

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 15, 2009 Session

CURTIS ROBIN RUSSELL, et al., v. ANDERSON COUNTY, et al.

**Direct Appeal from the Circuit Court for Anderson County
No. A4LA0692 Hon. Jon Kerry Blackwood, Circuit Judge**

No. E2008-00925-COA-R3-CV - FILED SEPTEMBER 8, 2009

In this wrongful death action, the Trial Court assessed 50% fault for the death to plaintiff mother, and 50% fault to defendant. The Complaint charged that the motor vehicle operator who struck decedent was at fault in the accident, but plaintiff settled with that defendant and the action was dismissed as to the defendant. The Trial Judge pretermitted the issue of fault chargeable to the dismissed defendant. On appeal, we vacate the Trial Court's Judgment and remand with instructions to rule on the pretermitted issue.

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

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, J., and JOHN W. MCCLARTY, J., joined.

Benjamin Lauderback, Knoxville, Tennessee, for appellant, City of Clinton, Tennessee.

Tasha C. Blakney and Ronald C. Koksals, Knoxville, Tennessee, for appellees, Curtis Robin Russell and Dorothy Louise Russell.

OPINION

This appeal arises from a wrongful death suit filed by plaintiffs, Curtis Robin Russell (Robin Russell) and Dorothy Louise Russell (Dorothy Russell)(collectively the Russells) following an accident on November 3, 2003 when the Russells' seven year old son, Curtis Tyler

Russell, was struck by a motor vehicle while crossing the street, resulting in the death of the child.

The Russells in this action joined as defendants the City of Clinton, Clinton Utilities Board, Anderson County, Anderson County Schools, Anderson County Board of Education and Ladislav M. Misek, the driver of the truck involved in the accident.

The Complaint alleged that the Russells' seven year old son attended a regional basketball tournament in Clinton with his family at the Clinton Middle School which is operated by Anderson County, Anderson County Schools and Anderson County Board of Education. Shortly after 7:00 p.m., Curtis left the gym of the school with his eleven year old cousin to retrieve a personal item from the cousin's family vehicle. The Complaint stated that at the intersection of North Hicks Street and West Board Street the boys started to cross West Broad Street in the cross walk when Curtis was struck by a vehicle driven by Ladislav Misek.

The Complaint asserted various causes of action against the defendants. As pertinent to this Opinion the Complaint alleged that Ladislav Misek, as the driver of the vehicle that struck Curtis, is liable to plaintiffs for failure to keep a proper lookout, failure to control his vehicle, failure to yield to a pedestrian in a crosswalk, and failure to exercise caution under the circumstances. Misek additionally was alleged to have violated Tenn. Code Ann. §§ 55-8-134, 55-8-136 and 55-8-153. Further, the Complaint stated that a blood test Mr. Misek submitted to following the accident showed the presence of a sedative-like medication that could effect his ability to operate a motor vehicle.

Defendant/appellant, the City of Clinton, filed an Answer to the Amended Complaint denying all claims made against it. The City of Clinton invoked the Tennessee Governmental Tort Liability Act (GTLA) and all immunities to which it was entitled under the Act as an affirmative defense. The City of Clinton also pled as an affirmative defense the doctrine of comparative fault as to the actions of Curtis and his parents as well as to the actions of all other defendants.

The Russells settled and dismissed their claims against Mr. Misek and the Clinton Utilities Board. Summary judgment was granted to the Anderson County Board of Education and Anderson County was voluntarily dismissed pursuant to Tenn. R. Civ. P. 41.01. The Russells' case against the City of Clinton was tried, without a jury, and the Trial Court entered an Order finding the City of Clinton and Mrs. Russell each 50% at fault for the wrongful death of Curtis. The Court stated that it was undisputed that the City of Clinton owned and controlled the intersection at issue and that the intersection is a school zone. The intersection was determined to be dangerous, defective and unsafe because it lacked pedestrian head signals as required by Section 4E.04 of the Manual of Traffic Control Bulletin (MUTCB). The MUTCB requires pedestrian head signals to be in place in a school zone at any signalized location. The Court found that a pedestrian head signal was accordingly required even after school hours. The Court also found the traffic light provided inadequate warning to pedestrians as they cross from the traffic island across Broad Street because the light is difficult to observe when the pedestrian is within two feet of the edge of the island. The Court concluded the City of Clinton was on notice of the defective condition of the intersection created by the lack of pedestrian head signals for two reasons. First, a School Board member had requested the placement of pedestrian head

signals at that particular intersection and the City of Clinton had investigated the cost of various types of signals in response to the request. Second, the Court noted the city was on notice because the MUTCB required use of a pedestrian head signal at the intersection as it was a signalized school zone. Based on these conclusions, the Court held that the City of Clinton was negligent in its failure to provide pedestrian head signalization for the intersection at issue and this negligence was in part the cause of Curtis' death.

The Court also concluded that Mrs. Russell was also negligent in allowing Curtis to leave the gym in the company of another child under the circumstances. The Court also found that Mrs. Russell's negligence was also a cause of her son's death and, after comparing her fault to that of the City of Clinton's, attributed each with 50% of the fault.

The City of Clinton filed a notice of appeal and the Russells filed a notice of cross appeal. This Court entered an order on July 17, 2009 stating that the appeal did not meet the requirements of an appeal pursuant to Tenn. R. App. P. Rule 3 because the record established that there had been no adjudication of the claim against Anderson County Schools nor had Ms. Russell's independent claim for negligent infliction of emotional distress been adjudicated. This Court ordered the parties to demonstrate to the Court that all issues are resolved or to furnish an order certifying the appeal pursuant to Rule 54.02, and the parties then complied with that order.

