action or defense, and no more favorable testimony appears, he is bound by it. (Citations omitted). However, where there is an explanation, or as here, *where other credible evidence is presented, the weight and credibility of the negative testimony becomes a question for the determination of the jury and cannot be determined by the court as a matter of law.* See Annotations 80 A.L.R. 627; 169 A.L.R. 798" (citation omitted).

Id. (Emphasis added).

The defendants contend that the plaintiff's testimony is impossible. Interpreted in one way, that testimony does appear to be highly suspect; however, we cannot say that the defendants' "spin" on that testimony is the only possible interpretation of what the plaintiff said. We believe the interpretation to be placed on that testimony and the weight to be given it are questions for the jury. In any event, the testimony of Mr. Millan that he saw the Gemini Missile hit the plaintiff's eye, without more, made out a jury issue on the question of causation.

The trial court and the defendants were all of the opinion that there was no evidence to support the plaintiff's claim

that the defendants breached their respective warranties of merchantability. The plaintiff contends that the breach can be found in the fact that, according to him, the Gemini Missile was not "fit for the ordinary purposes for which such goods are used." *See* T.C.A. § 47-2-314(2)(c). We agree with the plaintiff that there is evidence from which a jury could reach such a conclusion.

In ***Browder v. Pettigrew***, 541 S.W.2d 402 (Tenn. 1976), the Supreme Court, quoting from the case of ***Scanlon v. General Motors Corp***., 65 N.J. 582, 326 A.2d 673 (1974), addressed the concept of "fit[ness] for the ordinary purposes for which such goods are used":

> "A product is defective if it is not fit for the ordinary purposes for which such articles are sold and used . . . [citations omitted]. Establishing this element requires only proof, in a general sense and as understood by a layman, that 'something was wrong' with the product. As a rule the mere occurrence of an accident is not sufficient to establish that the product was not fit for ordinary purposes. However, additional circumstantial evidence, such as proof of proper use, handling or operation of the product and the nature of the malfunction, may be enough to satisfy the requirement that something was wrong with it. . . ." (Citations omitted).

In the instant case, a jury could reasonably conclude that the defendants warranted that if a person lit the fuse and then honored the admonition to "get away," the missile would go straight up in the air, and not be a potential source of harm to a person some eight to ten feet away. Furthermore, a jury could reasonably conclude that the missile, instead of going straight up in the air, went along a horizontal path and struck the right eye of the

plaintiff, who was then some eight to ten feet away from the truck. Based upon the evidence before it, a jury could reasonably conclude that "'something was wrong' with the product"--that it did not work as the defendants had warranted it would work and that this malfunction was a breach of the warranty of merchantability.

We believe that when the evidence is evaluated in the required manner--in the strongest legitimate view favoring the plaintiff--the plaintiff established his right to have a jury pass on the merits of his case. Whether a breach occurred and whether that breach proximately caused the plaintiff to lose sight in his right eye are questions for the jury. We express no opinion as to the ultimate answer to either question.

The dissent argues that *all* of the proof offered by the plaintiff regarding the underlying facts of this firecracker incident must be disregarded as "impossible" or "palpably improbable." This is based on the dissent's view that the subject proof "defies the law of physics." We respectfully disagree with the dissent's conclusion.

The dissent correctly states that we can take judicial notice of facts that are universally known. It follows from this that we can disregard testimony that we all know is impossible. For example, we all know that the sun sets in the west. Obviously, we would disregard a witness's "positive" statement that he or she saw the sun set in the east; but we do not believe that the plaintiff's proof lays out a set of facts about this firecracker rocket that are such as to be universally known to be contrary to

the law of physics. Anyone who has observed a rocket malfunction on television can attest to the unpredictability of its path--the erratic zigzags that it makes as it proceeds along its unintended journey. We do not believe there is a universally accepted truth suggesting, with "judicial notice" certainty, that this firecracker rocket could not behave in a similar fashion.

We freely acknowledge that a jury may ultimately agree with the dissent's conclusion that this incident could not have occurred as the plaintiff claims; but we cannot say, at this juncture in the proceedings, that this is the *only* conclusion that a jury could reasonably reach.

