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IN THE
COURT OF APPEALS OF INDIANA

MARY S. SUMERACKI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 64A03-0706-CV-265
	)	
JILL HITZ and JAMES HITZ,	)	
	)	
Appellee-Plaintiffs.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause No. 64D02-0404-CT-3629

DECEMBER 17, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Defendant-Appellant Mary S. Sumeracki ("Sumeracki") appeals the trial court's entry of judgment notwithstanding the verdict in favor of Plaintiffs-Appellees Jill Hitz ("Hitz") and James Hitz. We reverse.

Sumeracki raises one issue, which we restate as whether the trial court abused its discretion when it entered judgment notwithstanding the verdict on the issue of Hitz' fault.

On the morning of June 19, 2003, Sumeracki loaded two of her dogs into her Yukon SUV and left her home in Illinois to attend a dog show taking place at the Porter County Expo Center ("Expo Center"). The Expo Center is located just east of State Road 49 on Division Road in Valparaiso, Indiana. Sumeracki was scheduled to show her dogs in the show that day. She had never been to Valparaiso before. Sumeracki arrived in Valparaiso around 8 a.m. and began traveling south on State Road 49. She noted that the southbound traffic on State Road 49 was busy, but could not recall what the northbound traffic was like.[1]

At that same time, Hitz was traveling north on State Road 49 in her Ford Escort. Hitz was going to work at Porter Hospital where she was a registered nurse. She traveled this same route to work each day. Hitz testified that between 7:30 and 8 a.m., traffic on State Road 49 typically was busy. On this particular day, though, Hitz stated that the traffic on State Road 49 was especially busy because of the dog show at the Expo Center. Hitz indicated that the weather that day was clear and sunny.

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[1] At her deposition, Sumeracki testified that both the northbound and southbound traffic on State Road 49 was busy.

The speed limit on State Road 49 was fifty-five miles per hour. North of the intersection of State Road 49 and Division Road, State Road 49 had four lanes of traffic. South of Division Road, State Road 49 was primarily a two-lane highway. However, approximately nine hundred and twenty-five feet before the intersection of State Road 49 and Division Road, the northbound lane became two lanes. Northbound traffic could use either of these two lanes to pass through the intersection. Neither lane was specifically designated as a turning lane. Traffic at the intersection of Division Road and State Road 49 was controlled by a stoplight. The stoplight for north and southbound traffic did not have a left turn arrow. There were no signs at the intersection of State Road 49 and Division Road advising motorists to reduce their speed as they approached the intersection.

As Hitz neared the intersection of State Road 49 and Division Road, she was traveling in the right northbound lane. The light at the intersection was green. There was a steady stream of traffic around Hitz with cars both in front of and behind her. A number of vehicles were present at the intersection. Hitz noticed that there was a vehicle in the left northbound lane of State Road 49 stopped at the stoplight waiting to turn west onto Division Road. A second car was on Division Road waiting to turn north on State Road 49. A third car was on Division Road waiting to cross State Road 49 to continue east on Division Road. Hitz also saw Sumeracki's Yukon in the left southbound lane stopped at the stoplight. Sumeracki was waiting to turn left so that she could travel east on Division Road. As Hitz entered the intersection, she reduced her speed to between forty-five and fifty miles per hour.

While Sumeracki was waiting at the stoplight, she looked up and saw that the light was still green. She then looked at the northbound lanes to see if she was free to turn left. Sumeracki stated that she did not see anything, so she proceeded to cross the northbound lanes. At that point, Sumeracki's and Hitz' vehicles collided. Sumeracki stated that the first time she saw Hitz' car was after the accident.

Thereafter, Hitz and her husband filed suit against Sumeracki seeking to recover damages for the personal injuries Hitz sustained as a result of the accident. The jury trial began on May 7, 2007. At the close of the evidence and prior to closing arguments, Hitz, pursuant to Ind. Trial Rule 50(A), made a motion for a directed verdict arguing that there was no evidence that she bore any fault for the accident. The trial court denied Hitz' motion. The trial court then instructed the jury that Ind. Code § 9-21-8-30 (2004) provides:

> A person who drives a vehicle within an intersection intending to turn to the left shall yield the right-of-way to a vehicle approaching from the opposite direction that is within the intersection or so close to the intersection as to constitute an immediate hazard. After yielding and giving a signal as required by this chapter, the person who drives the vehicle may make the left turn, and the persons who drive other vehicles approaching the intersection from the opposite direction shall yield the right-of-way to the vehicle making the left turn.

