

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
January 28, 2016 Session

**S. CARMACK GARVIN, JR., ET AL. v. JOY MALONE**

**Appeal from the Circuit Court for Williamson County  
No. 2010655 James G. Martin, III, Judge**

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**No. M2015-00856-COA-R3-CV – Filed February 26, 2016**

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Plaintiffs and Defendant were involved in a motor vehicle accident. Plaintiffs allege Defendant was negligent in causing her van to run into the rear of their car and that as a result of Defendant's negligence, Plaintiffs suffered damages. During trial, Defendant introduced photographs of the vehicles taken immediately after the collision, which the trial court permitted, over Plaintiffs' objection, for the purpose of impeaching Plaintiffs' testimony. The evidence was heard by a jury, which determined Defendant was not at fault. Plaintiffs filed a motion for a new trial, which the trial court denied. On appeal, Plaintiffs argue the trial court erred by allowing the jury to consider Defendant's photographic evidence for purposes of impeachment. We conclude the trial court did not err and affirm its judgment.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court  
Affirmed**

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., P.J., M.S., and RICHARD H. DINKINS, J., joined.

August C. Winter, Brentwood, Tennessee, for the appellants, S. Carmack Garvin, Jr. and Barbara F. Garvin.

Russell E. Reviere, Keely N. Wilson, and Brandon W. Reedy, Jackson, Tennessee, for the appellee, Joy Malone.

## OPINION

### I. FACTUAL AND PROCEDURAL BACKGROUND

S. Carmack Garvin, Jr., was driving his car north on Royal Oaks Boulevard in Franklin, Tennessee, on December 18, 2009, and his wife, Barbara F. Garvin, was in the passenger seat. A police officer was driving south along the same road when his car crossed into the Garvins' lane unexpectedly, causing Mr. Garvin to brake and stop his car. Joy A. Malone was driving a van behind the Garvins and stopped her van when she saw the Garvins' vehicle stopped, but she was unable to prevent her van from hitting the rear bumper of the Garvins' vehicle.

The Garvins filed a negligence action against Ms. Malone in an effort to recover the damages they claim they suffered as a result of the accident. The Garvins alleged that Mr. Garvin suffered serious and permanent injuries to his cervical and lumbar spine that required surgery. Mr. Garvin initially sought compensatory damages in the amount of \$385,000, which he later increased to \$825,000. Mrs. Garvin claimed she suffered injury to the supporting tissues of the back and neck, and she asserted a claim for loss of consortium. She initially sought damages in the amount of \$25,000, and she increased her request to \$75,000 prior to trial.

The case was tried before a jury. During trial, Mr. Garvin testified as follows:

Q: [H]ow did you feel after the impact?

A: I had - - I had a sharp pain in my neck and back immediately, and I did scream out.

Q: Did - - were you able to get out of the car?

A: I did get out of the car.

....

Q: Describe the impact.

A: Somewhere in between sticking a needle in you and sticking a sword in you or a knife.

Q: I mean the impact of the vehicles. Was it a light impact, medium, heavy?

A: It - - the way it affected me, I felt it as heavy.

Q: So you felt there was a heavy impact?

A: Well, yes. I mean, it impacted me heavily.

....

Q: And this heavy impact to your vehicle, there was no visible damage to the back of your vehicle, was there?

A: I didn't go look at it.

Q: Would it help you to see that to know that?

A: I - - I think I - - my - - I believe what I said was, I felt a heavy impact to myself.

Q: Well, a heavy impact to yourself has to come from some source. We already talked about that. And that source was that heavy impact to the rear of your vehicle, correct?

A: Correct.

Q: There was no other impact from any other source, was there?

A: No, sir.

....

Q: But for you being moved around in your vehicle because of this heavy impact, there would be no other reason for your back and neck to be hurting severely at that point, correct?

A: That's correct.

Q: And that's what happened?

A: That's what happened.

Q: You had no cuts or bruises?

A: No, sir.

Q: No part of your body that you know of struck anything in the vehicle?

A: No, sir, not that I'm aware of.

Q: Your airbag didn't deploy?

A: No, sir.

Mr. Garvin further testified that when his car was struck from behind, neither his head nor his chest hit the steering wheel or dashboard, and he was not thrown to the left or to the right.

Mrs. Garvin testified about the impact from Ms. Malone's van as follows: I wasn't thrown; I was just thrown forward. You know, I didn't hit - - my body didn't hit anything except to just react. But it was, you know, pretty - - enough to make me sore for days.

Ms. Malone testified about the accident as follows:

Q: And what happened with the Garvin vehicle, then, ahead of you?