We also do not agree with the dissent's observation that Stewart Millan's testimony can only be construed as being identical to that of the plaintiff's. The relevant portions of Millan's testimony can be found as Appendix B to this opinion.[6] As can be seen, the testimony of Millan contains a number of vague references--references to "here," "came around," "turn around," and "like this." The jury may have observed what these references meant; but we are not in a position to make these observations. We are dealing with a "cold" record and that record does not tell us what these words mean in the context of this controversy.

Millan testified as an *observer* of events; the plaintiff was a *participant* in those events. Millan observed with his eyes; the plaintiff was hit in his eye. Millan testified unequivocally that he saw the Gemini Missile hit the plaintiff's eye. Given the site of the plaintiff's injury, it is a fair reading of his

[6]In fairness to the dissent, it should be pointed out that Appendix B was not a part of the majority opinion as originally drafted.

testimony that he assumes, from what was going on around him, that the Gemini Missile or some part of it hit his eye.

We would respectfully suggest that the dissent reaches its conclusion regarding Millan's testimony by weighing that testimony--by assigning a certain meaning to words such as "here" and "came around" and "turn around" and "like this." We cannot escape the fact that Millan said he *saw* the Gemini Missile hit the plaintiff's eye. We believe it is up to the jury to evaluate, weigh, and accept or reject Millan's version of these events.

The judgment of the trial court is vacated and this case is remanded for trial. Costs on appeal are taxed against the appellees.

_____
Charles D. Susano, Jr., J.

CONCUR:

_____
Herschel P. Franks, Jr.

_____
Clifford E. Sanders, Sp. J.

IN THE COURT OF APPEALS OF TENNESSEE

LARRY W. PHELPS	:	SEVIER CIRCUIT
	:	CA No. 03A01-9605-CV-00166
Plaintiff-Appellant	:	
	:	
	:	
vs.	:	
	:	
	:	
WET WILLY'S FIREWORKS SUPERMARKET OF TENNESSEE, INC. and MID-AMERICAN FIREWORKS COMPANY	:	
	:	
Defendants-Appellants	:	

DISSENTING OPINION

Sanders, Sp.J.

I respectfully dissent from the opinion of the majority in reversing the trial court. I would affirm the action of the trial court under the application of the "Physical Facts Rule".

It was the theory of the Plaintiff, in his complaint and upon the trial of the case, that after he lit the fuse of the missile he turned around and started walking away from it. When he was some eight or ten feet away from it, he heard it pass his left ear. After the missile passed his head, it made an instant turn around and came back and hit him in his right eye. In his complaint, Plaintiff described the malfunction of the missile as follows: "Following the directions found on the fireworks device, Plaintiff Larry W. Phelps placed the device on a flat, horizontal surface, lit the fuse, and turned and began moving away from the device. Instead of firing straight up into the air, the device took an erratic flight and <u>came around the Plaintiff's head</u> and struck him in the right eye." (Emphasis ours.)

The only witness the Plaintiff offered to testify as to how the accident occurred was Mr. Stewart Millan whose testimony was to the effect that he saw the missile do exactly what the Plaintiff claimed it did.

At the conclusion of Plaintiff's proof, the Defendants did not offer any proof, but moved for a directed verdict or dismissal of the complaint.

The trial court did not file a memorandum opinion setting forth a finding of facts and conclusions of law as his reason for directing a verdict. The following are, however, excerpts from his statements in his discussion of the issues with counsel for the

parties prior to sustaining the motion. As pertinent, he said: "[W]e don't know what happened after he [Plaintiff] lit that object." "[A]nd nobody knows what happened to it. It could have fallen over." "It had to be either by sparks coming off of it [missile] or something hit him in the eye from it." "[T]hat's what I think." "[I]n this particular case there are so many unanswered questions about what happened to the fireworks itself. Nobody who testified saw it leave and go up. You know, it could have done this, it could have done that, and there is no direct proof what happened to it...."

I concur with the trial court in his statements of the failure of competent evidence to show what actually happened in this case. I also would affirm the action of the trial court in dismissing the complaint, but primarily on different grounds.

