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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

John Watson **LITTLE** and Leslie Earl **Little**, Executors for
the Estate of Leslie H. **Little**, deceased, Plaintiffs/Appel-
lants,

v.

Michael **HOGAN**, Jeff Payne, and Mike Wilhelm Trucking,
Inc., Defendants/Appellees.

No. 01A01-9707-CV-00291.

Feb. 13, 1998.

APPEAL FROM THE CIRCUIT COURT OF BEDFORD
COUNTY AT SHELBYVILLE, TENNESSEE, HONOR-
ABLE LEE RUSSELL, JUDGE.

[D. Russell Thomas](#), [Herbert M. Schaltegger](#), 218 W. Main
St., Suite One, Murfreesboro, TN, 37130, Attorney For
Plaintiffs/Appellants.

[James D. Kay Jr.](#), Washington Square One, Suite 340M, 222
Second Avenue, North Nashville, TN, 37201, Attorney For
Defendants/Appellees.

OPINION

[HENRY F. TODD](#), PRESIDING JUDGE, Middle Section.

*1 The captioned executors filed this suit to recover dam-
ages for the wrongful death of 88 year old Leslie H. Little,
deceased, who lost his life in a motor vehicle collision at the
intersection of North Main Street and Colloredo Boulevard
in Shelbyville, Bedford County, Tennessee. Movement of
traffic through the intersection was controlled by the multi-
colored lights of an ordinary traffic control signal.

Several vehicles were present at the intersection at the time
of the collision. Two large transport trucks, being operated
on the business of Mike Wilhelm Trucking, Inc., ap-
proached the intersection from the north, moving south. One
of the Wilhelm trucks, operated by Jeff Payne, approached
the intersection in the left southbound lane, but did not enter
the intersection because its approach to the intersection was
blocked by the presence of a pick-up truck stopped in the
left lane waiting for the traffic signal to change. As the other
Wilhelm truck, operated by Michael Hogan, approached the

intersection in the right southbound lane, the signal for
southbound traffic changed to green and Hogan drove his
truck southward across the intersection.

The deceased approached the intersection from the south,
moving north, when the signal for northbound traffic turned
green, he entered the intersection and turned left (west)
across the two southbound lanes of North Main Street, in
the direction of Colloredo Blvd. West. The Wilhelm truck,
operated by Michael Hogan in the right southbound lane of
North Main Street, proceeded southward across the intersec-
tion and struck the right side of the vehicle of deceased.
After being struck by the Wilhelm truck, the vehicle of de-
ceased was propelled in a southerly direction to collide with
a northbound vehicle which had not arrived at the intersec-
tion, and then moved some distance southward to a point 65
or 70 feet from the point of the original collision with the
Wilhelm truck.

After striking the vehicle of deceased, the Wilhelm truck
operated by Hogan, proceeded southward in the right lane of
North Main Street to a point 295 feet from the point of colli-
sion.

At the subject intersection, North Main Street was desig-
nated as State Route 231. However, State Route 231 had al-
ternate routings in the city of Shelbyville. "Business South
231" continued south from the intersection through the city
square to its intersection with State Route 82. "Truck Route
231" turned right (west) on Colloredo Boulevard and con-
tinued thereon to its intersection with State Route 82, which
led to Lynchburg, the intended destination of both Wilhelm
trucks. The "truck route" around the city was somewhat
longer than the "business route" through the city.

The Trial Court ordered:

1. The motion for summary judgment in favor of Jeff Payne
is granted and all claims against Jeff Payne are dismissed
with prejudice. Mike Wilhelm Trucking, Inc. Is dismissed
with prejudice only as to all claims directed to Jeff Payne as
an employee, agent or driver of Mike Wilhelm Trucking,
Inc.

*2 2. The motion for summary judgment in favor of Mi-
chael Hogan is granted in part and denied in part. All claims
against Michael Hogan shall be dismissed with prejudice

with the exception of the issue of speed under the circumstances.

3. All claims against the defendants for punitive damages are dismissed with prejudice.

4. The defendant's motion for protective order is granted in part and denied in part. The plaintiffs are precluded from inquiry as to any records which do not relate to the particular delivery that defendant Mike Hogan was making on the date of the accident or the hiring of defendant Hogan as a driver. If the plaintiffs wish to seek additional records, and the defendants will not agree to the discovery, then the plaintiff must apply to the Court for permission to seek the information.

