IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

PHILLIP J. GRIFFIS, as Personal Representative of the Estate of FRANK E. GRIFFIS, Deceased,

Appellant,

v.

HOWARD E. WHEELER, JR., and DIANE A. WHEELER,

Appellees.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D08-4629

Opinion filed July 31, 2009.

An appeal from the Circuit Court for Levy County.
David A. Glant, Judge.

Robert P. Avolio and Tracy L. Markham of Avolio & Hanlon, P.C., St. Augustine, for Appellant.

Randy Fischer and R. Lance Wright of Boehm, Brown, Fischer, Harwood, Kelly & Scheihing, P.A., Ocala, and Rhonda B. Boggess of Taylor, Day, Currie, Boyd & Johnson, Jacksonville, for Appellees.

WOLF, J.

Phillip J. Griffis, as Personal Representative of the Estate of Frank E. Griffis, appeals a final judgment after a directed verdict in favor of the appellees/defendants, Howard E. Wheeler, Jr., and Diane A. Wheeler. They raise two issues on appeal: (1) whether the trial court erred in directing a verdict where

evidence was presented from which a jury could find that the operation of appellees' motor vehicle constituted negligence, and (2) whether the trial court erred in ruling that section 768.36, Florida Statutes (2006), applies in a wrongful death action against the claims of the personal representative brought on behalf of the survivors. We find merit as to the first issue.

In October 2006, appellant, Phillip J. Griffis, as Personal Representative of the Estate of Frank E. Griffis, the decedent, filed a wrongful death action against appellees, Howard and Diane Wheeler. Appellant brought the suit on behalf of the Estate and for the benefit of the decedent's parents. Appellant alleged that appellees negligently operated their vehicle on or about October 29, 2004, on U.S. Highway 27 so that it fatally collided with the decedent, who was 39 at the time. Appellant sought medical and funeral expenses and damages for the loss and value of support services.

Appellees affirmatively defended on the grounds of comparative negligence, collateral source, and the decedent's intoxication at the time of the accident. According to appellees, the decedent's blood alcohol level exceeded .08 percent at the time of the accident; the record shows that the decedent's ethanol/alcohol concentration was .27.

Appellant moved for partial summary judgment on appellees' third affirmative defense of intoxication, arguing that the defense did not apply when a

claim was brought by a personal representative. Appellant also moved to strike the affirmative defense. The trial court denied the motions. The trial court found that the intoxication defense presented questions of fact regarding "alcohol and the amount of alcohol (or not) of the decedent as well as issues of comparative fault." In noting appellant's argument that the "plaintiff" referred to in section 768.36, Florida Statutes, does not include an estate, the court set forth, "[T]he claim in this wrongful death suit is purely derivative through the decedent. Plaintiff's preferred interpretation of this statute is that the Plaintiff (the Estate) in this wrongful death suit can acquire greater rights derivatively than the decedent himself would have, had he survived." The trial court stated:

> Plaintiff concedes that if [the decedent] had survived, then [he] would be barred any recovery if the standards of F.S. Sec. 768.36(3) were met. Yet by virtue of his death, his Estate acquires greater legal rights than [the decedent] himself could ever have had (again, assuming the standards of F.S. Sec. 768.36 were met). Statutory interpretation cannot be stretched to an absurd result.

At trial, the following was established: U.S. Highway 27 is a four-lane, divided highway with two lanes going in each direction. Appellee, Mr. Wheeler, was driving in the right-hand lane. When he came over a hill, the decedent was walking in his lane of traffic. While the testimony indicated that appellee, who was driving under the speed limit, could not have braked in sufficient time to avoid the collision, the testimony concerning his ability to take evasive action was somewhat unclear.

Mrs. Wheeler, who was a passenger in the vehicle, said that when she first saw the decedent he was right in front of the passenger seat of the truck. She then turned to Mr. Wheeler, who was driving the truck. Her testimony as to any evasive action taken by Mr. Wheeler was ambiguous. "I don't remember specifically what he was doing. I just remember knowing that he was already reacting. I was kind of in shock, so I don't remember his specific actions. I just know that mentally I knew he was reacting, you know." She did not recall their truck moving to the left or right in any "traumatic" way. She did not recall the truck braking or hearing a horn. She testified that the accident damaged the truck's hood and light on the right side.