Mr. Phelps testified he didn't know what struck him in the eye. He didn't see the object that struck him and he didn't see or hear an explosion of the object which struck him. He did not think the injury to his eye could have been a fragment from the missile itself, as it may have passed by his ear, because of the extensive damage to his eye. As pertinent, he testified his doctor "told me I had a hole in my eye, a puncture wound". He also said, "The hole went all the way through and tore the retina in the back of my eyeball, so it couldn't have been a fragment". It was his theory of the accident that it was the Gemini Missile he heard pass his ear as he was walking away from it, and after it passed his ear it turned around, came back, and struck him in the eye. On cross-examination, he was asked, and testified, as follows:

Q. "You're not making any claim, are you, that you're walking this way and the Whistling Gemini goes by the side of your

head and instantly turns around and comes back and hits you in the eye, are you?

A. "That's the only thing I can figure out because there was nobody else shooting anything, and that was the only thing that was done.

Q. "That would be a complete violation of all the laws of physics, wouldn't it?

A. "Well, yeah."

The Plaintiff called as witnesses two people who were present on the evening the accident occurred. He called Shannon Underwood, the daughter of his former wife, who testified she watched the Plaintiff light each of the Gemini Missiles. She was sitting at a table about 10 feet away when he lit the missile here at issue, after which he turned and walked away. She testified she did not see the missile leave the truck bed nor did she see it after it left the truck bed, but seven or eight seconds later she saw him holding his eye and it was bleeding.

The only other witness to testify was Stewart Millan, who was present when the accident occurred. He testified he saw the missile hit Mr. Phelps in the eye. As pertinent, Mr. Millan testified he was standing four or five steps behind Mr. Phelps and saw him light the fuse to the missile. Mr. Phelps then turned around and started walking away from it. Mr. Millan then stated, "[A]nd the next thing I knew it came around and just about hit me because I was standing next to him." He was asked if he saw the missile leave the truck, to which he replied, "I didn't actually see it leave the truck; but it was coming from the truck right around like it was on something. It just went right in his eye." Mr. Millan's testimony was to the effect he saw the missile pass

Mr. Phelps, turn around and come back and hit him in the eye. On cross-examination, counsel for the Defendant asked him, "Are you testifying that you saw this missile leave the truck, come up here between you and turn around, like this and hit him in the eye?" Mr. Millan replied, "Yes, sir. That's what I said."

The majority opinion does not address this most critical part of Mr. Millan's testimony, claiming he saw the missile turn around, come back, and hit Mr. Phelps in the eye. The majority opinion conveys the impression Mr. Millan saw the missile coming from the direction of the truck from which it was launched and in the normal path of flight it struck Mr. Phelps in the eye. The last paragraph, beginning at the bottom of page nine of the majority opinion analyzes the testimony as follows: "Mr. Millan testified unequivocally that the Gemini Missile hit the Plaintiff's right eye. He said he was facing the pickup truck from which the missile came, saw it while it was in flight, and, most importantly, saw it strike the Plaintiff's right eye. We do not understand his testimony to recite a set of facts contrary to the law of physics. He simply stated the missile left the truck and struck the Plaintiff's eye. This is what he observed from his vantage point close to the Plaintiff."

I agree that Mr. Millan made the statements attributed to his testimony, but this is only a glossary of his testimony. In my view, Mr. Millan's admission that the facts he was testifying to were that the missile passed Mr. Phelps, turned around, reversed its direction of flight, and then struck Mr. Phelps in the eye is a correct analysis of Mr. Millan's testimony. It is also my view that only by failing to give consideration to this portion of Mr. Millan's testimony could the majority be justified in holding that

his testimony failed "to recite a set of facts contrary to the law of physics".

I cannot see any distinction in the law of physics applicable to this missile, launched by force to travel in a straight flight path, which would differ from that of any other missile, projectile, or bullet launched by force to travel in a straight flight path. The undisputed testimony is that the Plaintiff was walking away, with his back to the missile. For the missile to have struck the Plaintiff in a straight flight path it would have struck him in the back part of his body. It did not do this. In order to hit Mr. Phelps after it passed him, it would have had to do the impossible. As Mr. Millan testified, it would have had to turn around and reverse course to strike him, which would defy the law of physics and be at variance with well-established and universally recognized physical laws.