5. The plaintiffs' motion to compel is denied.

IT IS FURTHER ORDERED that this order is hereby expressly deemed a final judgment as to the dismissal of Jeff Payne as an employee, agent, or driver of Mike Wilhelm Trucking, Inc., there being no just reason for delay, all in accordance with [Rule 54.02 of the Tennessee Rules of Civil Procedure](#).

The plaintiffs have appealed and presented four issues. The first two issues are:

A. The Trial Court erred in granting Defendant Jeff Payne summary judgment when there are genuine issues of material fact which, when viewed in a light most favorable to the plaintiffs, and drawing all reasonable inferences therefrom, establish at least partial liability on the part of this Defendant for the death of Decedent Leslie H. Little.

B. Defendant Mike Wilhelm Trucking, Inc.

The Trial Court erred in granting the Defendant Mike Wilhelm Trucking, Inc. partial summary judgment when there are genuine issues of material fact which, when viewed in a light most favorable to the Plaintiffs, and drawing all reasonable inferences therefrom, establish at least partial liability on the part of this Defendant for the death of Decedent Leslie H. Little due to the actions of its agent, Defendant Jeff Payne, under the doctrine of *respondeat superior*.

In support of these issues, plaintiffs argue:

It has been established that Defendant Payne was proceeding south into the City of Shelbyville and into the business district rather than following the alternate state route around the downtown district.

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The Payne tractor-trailer rig was not following the posted truck route and was therefore in the wrong lane.

The presence of the Jeff Payne truck in the left southbound lane could be some indication that he intended to proceed south on the "Business Route", but, if so, he had not carried out the intent because his truck never entered the intersection before the other Wilhelm truck struck the vehicle of deceased.

Appellants' argue correctly that, if Payne had approached the intersection in the right lane in preparation for a right turn to follow the truck route, his truck would have blocked progress of the Hogan truck and would not have been in the left lane to obstruct the view of Michael in the direction of deceased. However, the test of the liability of Payne is the foreseeability of harm from his actions. There is no evidence that Payne should have known that the Hogan truck was approaching from his rear at high speed and that he should block its path by using the right lane to prevent Hogan from colliding with a northbound vehicle turning left across the path of Hogan.

*3 In [McClenahan v. Cooley, Tenn.1991, 806 S.W.2d 767](#), the question was the liability of the owner who left his keys in his vehicle. A thief stole the vehicle and a high speed chase by the policy resulted in the deaths of innocent persons. The Supreme Court held:

[4,5] This Court is of the opinion that the approach taken by the substantial (and growing) number of jurisdictions representing the minority view is the approach that should be taken in Tennessee, in part, because principles of common law negligence long established in this state provide a sufficient analytical framework to dispose of cases with fact patterns similar to the one presented in this appeal. First, it is axiomatic that in order for there to be a cause of action for common law negligence, the following elements must be established: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal, cause.

[6-8] Taken as a whole, our cases suggest a threepronged test for proximate causation: (1) the tortfeasor's conduct must have been a "substantial factor" in bringing about the harm being complained of; and (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence.

[9-12] With respect to superseding intervening causes that might break the chain of proximate causation, the rule is established that it is not necessary that tortfeasors or concurrent forces act in concert, or that there be a joint operation or a union of act or intent, in order for the negligence of each to be regarded as the proximate cause of the injuries, thereby rendering all tortfeasors liable.

"An intervening act will not exculpate the original wrongdoer unless it appears that the negligent intervening act could not have been reasonably anticipated."

"It is only where misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which such intervening acts contributed."

In the present case, this Court holds as a matter of law that no reasonable jury would find that Jeff Payne should have anticipated that the presence of his truck stopped in the left lane of traffic would create or contribute to the injury which occurred. The first issue therefore presents no ground for reversal.

Plaintiffs' insist that Wilhelm is liable for the fault of Payne under the doctrine of respondeat superior, but, without culpable fault of the agent, there is no vicarious liability of the principal. [Raines v. Mercer, 165 Tenn. 415, 55 S.W.2d 263](#)

[\(1932\): Goodman v. Wilson, 129 Tenn. 464, 166 S.W. 752 \(1914\); Loveman & Co. v. Bayless, 128 Tenn. 307, 160 S.W. 841 \(1913\).](#)

*4 No ground of reversal is presented by the first two issues.

