[Cite as *Musil v. Truesdell*, 2010-Ohio-1579.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93407

SUSAN MUSIL

PLAINTIFF-APPELLANT

vs.

LISA M. TRUESDELL

DEFENDANTS-APPELLEE

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-661338

BEFORE: Cooney, J., Kilbane, P.J., and Blackmon, J.

RELEASED: April 8, 2010

JOURNALIZED:
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COLLEEN CONWAY COONEY, J.:

{¶ 1} Plaintiff-appellant, Susan Musil ("Musil"), appeals the jury verdict in favor of defendant-appellee, Lisa Truesdell ("Truesdell"). Finding merit to the appeal, we reverse and remand.

{¶ 2} This appeal arises from a lawsuit filed by Musil in June 2008 against Truesdell for injuries Musil sustained while operating her bicycle. Musil alleges that Truesdell, who was operating her motor vehicle, negligently struck Musil's bicycle as Musil crossed an access driveway. Truesdell answered, denying all allegations in the complaint and raising the affirmative defense of comparative negligence.

{¶ 3} Prior to trial, Musil and Truesdell filed their respective jury instructions. Both parties' proposed jury instructions contained instructions on proximate cause. Musil and Truesdell also entered into an agreement, in which they stipulated to damages and agreed to proceed to trial on the issue of liability only. The parties further agreed that the jury would be instructed on comparative negligence and would receive an interrogatory for the apportionment of fault between Musil and Truesdell.

{¶ 4} The parties also submitted joint interrogatories, which asked the jury: (1) whether Truesdell was negligent and whether her negligence was a direct and proximate cause of the accident; and (2) whether Musil was negligent and whether her negligence was a direct and proximate cause of the

accident. If the jury answered "yes" to the preceding questions, a third interrogatory requested the jury to apportion fault between Truesdell and Musil. The parties further agreed that if the jury found Truesdell more than 50% negligent, her insurer would tender payment of $100,000.

{¶ 5} The following evidence was adduced at trial.

{¶ 6} On May 4, 2007, Truesdell, an employee of Strongsville High School, was leaving the school's parking lot for her lunch break. To exit the parking lot, Truesdell planned to drive her vehicle along a one-way access drive, heading east. There were arrows on the roadway indicating the proper direction for traffic. In addition, there was a "DO NOT ENTER" sign at the west end of the drive. Truesdell stopped at the stop sign and proceeded to turn left into the access driveway.[1]

{¶ 7} Musil, a bus driver for the Strongsville City School District, was leaving the school's parking lot on her bicycle and entered the access drive from the west, past the "DO NOT ENTER" sign. Musil testified that she observed Truesdell at the stop sign. She did not see Truesdell look her way, so she decided to cross the drive to the sidewalk located on the south side. As Musil crossed the roadway, Truesdell turned left and her vehicle struck Musil's bicycle, knocking Musil to the ground.

[1]There was also a "LEFT TURN ONLY" sign beneath the stop sign.

{¶ 8} Prior to the instructions being read to the jury, the trial judge discussed the jury instructions and proposed jury interrogatories with counsel for both parties. Musil's counsel requested an instruction on proximate cause.[2] Counsel explained that this instruction was important to Truesdell's affirmative defense argument of comparative negligence because Musil's riding her bicycle in the wrong direction was not the proximate cause of the accident, since she was merely crossing the drive at the time of the collision. The trial court denied counsel's request and also rejected the proposed joint jury interrogatories. Instead, the court opted for a single verdict form, asking the jury for the "[p]ercentage of negligence attributable to [Truesdell] causing the collision of 5/4/07" and the "[p]ercentage of negligence attributable to [Musil] causing the collision of 5/4/07[.]" The jury returned the verdict form indicating Truesdell was 49% negligent and Musil 51% negligent.

{¶ 9} Musil now appeals, raising one assignment of error, in which she argues that the trial court erred when it refused to instruct the jury on proximate cause.

Standard of Review

[2]Truesdell also submitted a proposed instruction on proximate cause that the court rejected.

{¶ 10} In Ohio, it is well established that the trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 348 N.E.2d 135, paragraph two of the syllabus. Requested instructions should ordinarily be given if they are correct statements of law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the specific instruction. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828.

{¶ 11} "'In determining the appropriateness of jury instructions, an appellate court reviews the instructions as a whole. If, taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled. Moreover, misstatements and ambiguity in a portion of the instructions will not constitute reversible error unless the instructions are so misleading that they prejudicially affect a substantial right of the complaining party.'" (Citations omitted.) *Harris v. Noveon, Inc.*, Cuyahoga App. No. 93122, 2010-Ohio-674, ¶22, quoting *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410, 629 N.E.2d 500.

{¶ 12} The exact language of a jury instruction is within the discretion of the trial court. *Youssef v. Parr, Inc.* (1990), 69 Ohio App.3d 679, 690, 591 N.E.2d 762, citing *State v. Scott* (1987), 41 Ohio App.3d 313, 535 N.E.2d 379,

paragraph three of syllabus. Thus, "[w]hen reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case." *Harris* at ¶20, citing *Chambers v. Admr., Ohio Bur. of Workers' Comp.*, 164 Ohio App.3d 397, 2005-Ohio-6086, 842 N.E.2d 580, ¶6. "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

Proximate Cause Jury Instruction

{¶ 13} Musil argues that the trial court committed reversible error when it failed to instruct the jury on proximate cause. The proximate cause instruction she proposed prior to trial stated as follows:

> "Proximate cause exists where an act or failure to act, in a natural and continuous sequence, directly produced the injury and without which it would not have occurred.
>
> "There may be more than one proximate cause. The fact that some other cause combined with the negligence of a defendant in producing an injury does not relieve him/her from liability, unless it is shown such other cause would have produced the injury independently of defendant's negligence."