A: The Garvin vehicle. Okay. . . . They're sort of going up, you know, slow over. And I don't know if it was a startle or what; the car in front was going slow, sort of lost it a little bit down, and then all of a sudden, the Garvins, when the police car was pointing toward sort of the driver's door, he slammed the brake on.

Q: Who slammed the brake on?

A: The Garvins did, brake on. And what I did, because of the van behind me, I tapped - - I tapped the brake. I went straight down, trying to do antilock, because I was going to turn and go over into the grassy bank and miss them. . . . So - - and I just left my foot on the floor there. So what happened with my car is, I tapped the passenger side [rear bumper], about maybe an eight-inch mark, but didn't see any paint off or anything, and I stayed on the antilock to see who was going to move or whatever, you know.

Prior to the start of trial, the Garvins filed a motion in limine asking the court to

prohibit Ms. Malone from introducing into evidence photographs, auto repair documents, or testimony for the purpose of showing a correlation between the damage to the parties' vehicles and the injuries sustained by Mr. Garvin unless the evidence was supported by expert testimony. The court did not rule on the Garvins' motion before the trial began, but it addressed this issue outside the jury's hearing during the trial. After the Garvins testified about the impact, and after Ms. Malone testified about the lack of visible damage to the parties' vehicles, Ms. Malone sought to introduce photographs of the parties' vehicles that she took immediately following the accident to show the impact caused little to no visible damage to either vehicle. She also wanted to use the photographs to impeach Mr. Garvin's testimony that the impact from her van was "heavy."

The trial court permitted Ms. Malone to introduce the photographs into evidence and gave the jury the following instructions:

The Court has been requested to give a limiting instruction, and I have agreed to do that, because I think it's appropriate under our rules of evidence. And this is my instruction to you concerning photographs and testimony regarding the damage to the vehicles, and that is that the Court acknowledges that - - and you're to acknowledge that there are those cases outside the heartland of common knowledge that slight force causes great injury or great force causes little injury. In order to account for those possibilities, where photographs of vehicle damage is admitted, you should remember that some bad accidents result in little injury and some minor accidents result in very serious injury. You have now seen the vehicle -- the pictures of the vehicles that were involved showing the rear of the plaintiffs' vehicle and the front of the defendant's vehicle. And the Court is instructing that you are not to make any inference regarding any correlation between property damage to the vehicles and the personal injury damages claimed by the plaintiffs. Thank you.

Ms. Malone's attorney then asked the trial court to instruct the jury that they could consider the photographs for impeachment purposes. The court agreed and gave the jury the following additional instruction:

Ladies and gentlemen, during the course of the testimony of Mr. and Mrs. Garvin in this case, you heard their testimony regarding the force of the impact, and you are authorized to consider the testimony that's been offered by Ms. Malone, both her verbal testimony and the photographs that she has placed into evidence, to impeach or contradict the testimony that you have heard from Mr. and Mrs. Garvin. So you are authorized to use the evidence for that purpose. Does that make sense? All right. Thank you.

Following the close of evidence, the jury deliberated and returned a verdict finding Ms. Malone “not at fault.” The trial court then ordered that the jury verdict was the judgment of the trial court and that the Garvins “shall go forth and take nothing, and judgment is hereby entered in favor of the Defendant, Joy A. Malone, and against the Plaintiffs.” The Garvins moved for a new trial arguing, in part, that the trial court erred in admitting Ms. Malone’s photographs for impeachment purposes. The trial court denied the Garvins’ motion. This appeal followed.

On appeal, the only argument the Garvins make is that the trial court misapplied controlling law and committed reversible error by admitting photographs of the parties’ vehicles to impeach the Garvins’ testimony. The Garvins contend the photographs should not have been admitted in the absence of expert testimony because the Garvins did not testify that the vehicles had sustained significant damage. As a result of the trial court’s alleged error, the Garvins contend they are entitled to a new trial.

## II. ANALYSIS

### A. Standard of Review

“The admissibility of evidence at trial is within the sound discretion of the trial court, and we will not overturn a trial court’s decision to admit or exclude evidence without finding a clear abuse of discretion on the part of the trial judge.” *Newcomb v. Kohler Co.*, 222 S.W.3d 368, 385 (Tenn. Ct. App. 2006) (citing *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442-43 (Tenn. 1992)); see also *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 222-23 (Tenn. Ct. App. 1999). This discretion extends to a trial court’s decision to admit photographic evidence following a motion in limine. *Allen v. Albea*, 476 S.W.3d 366, 377 (Tenn. Ct. App. 2015). If a photograph is relevant and the probative value outweighs any prejudicial effect, it may be introduced into evidence. *State v. Reid*, 213 S.W.3d 792, 838 (Tenn. 2006); see *State v. Morris*, 24 S.W.3d 788, 810 (Tenn. 2000) (“Tennessee courts follow a policy of liberality in the admission of photographs in both civil and criminal cases.”).