The jury was also instructed that Ind. Code § 9-21-5-1 (2004) states as follows:

> A person may not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions, having regard to the actual and potential hazards then existing. Speed shall be restricted as necessary to avoid colliding with a person, vehicle, or other conveyance on, near, or entering a highway in compliance with legal requirements and with the duty of all persons to use due care.

On May 10, 2007, the jury returned a verdict in favor of Hitz. The jury found that both Hitz and Sumeracki were fifty percent at fault for the accident, and awarded Hitz $91,100 in damages.[2] After the jury returned its verdict, the trial court stated:

> At this point, I'm going to enter judgment notwithstanding the verdict. I'm eliminating the 50 percent fault, and we'll charge 100 percent fault to the defendant, Mary Sumeracki. There is no evidence in the record that can find any fault toward the plaintiff, Jill Hitz . . . .

Transcript at 129. The trial court then entered a formal judgment for Hitz in the amount of $182,200. This appeal ensued.

Sumeracki argues that the trial court erred when it entered judgment notwithstanding the verdict on the issue of Hitz' fault. A trial court may enter judgment notwithstanding the verdict, also referred to as a judgment on the evidence, pursuant to T.R. 50(A), which provides as follows:

> Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict.

"The purpose for judgment on the evidence is to test the sufficiency of the evidence." *Hitachi Const. Machinery Co., Ltd. v. AMAX Coal Co.*, 737 N.E.2d 460, 462 (Ind. Ct. App. 2000), *trans. denied*. "The grant or denial of a motion for judgment on the evidence is within the broad discretion of the trial court and will be reversed only for an abuse of that discretion." *Id.*

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[2] The jury awarded Hitz' husband no damages.

When reviewing a challenge to a ruling on a motion for judgment on the evidence, we apply the same standard that the trial court used in ruling on the motion below. *Armstrong v. Federated Mut. Ins. Co.*, 785 N.E.2d 284, 291 (Ind. Ct. App. 2003), *trans. denied*. We look only to the evidence and the reasonable inferences drawn therefrom that are most favorable to the nonmoving party. *Kirchoff v. Selby*, 703 N.E.2d 644, 648 (Ind. 1998). Judgment on the evidence is proper when there is an absence of evidence or reasonable inferences in favor of the nonmoving party and the evidence must support without conflict only one inference which is in favor of the moving party. *Paragon Family Restaurant v. Bartolini*, 799 N.E.2d 1048, 1051 (Ind. 2003) (quoting *Sipes v. Osmose Wood Preserving Co.*, 546 N.E.2d 1223, 1224 (Ind. 1989)). '"If there is any probative evidence or reasonable inference to be drawn from the evidence or if there is evidence allowing reasonable people to differ as to the result, judgment on the evidence is improper."' *Id.*

Sumeracki contends that the trial court erred when it entered judgment notwithstanding the verdict because there was sufficient evidence to support the jury's finding that Hitz was fifty percent at fault for the accident. Sumeracki first argues that evidence was introduced that suggested Hitz was driving too fast under the circumstances.

The jury was instructed that under I.C. § 9-21-5-1 "[a] person may not drive on a highway at a speed greater than is reasonable and prudent under the conditions, having regard to the actual and potential hazards then existing." The record reveals that the speed limit on State Road 49 was fifty-five miles per hour, and that the weather on the

day of the accident was sunny and clear. Hitz testified that she was familiar with the intersection of State Road 49 and Division Road, and she admitted that the intersection was normally busy between 7:30 and 8 a.m. Hitz specifically stated that the intersection was especially busy the day of the accident because of the dog show at the Expo Center. Hitz was also aware of a number of vehicles that were present at the intersection including: (1) a vehicle in the left northbound lane of State Road 49 that was waiting to turn west onto Division Road; (2) Sumeracki's Yukon in the left southbound lane of State Road 49 that was waiting to turn east onto Division Road; (3) a vehicle on Division Road waiting to turn north onto State Road 49; and (4) a vehicle on Division Road waiting to cross State Road 49 so that it could continue east on Division Road. Despite these conditions, Hitz entered the intersection traveling between forty-five and fifty miles per hour.