Appellees argue this court should take judicial notice of the fact that Mr. Millan's testimony that he saw the Gemini Missile pass between him and the Plaintiff, suddenly reverse its direction and strike Plaintiff in the eye, defies the law of physics. In support of this insistence they cite the case of **Pemberton v. American Distilled Spirits Co.**, 664 S.W.2d 690 (Tenn.1984) at 693, where the court quoted as follows:

> "Facts which are universally known may be judicially noticed provided they are of such universal notoriety and so generally understood that they may be regarded as forming a part of the common knowledge of every person. **Standard Life Insurance Co. v. Strong**, 19 Tenn.App. 404, 89 S.W.2d 367 (1935) at 424 quoting Jones on Evidence; also see McCormick, Law of Evidence, West Pub.Co., at 688."

Appellees also rely upon the case of **Gordon's Transports,**

Inc. v. Bailey, 294 S.W.2d 313, 41 Tenn.App. 365 (1956) where the court said:

> It seems to be now firmly established that appellate courts may disregard impossible or palpably improbable evidence and treat it as no evidence. (Emphasis in original.) (Citations omitted.)
>
> 'A statement of alleged facts inherently impossible and absolutely at variance with well-established and universally recognized physical laws will not supply the required scintilla of evidence, a theory inherently impossible based on a statement of alleged facts certainly cannot supply it.' **Louisville Water Co. v. Lally**, 168 Ky. 348, 182 S.W. 186, 187, L.R.A. 1961), 300.

Id. 331.

The evidence shows Exhibit #I in the record to be an exact duplicate of the Whistling Gemini Missile which Mr. Phelps lit immediately prior to his injury and which allegedly caused his injuries. An examination of the missile reveals it is designed to travel in a straight line and in the direction it is pointing when its propellant is ignited. There is nothing which would cause it, or even permit it, to reverse its path of flight and travel in the opposite direction from which it was launched unless some unusual external force were applied.

In the case of **State v. Hornsby**, 858 S.W.2d 892, 894 (Tenn.1993), Justice Drowota, speaking for the supreme court, said:

> The so-called "physical facts rule" is the accepted proposition that in cases where the testimony of a witness is entirely irreconcilable with the physical evidence, the testimony can be disregarded. .... That is, where the testimony of a witness "cannot possibly be true, is inherently unbelievable, or is opposed to natural laws," courts can declare the testimony incredible as a matter of law and decline to consider it. .... "[W]here undisputed physical facts are entirely inconsistent with and opposed to testimony...the physical facts must control. No jury can be allowed to return a verdict based upon oral testimony which is flatly opposed to physical facts, the existence of which is incontrovertibly established." Id. at 713-14. Courts have made it

> clear that in order for testimony to be considered incredible as a matter of law, it must be unbelievable on its face, i.e., testimony as to facts or events that the witness physically could not have possibly observed or events that could not have occurred under the laws of nature. (Citations omitted.)

The majority opinion does not take issue with **State v. Hornsby**, but cites the case of **Nelms v. Tennessee Farmers Mutual Insurance Company**, 613 S.W.2d 481 (Tenn.App.1978) and **Harvey v. Wheeler,** 423 S.W.2d 283 (Tenn.App.1967) as support for not applying the "physical facts rule" in the case at bar.

I have no argument with either the **Nelms** case or the **Harvey** case. I think both of those cases were correctly decided under the evidence in each of them; however, neither of those cases is controlling in the case at bar. The **Nelms** case involved a claim by the Plaintiff against his insurance company for alleged theft of a Jeep automobile. Plaintiff claimed he had parked the Jeep in a remote area early in the morning, about 6:30. The sheriff found the Jeep about three or four hours later, but not where it had allegedly been parked. It had been completely stripped and rolled over an embankment. Because the Jeep had been stripped, there was snow in the body of the Jeep and certain tire tracks in the frozen ground, the sheriff was of the opinion the Jeep had not been stolen on the day it was reported but had been rolled over the embankment several days before. The jury returned a verdict for the Plaintiff. The insurance company appealed, insisting the trial court should have directed a verdict under the "physical facts rule". This court affirmed the trial court's finding that although Plaintiff's proof was suspect, the proof showed the Jeep could have been stripped in a matter of 45 minutes to one hour and the snow found in the Jeep body could have been collected from the snow on

the ground as it rolled down the embankment, and these were issues for the jury to decide.