A trial court abuses its discretion when it fails to consider the applicable law and relevant facts in reaching its decision. *Konvalinka v. Chattanooga-Hamilton Cnty. Hosp. Auth.*, 249 S.W.3d 346, 358 (Tenn. 2008). An abuse of discretion occurs if a trial court causes an injustice to a party by “(1) applying an incorrect legal standard, (2) reaching an illogical or unreasonable decision, or (3) basing its decision on a clearly erroneous assessment of the evidence.” *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). Our Supreme Court has described the abuse of discretion standard of review thusly:

The abuse of discretion standard of review envisions a less rigorous review

of the lower court's decision and a decreased likelihood that the decision will be reversed on appeal. *Beard v. Bd. of Prof'l Responsibility*, 288 S.W.3d 838, 860 (Tenn. 2009); *State ex rel. Jones v. Looper*, 86 S.W.3d 189, 193 (Tenn. Ct. App. 2000). It reflects an awareness that the decision being reviewed involved a choice among several acceptable alternatives. *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 708 (Tenn. Ct. App. 1999). Thus, it does not permit reviewing courts to second-guess the court below, *White v. Vanderbilt Univ.*, 21 S.W.3d 215, 223 (Tenn. Ct. App. 1999), or to substitute their discretion for the lower court's, *Henry v. Goins*, 104 S.W.3d 475, 479 (Tenn. 2003); *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998). The abuse of discretion standard of review does not, however, immunize a lower court's decision from any meaningful appellate scrutiny. *Boyd v. Comdata Network, Inc.*, 88 S.W.3d 203, 211 (Tenn. Ct. App. 2002).

*Id.* The *Beecher* Court directs appellate courts to review a lower court's discretionary decision to determine:

(1) whether the factual basis for the decision is properly supported by evidence in the record, (2) whether the lower court properly identified and applied the most appropriate legal principles applicable to the decision, and (3) whether the lower court's decision was within the range of acceptable alternative dispositions.

*Id.*

#### B. Admission of Photographs

The Garvins rely on the case *Hardeman County v. McIntyre*, 420 S.W.3d 742 (Tenn. Ct. App. 2013), for their argument that Ms. Malone's photographs should not have been admitted into evidence to impeach their testimony in the absence of expert testimony. *Hardeman County* also involved a vehicular accident, but unlike this case, the relevant issue in *Hardeman County* was the speed of the ambulance that collided with Ms. McIntyre's car. *Hardeman Cnty.*, 420 S.W.3d at 749. The defendant in that case, Ms. McIntyre, asserted the ambulance driver breached his duty of care to her by driving too fast. *Id.* The trial court relied on photographs depicting the damage to Ms. McIntyre's car to conclude that "the ambulance was traveling at a pretty good rate of speed." *Id.* at 746. On appeal, the Court of Appeals had to determine whether the evidence preponderated against the trial court's finding that the ambulance driver was driving too fast. *Id.* at 749. The *Hardeman County* Court noted that although the record included photographs showing that Ms. McIntyre's car had suffered a "substantial" impact, the record lacked any other evidence from which the finder of fact could infer

excessive speed from the circumstances. *Id.* at 752. The *Hardeman County* Court reversed the trial court's judgment that the ambulance driver was negligent, explaining that speed may not be inferred merely from photographs depicting damage to the vehicles as a result of a collision. *Id.* Instead, the *Hardeman County* Court explained, the factfinder must have additional evidence, such as skid marks on the road, the distance a vehicle overshot a point of impact, or the distance a pedestrian was thrown by the impact, to determine a vehicle's speed. *Id.*

Unlike *Hardeman County*, Ms. Malone's speed is not at issue. The Garvins do not contend Ms. Malone's speed was the cause of her negligence. However, the Garvins attempt to analogize the facts of *Hardeman County* with the facts of this case by arguing that based on the *Hardeman County* Court's holding that mere photographs are not probative of a correlation between property damage and speed, "mere photographs are not probative of a correlation between property damage and personal injury; mere photographs without expert testimony also are not probative of a correlation between property damage and the force of impact." According to the Garvins' argument, the trial court should not have permitted Ms. Malone's photographs to impeach the Garvins' testimony unless the Garvins or Ms. Malone had testified that one or both of the vehicles involved in the collision had sustained substantial property damage. We disagree. Contrary to the Garvins' contention, the *Hardeman County* case does not prevent a jury from considering photographic evidence to infer the force of impact from a collision in the absence of expert testimony.