Plaintiffs' third issue is:

(3) The Trial Court erred in granting Defendant Mike Hogan partial summary judgment as to all issues except for speed under the circumstances when there are genuine issues of material fact which, when viewed in a light most favorable to the Plaintiffs, and drawing all reasonable inferences therefrom, establish at least partial liability on the part of this Defendant for the death of Decedent Leslie H. Little under the theory of negligence *per se*.

Plaintiffs' argument in support of this issue is verbatim:

First, all arguments raised above with reference to negligence *per se* concerning Defendants Payne and Mike Wilhelm Trucking are full applicable and germane; the same statutes were violated by Defendant Hogan under the very same facts. Therefore, Defendant Hogan is guilty of negligence *per se*. Further, it is not at all unforeseeable that such negligence *per se* could or would lead to a fatal accident of this type. Had Defendant Hogan been following the designated state truck route around the downtown Shelbyville area, he would not have been approaching the intersection at between 30 and 40 miles per hour (Hogan Depo., pp. 35-36). Instead, he would have been moving much more slowly as he prepared to make the right-hand turn onto Coloredo Boulevard; it is a reasonable inference that but for Defendant Hogan's failure to follow the state truck route, he would have not collided with and killed the Decedent Mr. Little.

The foregoing quotation intimates that the failure of a truck to follow a "truck route" is unlawful, and therefore negligence *per se*. Appellants cite TCA § 54-5205 which authorizes the transportation department to select the streets upon which state highways are routed, and 55-8-101(33) and 55-8-109(a) requires that drivers obey traffic-control devices including "signs, signals markings and devices placed by authority of a public body or official having jurisdiction."

Not Reported in S.W.2d

Not Reported in S.W.2d, 1998 WL 57535 (Tenn.Ct.App.)

(Cite as: Not Reported in S.W.2d)

No evidence is cited or found as to who posted the “truck route” signs. If the signs were posted with due authority, then they would indicate that a right turn should be made at the intersection by trucks whose destination was not within the City of Shelbyville. The intended destination of the two subject trucks was not within the city of Shelbyville.

Nevertheless, the intent of the driver to proceed straight through the intersection instead of turning right to the “truck route” was not the proximate cause of the collision for lack of reasonable anticipation. That is, a reasonable truck driver in the position of Hogan would not have anticipated that proceeding through the intersection at a safe speed would result in a collision with a vehicle turning across the path of the truck.

The proximate negligence of Hogan must be based upon excessive speed or failure to avoid collision with another vehicle in the intersection.

*5 The Trial Court reserved the issue as to negligent speed. Therefore, when the Trial Judge reserved speed, he also reserved negligence per se by speed. The issue of negligent failure to avoid collision also remains for resolution.

No ground for modification or reversal is presented by plaintiffs' third issue.

Plaintiffs' fourth issue is:

4) The Trial Court erred in granting the Defendant summary judgment as to Plaintiffs' claims for punitive damages when there are genuine issues of material fact which, when viewed in a light most favorable to the Plaintiffs, and drawing all reasonable inferences therefrom demonstrate patterns of outrageous conduct sufficient to allow a claim for punitive damages to be submitted to a jury.

[T.C.A. § 55-8-143](#) defines the duties of drivers of vehicles at intersections where one vehicle is turning across the path of another vehicle. Material provisions are summarized and discussed as follows:

(a) The turning driver must first see that said movement can be made with safety. The requirement is not an absolute, but applies within the bounds of reason. That is, the turning driver must make that ascertainment of safety which a rea-

sonable person would make under the same or similar circumstances. The determination of the reasonableness of the ascertainment of safety is for the jury. [Atchley v. Sims, 23 Tenn.App. 167, 128 S.W.2d 975 \(1938\)](#). Among the facts to be considered by the jury in the present case are the obstruction of the vision of deceased and Hogan by the truck of Payne stopped north of the intersection and the observable movement and speed of the truck operated by Hogan.

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(2) Drivers receiving a signal for a left turn must “keep their vehicle under complete control and shall be able to avoid an accident resulting from a misunderstanding of such signal.” [Wright v. City of Knoxville, Tenn.1995, 898 S.W.2d 177](#). There is evidence in this record that Hogan approached an intersection where his vision was partially blocked by the truck in the left southbound lane, and that Hogan's speed was such that the collision knocked the vehicle of deceased into another stopped vehicle and beyond, a total of 65 or 70 feet from the point of collision with the Hogan truck, and the Hogan truck continued its southbound course 295 feet past the point of collision before stopping. Under these facts, it will be for the jury to decide whether Hogan was driving at an unreasonably high speed and whether his action or inaction constituted ordinary negligence and/or such gross negligence as justified the award of punitive damages. [Coppinger Color Lab, Inc. v. Nixon, Tenn.1985, 698 S.W.2d 72](#); [Huckeby v. Spangler, Tenn.1978, 563 S.W. 555](#).

