J. A05020/00

2000 PA Super 196

JULIA A. ZANGRANDO,	:	IN THE SUPERIOR COURT OF
Appellee	:	PENNSYLVANIA
	:	
v.	:	
	:	
JAN SIPULA,	:	
Appellant	:	No. 1297 WDA 1999

Appeal from the Order entered July 6, 1999,
in the Court of Common Pleas of Allegheny
County, Civil No. AR 98 3779

BEFORE: DEL SOLE, EAKIN and TODD, JJ.

OPINION BY EAKIN, J.: Filed: July 7, 2000

¶ 1
Appellee and two little dogs were walking down the street,
tending to business as they went, but soon they were to meet
¶ 2
Appellant, who this wintry day was driving toward the pair;
their mistress reined them to a stop along the thoroughfare.
¶ 3
Angel and Autumn were their names, one white, one apricot;
to walk beside her on a leash was their happy lifelong lot.
¶ 4
The poodles waited for the car, and watched as it drew near,
thinking there was naught at all to cause them any fear,
¶ 5
For often cars would pass them by, but this was no wayfarer -
the car begin to veer toward them and caution turned to terror.
¶ 6
The car was coming much too close, something inside told her;
the next thing Mrs. Zangrando knew, a poodle flew over her shoulder.
¶ 7
To appellee this was nothing short of an unmitigated disaster;
the wingless Angel'd taken flight and ascended quickly past her.
¶ 8
In this brace of miniature poodles, neither one wide nor tall,
one may have been named Autumn, but 'twas Angel took the fall.
¶ 9
The impact could have killed the pup but Angel would survive;
a doctor of the veterinary kept the dog alive.

¶ 10
The bill for Angel's treatment, though, was anything but small,
and appellee felt that in the end, appellant should pay it all,
¶ 11
So she filed this civil action in Allegheny county court
seeking eleven hundred fifty-five dollars for the nearly fatal tort.
¶ 12
The court sat with no jury, and after expeditious trial,
held appellee was right, which caused the court to promptly file
¶ 13
The order which appellant claims was entered quite in error;
he suggests the trial judge should have treated him much fairer.
¶ 14
Four issues now he raises, as he asks us to abort
the finding of the learned and distinguished county court.
¶ 15
When looking at a trial court's verdict, our standard of review[1]
requires we find legal error before granting trial anew,
¶ 16
Or find abused discretion that is clear and manifest;
with this unquestioned ruler we put his issues to the test.
¶ 17
First he says that appellee was standing in the road
in blatant violation of this Commonwealth's Vehicle Code,
¶ 18
So contributory negligence the trial court should have found
precluding his obligation to pay for damaging the tiny hound.
¶ 19
Appellant points us to Code Section 3544,[2]
which provides, indeed, pedestrians are required to do more
¶ 20
Than choose just any path while they are going down the way;
when in the street one must walk the left, and off the road should stay.
¶ 21
But appellee gave testimony she walked upon the "berm,"
and while the Vehicle Code has not defined that term

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[1] ***Stonehedge Square Ltd. Pshp. V. Movie Merchants***, 685 A.2d 1019, 1022 (Pa. Super. 1996), *alloc. granted in part,* 696 A.2d 805 (Pa. 1997).

[2] 75 Pa.C.S. § 3544(b)-(c).

¶ 22
The cases hold a berm is not highway or street *per se*;
it's a border visibly distinct from the remainder of the way.[3]
¶ 23
Appellee was toward the left side curb, and just about as far
as she could be from the center of the roadway and the car.
¶ 24
We find that being on the berm, when she could do no more
does not make a violation of 3544.
¶ 25
We find no negligence in staying off the neighbor's grass;
the road was fifteen feet in width, with room to safely pass.
¶ 26
Absent violation of this cited traffic section
we agree with the refusal of the judge to make a connection
¶ 27
Between her fixed location and *per se* contributory
negligence, notwithstanding appellant's version of the story.
¶ 28
Appellant however argues that because he hit the dog
while driving in the roadway, Angel must be the road hog.
¶ 29
But he didn't testify he saw the dog dash to the street,
yet he'd have this Court assume such caused the dog and car to meet.
¶ 30
Even if the poodle strained to reach the leashes' end,
appellant veered toward Angel, testimony we may not amend.
¶ 31
It's a credibility finding, and we are an appellate court;
such findings, if supported, bind us, despite his strong retort.[4]
¶ 32
If one looks very closely, the sum of appellant's dissembling
is he saw no impact 'til Angel rose, an extra point resembling.
¶ 33
The collision he says he didn't see, a fact there's no denying,
so he can't tell if Angel moved before he sent her flying.
¶ 34
Appellant next suggests the court in error applied the rule
of assured clear distance to find that he was fully liable