Our rules of evidence define "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." TENN. R. EVID. 401. If a piece of evidence assists the trier of fact to resolve an issue of fact, it is relevant. *Allen*, 746 S.W.3d at 377 (citing *Indoccio v. M & A Builders, LLC*, 372 S.W.3d 112, 117 (Tenn. Ct. App. 2011) (itself quoting Neil P. Cohen, et al., TENNESSEE LAW OF EVIDENCE § 4.01[4], at 4-9 (5th ed. 2005))). Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." TENN. R. EVID. 403. The Garvins do not argue that the probative value of Ms. Malone's photographs are outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury. Instead, they argue that the photographs are not relevant, in the absence of expert testimony, to the issue of whether the collision heavily impacted the Garvins' car.

The facts of *Allen v. Albea*, 476 S.W.3d 366 (Tenn. Ct. App. 2015), are very similar to those here, and the Court of Appeals' decision in that case is determinative of this appeal. The plaintiff and defendant in *Allen* were also involved in an automobile accident, and Mr. Allen sued Ms. Albea for damages he sustained as a result. *Allen*, 476



S.W.3d at 370. Mr. Allen filed a motion in limine to exclude photographs “depicting minimal or light property damage . . . to prove or suggest that Plaintiff was not injured or only minimally injured.” *Id.* The trial court in *Allen* denied Mr. Allen’s motion and allowed Ms. Albea to introduce the photographs during trial. *Id.* at 371. The jury returned a verdict in favor of Mr. Allen that he deemed insufficient, and he filed an appeal arguing, in relevant part, that the trial court erred by denying his motion to exclude from evidence photographs of the vehicles when no request for property damage was made and no expert was offered to provide scientific testimony regarding the correlation between property damage and personal injury. *Id.* at 372-73.

On appeal, the Court of Appeals affirmed the trial court’s ruling. *Id.* at 378. The Court wrote:

Upon review of the record in this case, we cannot say the trial court abused its discretion by denying Mr. Allen’s motion in limine to exclude photographs of the parties’ vehicles from admission into evidence. It is undisputed in this case that the parties’ vehicles sustained minimal damage. Additionally, as noted above, Mr. Allen testified with respect to the damage to his vehicle and stated that he repaired the damages himself. The weight to be given to the photographs introduced by Ms. Albea, and to Mr. Allen’s testimony, was a matter to be determined by the jury. We affirm on this issue.

*Id.*

The case *Williams v. Myers*, 1990 WL 12083 (Tenn. Ct. App. Feb. 15, 1990), involved a similar personal injury case where photographs were introduced to show the extent of damage to the cars involved. *Williams*, 1990 WL 12083, at \*3. In upholding the jury’s verdict on appeal, the Court of Appeals noted that the photographs showing minimal damage, together with the defendant’s testimony, “could readily have caused the jury to believe that plaintiffs were not injured as seriously as they contended.” *Id.* at \*4.

The Garvins testified about the impact they felt when Ms. Malone’s van hit the rear bumper of their car. Mr. Garvin testified that the impact felt “heavy” to him but that his body did not strike anything in the car as a result. Mrs. Garvin testified that the impact threw her forward but that her body made no contact with anything in the car either. Ms. Malone was entitled to defend the charges the Garvins were making against

her and to impeach the Garvins' testimony with any relevant evidence, including photographs.<sup>1</sup> She was not introducing the photographs as evidence of her speed, as in *Hardeman County*.

The Garvins have failed to show that the trial court abused its discretion in allowing the jury to consider Ms. Malone's photographs for the purpose of impeaching the Garvins' testimony regarding the impact they experienced as a result of the collision. As a result, we affirm the trial court's judgment denying the Garvins' motion for a new trial.

### III. CONCLUSION

The trial court's judgment is affirmed. Costs of appeal are assessed against the appellants, S. Carmack Garvin, Jr., and Barbara F. Garvin, for which execution shall issue if necessary.

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ANDY D. BENNETT, JUDGE

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<sup>1</sup>Ms. Malone asserts in her brief that the trial court should have permitted her to introduce the photographs as substantive evidence for the jury to consider in deciding several disputed questions of fact raised during the trial, including the force of impact. Because that issue is not on appeal, however, we will not address this contention by Ms. Malone.