Evidently, the Trial Court was of the opinion that the evidence was not sufficient as a matter of law to justify exemplary damages, as held in [Walgreen Co. v. Walton, 16 Tenn.App. 213, 16 S.W.2d 44 \(1933\)](#). The circumstances of the present case are distinguishable from those of the cited case. In addition to the claim of exemplary for the misconduct of Hogan, plaintiffs claim exemplary damages for the misconduct of Mike Wilhelm Trucking, Inc., in the general conduct of its trucking business such as selection and training of drivers, overloading and instruction or encouraging drivers to violate the law. This Court holds that the allowance of punitive damages from Mike Wilhelm Trucking, Inc., on these grounds may be pursued further in the Trial Court.

*6 The judgment of the Trial Court is modified to reserve the questions of punitive damages heretofore discussed.

Plaintiffs' fifth, and last, issue is:

5) The Trial Court erred in granting the Defendants' motion for a protective order when the material sought is directly relevant to Plaintiffs' claims for liability and punitive damages and when those materials were required by federal law to be maintained by the Defendant as part of its trucking enterprise.

The requested discovery included the following:

Come now the plaintiffs, John Watson Little and Leslie Earl Little, Executors for the Estate of Leslie H. Little, pursuant to Rule 34, Tenn. R. Civ. P., and hereby requests that the defendants, Michael Hogan, Jeff Payne and Mike Wilhelm Trucking, Inc. a/k/a Southern Grain, hereinafter referred to as Mike Wilhelm Trucking, produce for inspection and copying at the office of plaintiffs' attorney, within thirty days (30) days from the receipt hereof, the originals or complete and clearly readable copies of the items defined and described herein:

1. Drivers' trip records
2. Receipts for trip expenses
3. Pick up and delivery orders
4. All communications regarding transportation of cargo
5. All bills of lading and manifests
6. All equipment or cargo loading documents
7. All cargo freight bills
8. All written instructions to drivers
9. Dispatch records
10. All drivers' calls in records
11. Accounting records
12. All drivers' trip check-in financial sheets
13. All drivers' fuel purchase and mileage reports
14. Copies of all checks issued to Hogan and Payne
15. All special fuel permits
16. All trip lease contracts
17. All other operation or trip related documents
18. Complete "Driver Qualification" files of Hogan and Payne
19. Any pre-employment documents
20. Complete application of employment of a driver
21. All medical examination records

22. All drivers' violation statements
23. All drivers' road tests
24. All drivers' written tests
25. All drivers' test certificates
26. All inquiries to former employers
27. All answers of former employers
28. All inquiries and answers regarding violations or accidents
29. Test cards issued by former employers
30. All annual reviews
31. All other contents of driver qualification files
32. Records of drug tests
33. Records of training
34. Additions to Hogan and Payne file since June 10, 1994
35. Complete drivers' personal file to date
36. Application contracts and agreements
37. Hiring, suspensions, warnings
38. Prior health, accidents, sickness, shortage reports
39. Law Enforcement reports
40. Other documents on Hogan and Payne
41. Complete driver qualification file of Hogan and Payne
42. Addition to file of any driver operating same equipment
43. Documents in possession of other drivers
- *7 44. Drivers' licenses of all drivers that operated equipment before accident
45. Copies of violation notices of all drivers that operated same equipment
46. All objects, pictures, drawings or statements regarding subject accident
47. A more verbose repetition of 46.
48. All accident files on drivers of subject equipment
49. All drivers' records of Hogan and Payne
50. All drivers' records of other operators
51. Repetition of 50
52. Verbose repetition of previous request
53. Maintenance records
54. Verbose repetition of 53
55. Titles to both vehicles
56. Vehicle movement records
57. Leasing contracts
58. Purchase of rental payments
59. Company manuals
60. Maintenance records
61. Computer records

62. Instructions and logs of drivers
63. Notices to drivers
64. Operational documents of driver
65. State registration of vehicles
66. Operating Permits of Hogan and Payne
67. Safety Instructions
68. List of all employees of Wilhelm
69. All Dispatch records
70. All operation forms
71. Income tax forms of Hogan and Payne
72. Fleet Evaluation Surveys
73. Correspondence with insurers
74. Driver Training manuals
75. Employees substance abuse policy

The foregoing summarizes plaintiffs' 21-page demand for production of documents.