Because Mr. Wheeler was unable to appear because of medical issues, his deposition was introduced at trial. His testimony as to what evasive action he took, after seeing the decedent in his lane, was also unclear.

When asked when he first saw the decedent in terms of distance, he replied, "I estimate but – between, maybe, a hundred and 25, maybe a hundred and 75 feet." When asked how he could estimate the distance, he replied, "Headlights usually pick up on low beams somewhere around 150 feet or so, depending on the road." When asked if he was saying that he first saw the decedent when he came into the light provided by his headlights, Mr. Wheeler replied, "Yes." When asked if there were any cars that he could see "in front of [him] in the lane next to [him]

to the left ahead of [him]," he replied, "No." When asked what he did in terms of operating his vehicle from the time he first saw the decedent to the time in which he struck him, Mr. Wheeler replied, "On that, I don't recall." He believed the decedent had been in the middle of his lane. When asked again what he did with respect to operating his vehicle when he saw the decedent, Mr. Wheeler replied, "I believe I started to turn [t]o the left." When asked if he remembered doing that, he replied, "I remember vaguely about my hands." When asked whether he understood the silhouette that he first saw to be that of a person, Mr. Wheeler replied, "A person."

The evidence concerning Mr. Wheeler's ability to swerve was somewhat sparse. An expert testified that braking and coming to a complete stop would take twice the distance than simply swerving. There was evidence that coming to a complete stop once Mr. Wheeler was able to see the decedent would have taken anywhere from 220 feet to 370 feet. Thus, there is some evidence reflecting that, had Mr. Wheeler begun to swerve immediately, he might have avoided the decedent.

In Vantran Industries, Inc. v. Ryder Truck Rental, Inc., 955 So. 2d 1118 (Fla. 1st DCA 2006), this court dealt with the responsibility of a driver when confronted with a sudden emergency. In that case we stated,

> When a driver is confronted with a sudden emergency, he is not held to the same standard of care that would otherwise be expected, but

> neither is he excused from not acting in a reasonable and prudent manner. Dupree v. Pitts, 159 So. 2d 904, 906-07 (Fla. 3d DCA 1964). Once the emergency arises, a driver "is not negligent, provided he has used due care to avoid meeting such an emergency and, after it arises, he exercises such care as a reasonably prudent and capable driver would use under the unusual circumstances, which is usually [a question] for the jury." Id. at 906 (quoting Blashfield, Cyc. of Automobile Law & Practice, Sec. 668, pp. 538-45).

955 So. 2d at 1120.

We found that the trial court erred when it found that the driver of a vehicle had no legal duty because he was confronted by a suicidal pedestrian jumping in front of his vehicle. Id. at 1121. The driver had both a duty to act as a reasonably careful and prudent driver in attempting to avoid the unusual situation and a duty as to how he reacted to it.

In the instant case, based on the evidence presented, a reasonable jury could have determined that Mr. Wheeler was negligent in his failure to react and swerve to avoid hitting the pedestrian in his lane. The trial court therefore erred in directing a verdict in favor of the appellees.

Appellant also argues that the trial court erred in ruling that the intoxication defense provided for in section 768.36, Florida Statutes, applied in a wrongful death action against the claims of a personal representative brought on behalf of the decedent's survivors.

Florida's Wrongful Death Act provides in part:

When the death of a person is caused by the wrongful act, negligence,

> default, or breach of contract or warranty of any person . . . and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person . . . that would have been liable in damages if death had not ensued shall be liable for damages as specified in this act notwithstanding the death of the person injured, although death was caused under circumstances constituting a felony.

§ 768.19, Fla. Stat. (2005). The Act also provides that "[w]hen a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate." § 768.20, Fla. Stat. (2005).

The supreme court has long characterized the wrongful death statute as creating a new and distinct right of action from the right of action the decedent had prior to death. Toombs v. Alamo Rent-A-Car, Inc., 833 So. 2d 109, 111 (Fla. 2002). With that said, the supreme court has acknowledged that the statute makes clear that a wrongful death action is predicated on the decedent's entitlement to maintain an action and recover damages if death had not occurred. Id. at 118 (holding that no cause of action for wrongful death survived the decedent because she had no right of action at her death).