In the **Harvey** case, the Plaintiff sued for personal injuries she received while riding with the defendant as a guest passenger. Plaintiff alleged the defendant was driving at a high rate of speed when he lost control of the car and skidded off the highway and turned over. The complaint alleged defendant was negligent in (1) failing to keep a proper lookout, (2) failing to have his automobile under control, (3) driving at a dangerous rate of speed, and (4) operating a motor vehicle while under the influence of an intoxicant. Defendant admitted he lost control of his automobile just before the accident but said it was because he had to take evasive action to avoid an automobile that turned into his path. Defendant denied he was under the influence of an intoxicant at the time of the accident. In the trial of the case, the plaintiff testified that to her knowledge the defendant had several "mixed" drinks that evening. About 11:30, p.m., she told the defendant "he had had enough to drink" and asked him to take her home. She "thought he was drunk and asked permission to drive defendant's automobile", but he refused. The police officer who investigated the accident testified the defendant had been drinking but, in his opinion, the defendant was not under the influence of an intoxicant. At the close of plaintiff's proof the defendant moved for a directed verdict on the grounds (1) there was no evidence upon which a verdict could be predicated and (2) the plaintiff was guilty of proximate contributory negligence in riding with the defendant, knowing he had been drinking alcoholic beverages. The trial court overruled the motion. The defendant elected to stand on the motion and offered no proof. The jury

returned a verdict in favor of the plaintiff, and defendant appealed.

On appeal, this court found there was conflicting testimony as to whether or not the defendant was intoxicated at the time of the accident, which presented a jury question. In affirming the trial court, Justice Cooper, who was then a member of this court, as pertinent, said:

> The present case is singular in that the plaintiff readily admits that she knew the defendant had been drinking "mixed" drinks throughout the evening, and that she believed him to be intoxicated. Based on this testimony, the defendant insists that the trial court should have directed a verdict in his behalf under the above stated general proposition of law. We would agree if the plaintiff's testimony was all the evidence in the record; but it is not. We have the testimony of the defendant and of the investigating police officer, which places in issue the question of whether or not the defendant was under the influence of an intoxicant at the time the accident occurred. The issue of defendant's intoxication being in doubt, it would follow that the issue of plaintiff's contributory negligence would be in doubt and would be a question for the jury - for, after all, the plaintiff could not voluntarily assume a risk which did not, in fact, exist. (Emphasis ours.)

There is no question but what the **Nelms** court was correct in holding "[I]t is not a question of whether this court believes the plaintiff's evidence. The issue to be resolved in this court is: Is there credible evidence offered by the plaintiff which is capable of being believed by reasonable men who are sitting on the jury?" The court then enumerated the issues to be decided by the jury, such as: Was there time for the Jeep to have been stripped between the time it was allegedly parked by the plaintiff and the time it was found by the sheriff? Was the snow found in the body of the Jeep collected two days before the date of the alleged parking or as it rolled down the embankment? etc.

Nor is there any question but what the Harvey court was correct in holding: "The issue of defendant's intoxication being in doubt, it would follow that the issue of plaintiff's contributory negligence would be in doubt and would be a question for the jury."

The majority opinion in the case at bar fails to point to any evidence in the record which would require the jury to make a comparison of the credibility of witnesses or how the missile could have struck the plaintiff in the eye without violating the law of nature. On page 11 of the majority opinion is quoted the following principle of law as stated by this court in the **Harvey** case:

> The rule is well established in this state that where an interested party in his testimony make [sic] a material statement of fact negativing his right of action or defense, and no more favorable testimony appears, he is bound by it. (Citations omitted). However, where there is an explanation, or as here, where other credible evidence is presented, the weight and credibility of the negative testimony becomes a question for the determination of the jury and cannot be determined by the court as a matter of law. See Annotations 80 A.L.R. 627; 169 A.L.R. 798. (citation omitted).

