IN THE COURT OF APPEALS

LILLIAN H. EDWARDS,	)	BRADLEY CIRCUIT
	)	C.A. NO. 03A01-9512-CV-00457
	)	
Plaintiff-Appellant	)	
	)	
	)	
	)	
	)	
	)	
vs.	)	HON. EARLE G. MURPHY
	)	JUDGE
	)	
	)	
	)	
	)	
	)	
JASON ALAN MILLER,	)	AFFIRMED AND REMANDED
	)	
Defendant-Appellee	)	

JAMES S. THOMPSON, Logan, Thompson, Miller, Bilbo, Thompson & Fisher, P.C., Cleveland, for the Appellant.

PAUL H. DIETRICH, Dietrich, Dietrich & Powers, Cleveland, for the Appellee.

OPINION

McMurray, J.

This case arose out of an automobile accident. The plaintiff, a pedestrian, was struck by a car being driven by the defendant. At the close of the plaintiff's proof, the court directed a verdict in favor of the defendant thereby giving rise to this appeal. We affirm the judgment of the trial court.

The facts, as demonstrated by the evidence in this case, are that all the parties had attended a baccalaureate ceremony and reception at Lee College. At the time of the accident, it was raining and dark or "dusky" dark. The defendant was driving a 1988 model Ford Escort automobile on the right side of the street where the accident occurred. He stated that he was well within his side of the road and never left the roadway. His speed was estimated to be between five and ten miles per hour. He had the headlights of his car on.

The plaintiff was walking on the right side of the street where the accident occurred. She was walking along the side of the road facing oncoming traffic and wearing a "cream-colored" rain coat. She was struck by the vehicle being driven by the defendant. There were no witnesses who actually saw the accident happen. The plaintiff has no memory of how the accident occurred.

The defendant testified that he was traveling up the street preparing to turn left into the "dorm." There had been a car in

front of him "who had already turned in up the road and one that had just come in the other direction that had just passed me. And as I was about to turn, just in a flash, I see a shadow and hear a noise. And I slammed on my brakes and stopped dead in the road."

The plaintiff, Ms. Edwards, was found lying on her back with her head on the road and her feet in the ditch located along the side of the road. Ms. Edwards suffered a broken leg as a result of the accident. The bone was broken about three inches below the knee. The plaintiff's daughter, Judith Duncan, testified that she had measured the distance from the ground to the plaintiff's kneecap with the plaintiff wearing the same shoes that she was wearing at the time of the accident. The measurement was nineteen and one-half inches. It was further shown that from the ground to the right front bumper of a 1988 Ford Escort four-door sedan was measured to be sixteen to twenty-two inches.

From these facts, the plaintiff seeks to have the court infer that the defendant was not keeping a proper lookout ahead and that the measurements of the distance from the ground to the plaintiff's kneecap and the distance between the ground and the front bumper of a Ford Escort automobile, being consistent with the break in the plaintiff's leg, gives rise to a conclusion that the bumper struck the plaintiff.

The plaintiff tenders the following issues for our review:

1. Did the court err in granting the defendant's motion for a directed verdict, at the close of the plaintiff's proof?

2. Did the court err in refusing to allow an investigator, employed by the plaintiff's law firm, to testify to matters believed to be uncontested and undisputed?

The standards governing trial courts in ruling on motions for directed verdicts in negligence cases are well established. In ruling on the motion, the court must take the strongest legitimate view of the evidence in favor of the non-moving party. In other words, the court must remove any conflict in the evidence by construing it in the light most favorable to the non-movant and discarding all countervailing evidence. The court may grant the motion only if, after assessing the evidence according to the foregoing standards, it determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence. Sauls v. Evans, 635 S.W.2d 377 (Tenn. 1982); Holmes v. Wilson, 551 S.W.2d 682 (Tenn. 1977). If there is any doubt as to the proper conclusions to be drawn from the evidence, the motion must be denied. Crosslin v. Alsup, 594 S.W.2d 379 (Tenn. 1980). Eaton v. McLain, 891 S.W.2d 587, 590 (Tenn. 1994).

In viewing the entire evidence presented in this case as required by the above rule, we conclude that reasonable minds could

not determine, absent pure speculation, how the accident happened or who, if anyone, was guilty of actionable neligence. The facts viewed in the light most favorable to the plaintiff do not rise to the level that the inferences sought to be drawn by the plaintiff can reasonably be done.

> Verdicts cannot rest on conjecture or surmise. With no evidence to the contrary as to the locus of the [injured party] immediately prior to [the] injury, and under the applicable rule of law, we hold that plaintiff has failed to sustain the pleaded negligence * * *. ... Finally, it is well to recall the rule that negligence cannot be inferred from the mere fact of the occurrence of the injury alone. In Nichols v. Smith, 21 Tenn. App. 478, 111 S.W.2d 911 (1937), an admission by the driver of a motor vehicle that he did not see the deceased until the latter was on the hood of the vehicle was not evidence that he was not maintaining a proper lookout, in the absence of any evidence that the deceased appeared in front of the truck at a distance and in such a position that he could have been seen by the driver.