Turning to the statute at issue, section 768.36, Florida Statutes (2005), entitled "Alcohol or drug defense," provides:

> (2) In any civil action, a plaintiff may not recover any damages for loss or injury to his or her person or property if the trier of fact finds that, at the time the plaintiff was injured:
> (a) The plaintiff was under the influence of any alcoholic beverage or

> drug to the extent that the plaintiff's normal faculties were impaired or the plaintiff had a blood or breath alcohol level of 0.08 percent or higher; and
> (b) As a result of the influence of such alcoholic beverage or drug the plaintiff was more than 50 percent at fault for his or her own harm.

§ 768.36, Fla. Stat. (2005).

As the trial court noted, appellant acknowledged that the statute would apply had the decedent lived and filed suit against appellees. Yet, appellant argues that the defense cannot be asserted in wrongful death actions given that the statute does not expressly apply to such actions or to personal representatives serving as plaintiffs. As the supreme court has noted, when a statute is clear and unambiguous, it must be given its plain and obvious meaning. Saleeby v. Rocky Elson Constr., Inc., 3 So. 3d 1078, 1082 (Fla. 2009). Appellant is correct that the statute speaks only to plaintiffs, their injuries, and their being under the influence. The Legislature could have included the word "decedent" or "death." This interpretation is reading the statute out of context, that wrongful death litigation is a derivative action. We decline to do so.

Further, adhering to appellant's interpretation of the statute would result in an absurd or unreasonable result. See Maddox v. State, 923 So. 2d 442, 448 (Fla. 2006); ContractPoint Fla. Parks, LLC v. State, 958 So. 2d 1035, 1037 (Fla. 1st DCA 2007) (noting that a literal interpretation of a statute should not be adhered to when it would lead to an absurd or unreasonable result). Accepting appellant's

interpretation would prevent appellees from asserting a defense that they could have asserted had the decedent survived and filed suit against them. Appellant's argument that the decedent's survivors should not be subject to the same limitations because the decedent was intoxicated likewise makes little sense. If the decedent would have been precluded from recovery because of his intoxication, his survivors should also be so limited.

Reversed and remanded for a new trial.

ALLEN, J., CONCURS WITH OPINION; DAVIS, J., CONCURS IN PART AND DISSENTS IN PART WITH OPINION.

ALLEN, J., concurring.

A trial court may not direct a verdict against a party if there is any evidence upon which the jury could lawfully make a finding in favor of that party. Miller v. City of Jacksonville, 603 So. 2d 1310 (Fla. 1st DCA 1992). Directed verdicts in negligence cases are rarely proper because the elements of negligence are usually subject to more than one interpretation. Regency Lake Apartments Assocs. Ltd. v. French, 590 So. 2d 970 (Fla. 1st DCA 1991). The trial court erred in directing a verdict for the appellees/defendants in this automobile negligence case because there was evidence upon which the jury might lawfully have found in favor of the appellant/plaintiff.

The jury might reasonably have concluded from the testimony presented that the driver failed to take any action to avoid colliding with the decedent despite observing him over a distance equal to half the length of a football field or more. And the jury might also have concluded that, had the driver been reasonably attentive and responsive to the sudden emergency with which he was confronted, there was ample time for him to simply redirect the vehicle a few feet into the unoccupied left lane of the divided highway, thereby avoiding the collision. Although expert testimony as to this latter determination might have been helpful, it was not a prerequisite to the jury's lawful authority to reach its own conclusion

based upon the evidence that was presented. See, e.g., Zwinge v. Hettinger, 530 So. 2d 318 (Fla. 2d DCA 1988).

DAVIS, J., concurring in part and dissenting in part.

I concur with the majority's conclusion that the trial court properly ruled that the intoxication defense could be raised in this case. However, I respectfully dissent from the majority's holding that the trial court erred in directing a verdict in the Wheelers' favor. In my opinion, the record is devoid of any evidence that would lead a reasonable jury to render a verdict in Appellant's favor based upon Mr. Wheeler's alleged failure to take evasive action. Therefore, I would affirm the final judgment.