Although the speed limit on State Road 49 was fifty-five miles per hour, I.C. § 9-21-5-1 indicates that, depending upon current conditions, traveling at or even below the posted speed limit may not be reasonable and prudent. Here, Hitz was traveling between forty-five and fifty miles per hour, but traffic at the intersection was especially busy with numerous vehicles present at the intersection. In this instance, we cannot say that there is an absence of evidence or reasonable inferences in favor of Sumeracki and that the evidence supports without conflict only one inference in favor of Hitz. Therefore, we agree with Sumeracki that sufficient evidence was presented to permit the jury to conclude that Hitz' speed was not reasonable and prudent given the existing conditions.

Sumeracki also contends that sufficient evidence was introduced to show that Hitz was at fault for the accident because she did not yield the right of way to Sumeracki. The jury was instructed that pursuant to I.C. § 9-21-8-30:

> A person who drives a vehicle within an intersection intending to turn to the left shall yield the right-of-way to a vehicle approaching from the opposite direction that is within the intersection or so close to the intersection as to constitute an immediate hazard. After yielding and giving a signal as required by this chapter, the person who drives the vehicle may make the left turn, and the persons who drive other vehicles approaching the intersection from the opposite direction shall yield the right-of-way to the vehicle making the left turn.

In this case, there was conflicting testimony as to who had the right of way. Sumeracki testified that she came to a complete stop at the intersection of State Road 49 and Division Road. She was in the left southbound lane of State Road 49 and was signaling to make a left turn so that she could travel east on Division Road. While waiting at the stoplight, Sumeracki saw that she still had the green light. Sumeracki looked at the northbound lanes to see if she was free to turn left and when she did not see anything, proceeded to cross the northbound lanes. Sumeracki's testimony suggests that because there were no northbound vehicles in the intersection or so close to the intersection as to constitute an immediate hazard, she properly entered the intersection and Hitz was required to yield the right of way to her.

Hitz' testimony supports the opposite view. Hitz was traveling in the right northbound lane of State Road 49 as she approached Division Road. Hitz testified that as she entered the intersection, she had the green light and that Sumeracki's vehicle was not

moving. Given her proximity to the intersection, Hitz' testimony suggests that Sumeracki was required to yield the right of way to her.

Because of the conflicting evidence regarding who had the right of way, this issue was a question of fact for the jury to evaluate based on the various witnesses' credibility. As such, we will not substitute our judgment for that of the jury. *See Kristoff v. Glasson*, 778 N.E.2d 465, 475 (Ind. Ct. App. 2002) (refusing to substitute its judgment for that of the jury, the court affirmed the trial court's denial of Plaintiff/Appellant's motion for judgment notwithstanding the verdict because conflicting evidence regarding the speed of the car Plaintiff/Appellant was riding in was a question of fact for the jury). Sufficient evidence was presented to permit the jury to find that Hitz should have yielded the right of way to Sumeracki.

We conclude that the jury could have properly determined that Hitz was fifty percent at fault for the accident because sufficient evidence was presented to permit the jury to find that Hitz' speed was not reasonable and prudent given the existing conditions and that she should have yielded the right of way to Sumeracki. Therefore, the trial court abused its discretion when it entered judgment notwithstanding the verdict on the issue of Hitz' fault.

Reversed.

BAKER, C.J., concurs.

KIRSCH, J., dissenting with separate opinion.

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APPEAL FROM THE PORTER SUPERIOR COURT
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KIRSCH, Judge, *dissenting*.

I respectfully dissent from my colleagues' conclusion that there was sufficient evidence in the record from which the jury could have reasonably assigned fifty per cent (50%) of the total fault for this accident to the plaintiff Jill Hitz on the basis that while she was driving within the speed limit she may have been traveling too fast for road conditions.

First, there is no evidence that the plaintiff was traveling too fast for road conditions. There is at best speculation. There is no evidence that the weather conditions

made it prudent for her to reduce her speed. There is no evidence that she was traveling faster than other cars then traveling the road. There is no evidence from which a jury could reasonably determine either that the applicable standard of care was a speed less than the established speed limit or that the plaintiff breached such a standard.

Second, it is axiomatic that to assign fault in a comparative fault case to a party that party must not only have breached the applicable standard of care, but that such breach was a proximate cause of the plaintiff's injuries. Here, there is no evidence that the defendant Mary Sumeracki misjudged the speed of the plaintiff's car when she turned in front of it — she did not even see it. Similarly, there is no evidence that the speed of the plaintiff's car exacerbated her injuries. Thus, even if we assume that the jury may have found that the plaintiff was traveling too fast for the existing road conditions there is no evidence from which the jury could have reasonably found that such speed was a proximate cause of plaintiff's injuries.

I would affirm the trial court in all respects.