Williams v. Jordan, 346 S.W.2d 583 (Tenn. 1961).

Further, it is well-settled that the mere fact that an accident resulted in an injury to a plaintiff does not raise a presumption that a defendant was guilty of negligence for the reason that negligence is never presumed from the mere happening of an accident. City of Knoxville, Tennessee v. Bailey, 222 F.2d 520 (6th Cir. 1955). "Negligence cannot be inferred merely from the fact of [an accident]... . The burden is on the plaintiff to establish, by proof, that negligence did exist." Southern Ry. Co. v. Derr, 240 F. 73, 74 (6th Cir. 1917). "The happening of an accident which results

in injury to a person does not of itself constitute actionable negligence." Combs v. Rogers, 60 Tenn. App. 689, 450 S.W.2d 605 (1969).

We concur with the trial court that the plaintiff did not establish a prima facie case. Accordingly, a directed verdict was appropriate.

As to the second issue, we are somewhat at a loss to explain the necessity of eliciting testimony on any issue that is uncontested or undisputed. In any event, we will examine the propriety of the trial court's action in excluding the testimony of an investigator employed by the plaintiff's law firm. The record discloses the following colloquy between counsel and the court:

> MR. DIETRICH: Your Honor, at this time I'm going to have to impose an objection. I know that Mr. Botts works for Mr. Thompson. He said that in his opening statement, I think.
>
> THE COURT: Yes.
>
> MR. DIETRICH: I don't think he will be qualified to testify.
>
> THE COURT: I think that's right under the Ethics Committee Regulations. No employee of an attorney can testify unless the attorney withdraws from the case and —
>
> MR. THOMPSON: Well, he's not a factual witness.
>
> THE COURT: Well, it doesn't make any difference. He's not qualified. Even your secretary wouldn't be qualified to testify if she had knowledge of something.

Ostensibly, the court was relying on Formal Ethics Opinion 81-F-10, interpreting Disciplinary Rule 5-101. In that opinion the Board of Professional Responsibility determined that an attorney could not accept employment in a case where both he and his secretary had determined that a client was mentally incompetent to make a will and the attorney, in fact, refused to make a will. The client went to another attorney and a will was prepared and executed. A son sought to challenge the will based on mental incompetency and sought to employ the attorney who had declined to make the will. Clearly, both the attorney and his secretary had formed their opinions that the testatrix was incompetent to make a will in an attorney-client relationship.

We agree with the conclusion reached by the Board. "Obviously, both the attorney and his secretary will be material witnesses in the will contest case in which the issue of mental competence and testamentary capacity of the former client will be of prime importance." The board was, therefore, of the opinion that the attorney should decline the representation if it was contemplated that either the attorney or his secretary would appear as a witness.

We perceive this case of being of a different kind, however, because under the facts in the above case, both the attorney and

his secretary had prior knowledge concerning the case and that knowledge came to them as a result of the attorney's professional contact with a person who had consulted with him. In the case at hand, the investigator had no prior knowledge, but was employed for the specific purpose of gathering evidence, post accident, to assist in the preparation and trial of the case. To interpret Formal Ethics Opinion 81-F-10 as the defendant urges would be to place an attorney in the position of being unable to employ an investigator to assist him in the investigation and preparation of a case if the investigator would be expected to testify concerning facts discovered during his investigation. We do not perceive Rule 5-101 as interpreted by Formal Ethics Opinion 81-F-10 as being so inclusive. Were it so construed, expert witnesses employed by an attorney could be excluded on the same premise.

We are of the opinion that possession of prior knowledge of facts which may be material to the litigation under consideration places an attorney on notice that he and/or his employees may be called to testify as a material witness. "The purpose ... is not to protect adversaries from the opposing party's attorney but is to protect the attorney's client in the event his attorney's testimony is needed at trial." Coakley v. Daniels, 840 S.W.2d 367 (Tenn. App. 1992). We do not perceive that allowing the testimony of the plaintiff's investigator would be a violation of this rule.

An order was entered whereby the parties agreed that if the plaintiff's investigator, Mr. Arnold Botts, had been called as a witness, he would testify to the facts set forth in his affidavit which the trial court allowed to be filed and made a part of the record.

We have carefully examined the affidavit of Mr. Botts and are of the opinion that his affidavit contains nothing which, in conjunction with testimony presented, would have constituted a prima facie case of negligence on the part of the defendant. Accordingly, we find that any error in refusing to allow Mr. Botts to testify was harmless.

We affirm the judgment of the trial court. Costs are taxed to the appellant and this cause is remanded to the trial court for the collection thereof.

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Don T. McMurray, J.

CONCUR:

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Houston M. Goddard, Presiding Judge

_____
Charles D. Susano, Jr., J.

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ORDER

This appeal came on to be heard upon the record from the Circuit Court of Bradley County, briefs and argument of counsel. Upon consideration thereof, this Court is of the opinion that there was no reversible error in the trial court.

We affirm the judgment of the trial court. Costs are taxed to the appellant and this cause is remanded to the trial court for the collection thereof.

PER CURIAM