Aside from the Wheelers' testimony, the only testimony Appellant presented concerning the accident was that of Miles Moss, a transportation consulting engineer. The parties agreed that the sole area in which Moss was qualified to testify was the field of civil engineering. He testified that a car traveling at sixty miles per hour would cover eighty-eight feet in one second and 220 feet in 2.5 seconds. As the majority notes, Mr. Wheeler testified via deposition that he first saw the decedent at a distance of 125 to 175 feet. Thus, Mr. Wheeler, who was driving under the speed limit on an unlit, rural highway, had no more than two seconds to react. There is no question given the evidence presented that Mr. Wheeler could not have braked to avoid the collision. There is also no question in my opinion that Appellant failed to present any evidence that Mr. Wheeler could

have successfully employed some sort of evasive action to avoid striking the decedent.

The majority describes the evidence concerning Mr. Wheeler's ability to swerve as being "somewhat sparse." It notes that Mr. Moss testified that braking and coming to a complete stop would have taken "twice the distance" than simply swerving. According to the majority, this statement serves as "some evidence" reflecting that, had Mr. Wheeler begun to immediately swerve, he might have avoided the decedent. However, contrary to the majority's characterization of the evidence, Moss gave no testimony that braking would take twice the distance than swerving would. Instead, when asked on redirect examination "[w]hich takes longer," Moss replied, "Well, certainly braking to come to a complete stop takes quite a bit longer, probably double the amount than the swerve." Importantly, there was no specific testimony presented as to the amount of actual time that braking would have taken.

My conclusion that the directed verdict was proper in this case is further buttressed by Appellant's unsuccessful attempt to have Moss testify on direct examination regarding Mr. Wheeler's ability to swerve. When asked his opinion as to the distance it would have taken to swerve, the trial court sustained defense counsel's objection because this information was not included in Moss's report.

The trial court also sustained defense counsel's objection when Moss testified that he had looked at "what amount of movement to the left it would need to avoid the impact, considering the damage to the vehicle, and how far in front of the vehicle [the decedent] was." As a result of these rulings, which have not been challenged on appeal, there was no testimony presented as to what amount of movement would have been necessary to avoid the collision or the distance it would have taken to swerve. Moreover, this is not the type of issue that a juror would be aware of simply by virtue of his or her driving experience.

A reasonable jury could not have determined that Mr. Wheeler was negligent in failing to react and swerve to avoid hitting the decedent. Although the majority cites to Vantran Industries, Inc. v. Ryder Truck Rental, Inc., 955 So. 2d 1118, 1120 (Fla. 1st DCA 2006), in support of its conclusion, we explained in that case that the sudden emergency doctrine requires not only that the claimed emergency actually or apparently existed and that the perilous situation was not created or contributed to by the person confronted but also that "alternative courses of action in meeting the emergency were open to such person." There was no testimony presented in this case that Mr. Wheeler had any alternative course of action that would have led him to avoid the collision. Cf. Gowdy v. Bell, 993 So. 2d 585, 586-87 (Fla. 1st DCA 2008) (reversing the summary judgment in the

wrongful death case and noting that there was testimony that had the driver applied the brakes and reduced his speed to fifteen miles per hour or less when he first observed the decedent, the collision likely would have been avoided); Wallace v. Nat'l Fisheries, Inc., 768 So. 2d 17, 18-19 (Fla. 3d DCA 2000) (reversing the summary judgment in the automobile negligence case, noting that the estate's expert opined in part that the driver's failure to take evasive action was a proximate cause of the accident, and concluding that "faced with evidence that the driver had been speeding and the affidavit of the expert who outlined his opinion and the factual basis for that opinion, it was for the trier of fact to decide whether [the driver] had breached his responsibilities"); Dubois Fence & Garden Co. v. Stevens, 296 So. 2d 116, 117-19 (Fla. 1st DCA 1974) (affirming the order granting a new trial in favor of the plaintiffs and noting that the engineer testified that had the appellant applied and held his brakes, he could have stopped before impact).

This case presents a situation where the plaintiff failed to present sufficient evidence from which a reasonable jury could render a verdict in its favor. The trial court correctly recognized this when it explained that, while it did not grant the motion for directed verdict lightly, it did believe that the evidence could support no other ruling. The final judgment should be affirmed.

Accordingly, I concur in part and dissent in part.