It appears from the record the **Harvey** court was relying on this authority in support of its holding that the plaintiff was not bound by her testimony that "she thought [defendant] was drunk" when she got in the car with defendant.

The majority fails to demonstrate how this principle of law supports the reversal of the holding of the trial court in the case at bar. It does, however, bind the Plaintiff by his testimony in which he admitted the fact that for the missile to go "by the side of your head, instantly turn around and come back and hit you in the eye.... That would be a complete violation of all the laws of physics."

It appears, however that the majority quotes the principle of law set out above in support of its argument immediately following the quote above, as follows: "The defendants contend that the plaintiff's testimony is impossible. Interpreted in one way, that testimony does appear to be highly suspect; however, we cannot say that the defendants' 'spin' on that testimony is the only possible interpretation of what the plaintiff said. We believe the interpretation to be placed on that testimony and the weight to be given it are questions for the jury. In any event, the testimony of Mr. Millan that he saw the Gemini Missile hit the plaintiff's eye, without more, made out a jury issue on the question of causation."

The majority argues that the Defendants' contention the plaintiff's [sic] testimony is impossible, is correct, but that it is not "the only possible interpretation of what the plaintiff [sic] said," but they do not suggest what those other interpretations might be, nor can I think of any. They further argue they believe the interpretation to be placed upon that testimony and the weight to be given it are questions for the jury. This would be in complete derogation of the uniform holding in this jurisdiction that the "physical facts rule" is a rule of law for the court and not a question of fact for the jury.

In the case of **Carpenter v. King**, 488 S.W.2d 383, 386 (Tenn.App.1972) this court, in addressing this issue, said:

> "When the testimony introduced by a plaintiff is shown by the physical facts and surroundings to be absolutely untrue, or when it is so inherently improbable as that no reasonable person can accept it as true or possible, the Circuit Judge should take the case from the jury, notwithstanding oral statements tending to show a right of action." **Southern Railway Co. v. Hutson** (1936) 170 Tenn. 5, 91 S.W.2d 290. See also: **Nashville, Chattanooga & St. Louis Railroad v. Justice** (1914) 5 Tenn.Civ.App. (Higgins) 69, and the authorities therein cited; **Gordon's Transports, Inc. v. Bailey** (1956) 41 Tenn.App. 365, 294 S.W.2d 313; **Camurati v. Sutton** (1960) 48 Tenn.App. 54, 342 S.W.2d

732; **McCray v. Hughes** (1964) 53 Tenn.App. 533, 385 S.W.2d 124.

The majority further argues: "In any event, the testimony of Mr. Millan that he saw the Gemini Missile hit the Plaintiff's eye, without more, made out a jury issue on the question of causation." No authority is cited to support this issue. It is negated, however, by the holding of the supreme court in **State v. Hornsby**, supra, 858 S.W.2d footnote #2, p.895, the court quoting with approval as follows:

> "In the review of a judgment based on a jury verdict [in a civil case], the appellate courts in this state do not weigh the evidence or decide where the preponderance lies but merely determine whether there is material evidence to support the verdict. (Citations omitted.). This does not mean that the appellate courts must accept as credible evidence the impossible. Our courts recognize and follow the physical evidence rule. Courts may disregard impossible or palpably improbable testimony and treat it as no evidence. Further, testimony of facts inherently impossible and absolutely at variance with well-established and universally recognized physical laws is not credible evidence." (Citations omitted.). **Nelms**, 613 S.W.2d at 483.

The Plaintiff had the burden of proving by credible evidence he suffered personal injuries as a result of the malfunction of the missile. The only evidence offered by the Plaintiff to meet this burden was the testimony of Mr. Millan. His testimony is not disputed by other witnesses nor is there other testimony for a jury to consider. Since the testimony of Mr. Millan is to be treated "as no evidence", the Plaintiff has failed to carry his burden of proof. I would affirm the judgment of the trial court.

It is a well-established rule in this jurisdiction that a trial court will not be reversed where the correct result has been

reached, though predicated on an erroneous reason. See **Perlberg v. Jahn**, 773 S.W.2d 925 (Tenn.App.1989).

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Clifford E. Sanders, Sp.J.