Upon reviewing the record, we pretermite all issues raised except whether the Trial Court erred in failing to consider the fault of all parties, specifically the driver of the vehicle that struck Curtis Russell?

Plaintiffs/appellees contend that the Trial Court erred when it failed to consider the fault of any parties other than the City of Clinton and Mrs. Russell. Specifically, plaintiffs argue that the fault of the driver of the truck that struck and killed Curtis, Ladislav Misek, should have been considered by the Trial Court. In support of this position, plaintiffs rely on *Lindgren v. City of Johnson City*, 88 S. W.3d 581 (Tenn. Ct. App. 2002) where this Court stated as follows:

The Trial Court has the responsibility to apportion fault to anyone having a degree of culpability. *See Carroll v. Whitney*, 29 S. W.3d 14, 22 (Tenn. 2000); *Dotson v. Blake*, 29 S. W.3d 26 (Tenn. 2000); *Bervoets v. Harde Ralls Pontiac-Olds, Inc.*, 891 S. W.2d 905 (Tenn.1994). The trier of fact in a comparative fault case, such as this, should first determine the total amount of the plaintiff's damages without regard to fault, and then apportion damages on the percentage of fault attributable to each tortfeasor. *Grandstaff v. Hawks*, 36 S. W.3d 482 (Tenn. Ct. App. 2000). In this case, the Trial Court did not follow this procedure, although defendant . . . had raised the comparative fault of [the dismissed defendant] as an affirmative defense.

Lindgren at 585.

The *Lindgren* case involved a claim under the GTLA. The Trial Court found the municipal defendant to be 100% at fault for the plaintiff's injuries but did not consider the fault of another defendant who had been dismissed pursuant to a compromise with the plaintiff. This

Court found the Trial Court erred when it failed to consider the fault of all tortfeasors and had “pretermitted the issue of whether any fault should be apportioned” to a party who had been dismissed from the lawsuit prior to trial, even though the municipal defendant had raised comparative fault of the dismissed party as an affirmative defense. The Court noted that the dismissed party had, like Mr. Misek, reached a settlement with the plaintiff, and this Court vacated the judgment against the municipal defendant and remanded with directions to the trial court . . . “ without hearing further proof, to determine the total amount of damages to which plaintiff would be entitled, and then determine the percentage of fault, if any, attributable to the [settling defendant], and then enter Judgment against [the municipal] defendant, based upon the percentage of fault attributed to the [municipal defendant] in accordance within the constraints of the Governmental Tort Liability Act.” *Id.*

We hold that the Trial Court committed reversible error when it failed to rule on the issue of negligence and fault to be attributed to Mr. Misek. We vacate the Judgment and remand.

We further hold there is material evidence relating to the culpability and fault to be attributed to Mr. Misek.¹

It is a basic requirement of due care in the operation of a vehicle that the driver keep a reasonably careful lookout for traffic upon the highway commensurate with the dangerous character of the vehicle and nature of the locality and to see all that comes within the radius of his line of vision both in front and to the side. *Jacocks v. Memphis Light, Gas & Water*, No. W2008-00802-COA-R3-CV, 2008 WL 4613570 at * 2 (Tenn. Ct. App. Oct. 13, 2008)(citing *Van Sickel v. Howard*, 882 S. W. 2d 794, 798 (Tenn. Ct. App.1994); *Fraday v. Smith* 519 S.W.2d 584, 587 (Tenn. 1974). The evidence shows that because Mr. Misek was admittedly aware of the presence of the children at the edge of the traffic island, Mr. Misek had a heightened duty of care because “[w]here the presence of children is known to the driver, Tennessee law places upon a driver a duty of care to consider childish behavior and to take precautions accordingly. *Kim v. Boucher* 55 S. W.3d 551, 558 (Tenn. Ct. App.,2001)(citing *Staley v. Harkleroad*, 501 S. W. 2d 571 (Tenn. Ct. App.1973).” The *Kim* court explained that “[c]hildren, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them, must calculate upon this, and take precaution accordingly.” *Kim* at 558 (citing *Townsley v. Yellow Cab Company*, 145 Tenn. 91, 237 S.W. 58 (1922) (quoting *Ficker v. Cleveland etc., R. Co.*, 7 Ohio N.P. 600)); *see also Townsley v. Yellow Cab Co.*, 145 Tenn. 91, 237 S.W. 58 (1921).

¹ Misek was subpoenaed to testify at trial, but did not appear. Portions of his deposition were read into evidence. Misek, age 85, testified that he saw the boys standing right next to the curb on the island as he approached the intersection. He described his view of the boys as “just a glance”. While he stopped at the light, he looked down both Broad Street and Hicks Street to see if traffic was coming but he did not look to his left at the boys he had previously observed. When he entered the intersection he did not see the boys because he was not paying attention to them, he was paying attention to traffic. He never saw Curtis before the impact and he first thought he had hit an animal.

The Judgment of the Trial Court is vacated and the cause remanded to reconsider its Opinion and to apportion fault to anyone having a degree of culpability.

The cost of the appeal is assessed one half to the plaintiff and one-half to the City of Clinton, Tennessee.

HERSCHEL PICKENS FRANKS, P.J. _____