The judgment of the Trial Judge ruled as follows on these demands:

As to the discovery issues, it appears that the Plaintiffs are exploring a number of areas which might or might not uncover sloppy business practices, but which are totally irrelevant to the cause of this accident. If it is undisputed that Defendant Hogan did not apply his brakes until the time of impact, then maintenance of brake records is irrelevant. If it is undisputed that Defendant Payne sat at the red light to wait for a truck to turn across the intersection, then it is irrelevant how much his load weighed. It is equally certain that the failure to maintain some particular document back at Wilhelm corporate headquarters did not kill anyone at the intersection.

In the current state of the record, the Plaintiffs are precluded from inquiry as to any records which do not relate to the particular delivery that Defendant Hogan was making on the day of the accident or to the hiring of Defendant Hogan as a driver. If the Plaintiffs wish to seek additional records and the Defendants will not agree to that discovery, then the Plaintiffs will have to apply to the court for permission to seek the information. The written discovery heretofore filed by the Plaintiffs is extremely oppressive, but no sanctions

will be ordered and no avenue of inquiry is finally precluded, but the Plaintiffs will have to make a showing to the court on an *ad hoc* basis that information sought is reasonably calculated to lead to the discovery of admissible, relevant evidence.

A trial court has wide discretion in enforcing discovery. T.R.C.P. Rule 26, [Strickland v. Strickland, Tenn.App.1981, 618 S.W.2d 496](#). The issuance of a protective order limiting discovery lies within the sound discretion of the trial judge. [Brown v. Brown, Tenn.App.1993, 863 S.W.2d 432](#). It is within the inherent powers of a trial judge to take appropriate corrective action against a party for discovery abuse. [Lyle v. Exxon Corp., Tenn.1988, 746 S.W.2d 694](#).

*8 The judgment of the Trial Court is modified to require the plaintiffs to specify in detail the grounds upon which punitive damages are claimed and to require a discovery conference pursuant to TRCP Rule 26.06 for the purpose of identifying issues for discovery and appropriately limiting its scope.

The judgment of the Trial Court is modified to delete the partial summary judgment dismissing plaintiffs' suit against Michael Hogan and Mike Wilhelm Trucking, Inc., for punitive damages. As modified, the judgment of the Trial Court is affirmed. One-half the costs of this appeal is taxed against the plaintiffs-appellants and their surety, and one-half of said costs are taxed against the defendants, Mike Hogan and Mike Wilhelm Trucking, Inc. The cause is remanded for further proceedings.

MODIFIED, AFFIRMED AND REMANDED

CONCUR IN SEPARATE OPINION: [BEN H. CANTRELL](#), [WILLIAM C. KOCH, JR.](#), JUDGE.

CONCURRING OPINION

[BEN H. CANTRELL](#), Judge.

I concur in the disposition we have made of this case. My only concern is that our opinion may be interpreted as an endorsement of the idea that a truck driver who does not follow a designated "truck route" is guilty of negligence per se. "In order to establish negligence per se, it must be shown that the statute violated was designed to impose a duty or

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prohibit an act for the benefit of a person or the public.... It must also be established that the injured party was within the class of persons that the statute was meant to protect.” [Cook v. Spinnaker's of Rivergate, Inc., 878 S.W.2d 934 at 937 \(Tenn.1994\).](#)

I have searched the Tennessee Code for a statute that says truck drivers must follow designated truck routes through or around cities and towns. With the statute I might get from its legislative history some indication of the reasons for its passage and the class of persons it was meant to benefit. I have found no such statute and the appellant does not refer to one in its brief. So far as this record shows the designation of certain streets as truck routes is for the sole benefit of the truckers and not for the general public.

The appellant does refer to one statute that gives the department of transportation sole jurisdiction to select streets through which traffic shall be routed. See [Tenn.Code Ann. § 54-5-205](#). But that section has been construed as a limited grant of power to the commissioner to “route the traffic from state highways through a municipality only over and through such streets and roads which are provided by the municipality for traffic of the character brought to the city limits by the highways.” [Collier v. Baker, 160 Tenn. 571, 27 S.W.2d 1085 at 1086 \(Tenn.1930\).](#)

I would hold that there is nothing in this record to indicate that the failure to follow truck routes is negligence per se.

I am authorized to state that Judge Koch joins in this concurring opinion.

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