{¶ 14} In denying Musil's request, the trial court found that the parties' agreement to try the case solely on liability obviated the need for an instruction on proximate cause. The court reasoned that the proximate cause instruction "doesn't relate to proximate cause as far as the collision, the negligence is concerned." Musil argued that there is no proximate cause issue involving the direction she was traveling on her bicycle before the collision occurred and the moment of the collision, when she was merely crossing the drive. The court advised Musil that if "[y]ou want to argue that, you can, as far as it didn't cause the accident. But it's not classical proximate cause under the charge that we ordinarily give because that relates to injury proximate cause, not collision * * * proximate cause."

{¶ 15} Musil argues that the trial court's rationale for declining to give a proximate cause instruction is flawed because, when allocating comparative fault, one cannot assign percentages of legal fault to each party without first determining that the party's negligence was a proximate cause of the resulting harm. She maintains that a stipulation to the amount of damages payable if the plaintiff prevails does not negate the necessity for a proximate cause instruction.

{¶ 16} She further argues that an instruction on proximate cause was warranted by the evidence in the case. She claims that the primary theme of

Truesdell's case was that Musil should be held responsible for the accident because she rode her bicycle the wrong way on a one-way road. Musil maintains that at the moment of the accident, she was not riding her bicycle in the wrong direction, but was merely crossing the access drive. Thus, she claims that the trial court's failure to deliver the proximate cause instruction was prejudicial and constituted reversible error. We agree.

{¶ 17} In *Murphy*, the Ohio Supreme Court stated that: "'[o]rdinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction.' 'In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n] * * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction.'" (Internal citations omitted.) Id. at 591.

{¶ 18} In a negligence action, in order for a person to recover damages for a claimed injury, "the act complained of must be the direct and proximate cause of the injury." *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 286, 423 N.E.2d 467. We note that, "an injury may have more than one proximate cause. * * * '[W]hen two factors combine to produce damage or illness, each is

a proximate cause.'" *Murphy* at 587-588, quoting *Norris v. Babcock & Wilcox Co.* (1988), 48 Ohio App.3d 66, 67, 548 N.E.2d 304, 305.

{¶ 19} Furthermore, "the determination of causal negligence on the part of one party [is] a precondition to apportioning comparative fault to that party." *O'Connell v. Chesapeake & Ohio RR. Co.* (1991), 58 Ohio St.3d 226, 235, 569 N.E.2d 889. As the Ohio Supreme Court stated in *O'Connell*: "[i]n a comparative negligence case, the initial, and somewhat talismanic question, is whether the defendant is causally negligent for the injury to the plaintiff. The obvious corollary to this is whether the plaintiff was negligent in causing his or her own injury. * * * As such, the allocation of fault *flows from* the adjudication of negligence and proximate cause." (Emphasis in original and internal citations omitted.) Id. at 235.

{¶ 20} In the instant case, Musil testified that she observed Truesdell stop at the stop sign and look only to the right, and never toward Musil. Musil acknowledged that Truesdell had to turn left at the stop sign. Nevertheless, Musil decided to cross the access drive at this point. On the other hand, Truesdell maintains that Musil committed two acts of negligence by: (1) riding her bicycle the wrong way along the access drive, and (2) crossing the drive when Truesdell was about to turn left toward her.

{¶ 21} When the trial court read the charge to the jury, it defined negligence as "the failure to exercise reasonable and ordinary care. Negligence may consist of doing * * * some act which a reasonably prudent person would not do under the same or similar circumstances or the failure to do something which a reasonably prudent person would have done under the same or similar circumstances or conditions." The court went on to state:

> "Now, under this case [Musil] claims that the defendant negligently failed to look in [her] direction before executing a turn. [Truesdell] is required to use ordinary care to discover and avoid danger.
>
> "[Truesdell] is negligent if she looks but does not see that which would have been seen by a reasonably cautious person under the same or similar circumstances.
>
> "[Truesdell] is negligent if she does not continue to look if under the circumstances a reasonably cautious person would have continued to look.
>
> "On the contrary, [Truesdell] claims that [Musil] was negligent. [Musil] was negligent if she failed to use that care for her own safety which a reasonably cautious, careful, and prudent person would use under the same of similar circumstances."
>
> * * *
>
> "The manner in which you will reflect your judgment is in a single interrogatory that the Court has prepared for you and the attorneys have both approved.
>
> "It simply reads as follows. We, the jury, being duly empaneled and sworn, do find as follows regarding comparative negligence percentages of each party. There's two blanks there. The first blank says, the

> percentage of negligence attributable to [Truesdell], causing the collision of 5-4-07. Then there's a blank there with the percentage amount." "The second one, the percentage of negligence attributable to [Musil], causing the collision of 5-4-07. There's a blank there.
>
> "You are to fill [in] each of those blanks a percentage, an amount of the contribution of each party.
>
> "The only rule here is that they have to total — as the lawyers have both mentioned in their arguments, the total must be 100 percent."

{¶ 22} Based on the evidence, reasonable minds could have concluded that Musil's conduct was not a proximate cause of the accident.[3] "It is the duty of a trial court to submit an essential issue to the jury when there is sufficient evidence relating to that issue to permit reasonable minds to reach different conclusions on that issue[.]" *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896, paragraph four of the syllabus. Thus, we find that the trial court abused its discretion when it failed to instruct the jury on proximate cause, an essential issue to apportioning negligence.

{¶ 23} Accordingly, the sole assignment of error is sustained.

{¶ 24} Judgment is reversed, and the matter is remanded for a new trial.

It is ordered that appellant recover of said appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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[3]We note that the proximate cause instructions submitted by both parties were a correct statement of law applicable to the facts of the case.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR