IN THE COURT OF APPEALS OF TENNESSEE

AT KNOXVILLE

GREGORY ALLEN, BNF LISA BUMPASS,	) C/A NO. 03A01-9903-CV-00067
Plaintiffs-Appellants,	) HAMILTON CIRCUIT
vs.	) HON. L. MARIE WILLIAMS, JUDGE
MICHAEL L. PAYNE,	) AFFIRMED AND
Defendant-Appellee.	) REMANDED

JEFFREY W. RUFOLO, SUMMERS & WYATT, P.C., Chattanooga, for Plaintiffs-Appellants.

MICHAEL R. CAMPBELL, CAMPBELL & CAMPBELL, Chattanooga, for Defendant-Appellee.

O P I N I O N

Franks, J.

In this negligence action against defendant scout master, the jury returned a verdict assigning 50% of the fault for plaintiff's injuries to plaintiff, and 50% to defendant.

Plaintiff has appealed, and urges this Court to reapportion the jury's allocation of fault between the two parties, or set aside the jury's verdict and remand for a new trial.

In the case of *Turner v. Jordan,* 957 S.W.2d 815 (Tenn. 1997), the Supreme Court addressed the issue of whether it is appropriate for the Trial Court to

reallocate the percentage of fault, rather than granting a new trial. *Id.* at 823. The Court said that the Trial Court had to grant a new trial if the verdict was contrary to the weight of evidence, and could not reapportion the comparative fault in its role as the thirteenth juror. *Id.* In sum, the Court instructed that the standard of review mandates that a jury's findings of fact be set aside if there is no material evidence to support the verdict, and that the Trial Court could not reapportion fault, but only grant a new trial if there was no material evidence to support the verdict. *Id.* On the rationale of *Turner*, it logically follows that a reviewing court is precluded from reapportioning fault, as well. *Also see Fye v. Kennedy*, 991 S.W.2d 754, 762 (Tenn. Ct. App. 1998) (jury case in which we ruled that *Turner* "precludes even a partial reallocation of a jury's finding as to comparative fault" by the trial court).

Our research reveals other comparative fault jurisdictions are in accord with this view, since the jury's apportionment of fault will not be set aside if there is material evidence to support it. *See Metzger v. Barnes*, 141 Cal. Rptr. 257 (Cal. Dist. Ct. App. 1977) ("appellate court may not substitute its judgment for that of the jury or set aside the jury's finding if there is any evidence which under any reasonable view supports the jury's apportionment."); *Martin v. Bussert*, 193 N.W.2d 134 (Minn. 1971)("we will not substitute our judgment for that of the jury unless there is no evidence reasonably tending to sustain the apportionment"); *Neider v. Spoehr*, 165 N.W.2d 171 (Wis. Sup Ct. 1969)("if there is credible evidence, which under any reasonable view, supports the jury's finding as to comparative negligence, the finding will not be set aside.").

Thus, the question becomes whether there is any material evidence in the record to support the jury's verdict.

This action was based on a theory of negligence, which requires plaintiffs to prove breach of a duty of reasonable care of the Scout Master who was in charge of a lock-in, as well as causation. *McCall v. Wilder*, 913 S.W.2d 150 (Tenn. 1995). The evidence showed that Payne was present at all times in the gymnasium where the boys were playing, and that he went to sleep at some point around midnight while the boys and the assistant scoutmaster were still awake. Defendant Payne had

instructed the boys regarding their conduct, and had observed no inappropriate behavior on their part before he fell asleep. Payne further testified that the boys could have come to him at any point if inappropriate behavior occurred, but that they did not .

The proof also demonstrated that Allen had participated in throwing ice, playing basketball, throwing a wet foot ball, and was running on the wet basketball court when he slipped and fell, and sustained his injuries. There is material evidence in the record to support the jury's verdict allocating 50% fault to each party. Payne could reasonably be faulted for falling asleep when he was supposed to be supervising, although at the time he fell asleep, his assistant scoutmaster was awake. Allen could also be faulted by the trier to fact for playing on the wet basketball court even though he understood that the water/ice could make the court slippery. Both Allen and Payne could reasonably foresee that their behavior could result in an injury, and we affirm the Trial Court judgment affirming the jury's verdict.

Finally, plaintiffs argue that it was inappropriate for the jury to apportion 50% of the fault for this accident to Allen, since he was only 12 years old at the time. The jury, however, was properly instructed regarding the standard of care applicable to minors. *Cook v. Spinnaker's of Rivergate*, 878 S.W.2d 934 (Tenn. 1994).) This issue is without merit.

We affirm the judgment of the Trial Court and remand, with the cost of appeal assessed to appellants.

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Herschel P. Franks, J.

CONCUR:

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Charles D. Susano, Jr., J.

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D. Michael Swiney, J.