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[3] ***Masters v. Alexander***, 225 A.2d 905, 910 (Pa. 1967).

[4] ***Commonwealth v. Cappellini***, 690 A.2d 1220, 1224 (Pa. Super. 1997).

¶ 35
This is a venerable doctrine that is very far from moot,[5]
and quite appropriate to the facts giving rise to this dispute.
¶ 36
The court gave to this principle its proper application;
the issue raised, we find, lacks a meritorious foundation.
¶ 37
Besides, we can't find where he's raised this in a post-trial motion;
the issue's waived, no matter how appealing the notion.[6]
¶ 38
Next, he claims he was the victim of a sudden emergency,
a doctrine[7] which absolves some torts, and he should be set free
¶ 39
Of any obligation for the money owed the vet,
but the record shows the elements of this concept are not met.
¶ 40
This doctrine's application is with unforeseen events
when normal care's impossible in any real sense.
¶ 41
Unexpected perils do from time to time arise
whose suddenness may obviate the fault in our law's eyes.
¶ 42
But while appellant touts this rule, no matter how it's styled
he needs to have us find the dog was like the darting child,
¶ 43
And there simply is no evidence that Angel did such darting
before the car ran into her, trajectory imparting.
¶ 44
The poodles were not proved the source of sudden immediate peril;
their actions did not put him over any decisional barrel.
¶ 45
The poodles and the appellee had surely come to a halt;
they didn't appear suddenly; the impact wasn't their fault.
¶ 46
This claim of exigency he makes further begins to unravel
when one but thinks about appellant's stated rate of travel.

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[5] ***Lockhart v. List***, 665 A.2d 1176, 1180 (Pa. 1995).

[6] ***Kraus v. Taylor***, 710 A.2d 1142, 1146 (Pa. Super. 1998).

[7] ***Levey v. DeNardo***, 725 A.2d 733 (Pa. 1999).

¶ 47
15 miles an hour he claims as his maximum rate of speed,
quite a cautious, prudent rate, not very fast indeed,
¶ 48
Not fast enough to trouble him or force a quick decision;
it shows, had he been paying heed, there'd have been no collision;
¶ 49
For he admits he saw the dogs as he approached the scene,
and didn't know he'd struck a pup 'til Mrs. Zangrando keened.
¶ 50
It's also hard to quarrel here with what the trial court said:
That speed's not fast enough to launch a poodle overhead.
¶ 51
The doctrine's just not applicable, factually, in this case;
Thus the dependent argument is similarly off base.
¶ 52
In sum, assured clear distance creates duty when one drives;
the emergency doctrine excuses it should sudden peril arise.
¶ 53
Appellant would skip the former rule, and apply only the latter,
which seems to us as illogical as dieting to get fatter.
¶ 54
This argument is not so far from the dog in the fabled manger;
were we to find as appellant asks, we would create a danger
¶ 55
For everyone who find the needs of their beloved pet
makes them walk within the confines of their street, and yet
¶ 56
They cannot be fair game for cars that drive that very street
(and cars will always win the ties, when pedestrian and auto meet).
¶ 57
Be it interstate or neighborhood, drivers get no free shot
at things they may encounter, whether in the street or not.
¶ 58
So while counsel raises issues that are worthy and well taken
in the end we find the effort to apply them here's mistaken.
¶ 59
We must conclude the issues raised do not warrant a new trial
and all that we may offer now is this respectful rhymed denial.
¶ 60
Judgment affirmed.