

RENDERED: NOVEMBER 14, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001654-MR

TERESA ADKINS

APPELLANT

APPEAL FROM CAMPBELL CIRCUIT COURT
v. HONORABLE FRED A. STINE, V, JUDGE
ACTION NO. 06-CI-01135

JOSEPH M. BRANDT

APPELLEE

OPINION
AFFIRMING

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BEFORE: VANMETER AND WINE, JUDGES; LAMBERT,¹ SENIOR JUDGE.

WINE, JUDGE: Teresa Adkins appeals from a jury verdict in the Campbell Circuit Court which rejected her personal injury claim against Joseph Brandt. Specifically, Adkins argues the trial court erred by instructing the jury that she had a duty not to ride her bicycle on the sidewalk. Adkins asserts that she is exempt

¹ Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

from that general prohibition due to her disability, and that the trial court erred in finding that she was not handicapped as a matter of law. Adkins also contends that the court erred in overruling her motion for a directed verdict on the issue of negligence *per se* arising from Brandt's alleged violation of a Newport City Ordinance. Finding no error as to either issue, we affirm.

This case arises from a collision involving an automobile operated by Brandt and a bicycle ridden by Adkins on August 9, 2005, in Newport, Kentucky. At the time of the collision, Brandt was driving his vehicle northbound in Hamlet Alley towards Sixth Street. He stopped at the Seventh Street intersection and then proceeded toward Sixth Street in the alley.

At the same time, Adkins was riding her bicycle on the sidewalk along Sixth Street eastward toward Hamlet Alley. A wall runs along Hamlet Alley and ends at the corner of the alley and Sixth Street. Adkins asserts that the collision occurred when Brandt's vehicle suddenly emerged from behind the wall and she was unable to avoid the collision. Conversely, Brandt claims that he stopped at the intersection at Sixth Street on the right-hand side of Hamlet Alley. According to Brandt, he began to enter the intersection at Sixth Street where Adkins' bicycle, failing to stop at the intersection of the alley and sidewalk, struck his vehicle.

As a result of the collision, Adkins was thrown from her bicycle and onto the front end of Brandt's vehicle. She suffered an injury to her knee which

eventually required surgery. The collision also damaged the front driver's side headlight area of Brandt's vehicle.

Adkins filed this action to recover for medical bills and pain and suffering she sustained as a result of the collision. In response, Brandt answered that Adkins was negligent *per se* and in violation of Newport Ordinance § 70.35 because she was riding her bike on the sidewalk. Newport Ordinance § 70.35 reads as follows: "It is unlawful for any person to ride a bicycle or operate any motorized device upon the sidewalks of the City, excluding those operated by any handicapped individual."

At trial, Brandt moved for a directed verdict to hold Adkins negligent *per se* based on her violation of the ordinance. In opposition, Adkins asserted that she is exempt from the ordinance because she is handicapped. Specifically, she testified that she was and is totally disabled, unemployable, unable to drive and receiving social security disability income as a result of being afflicted with grand mal seizures. Adkins further testified that the Social Security Administration recognizes her disability. Her treating physician, Dr. Michael Grefer, also testified that Adkins is disabled.

The trial court found that Adkins was not, as a matter of law, a "handicapped individual" under the ordinance. The trial court then instructed that Adkins had a duty not to ride her bicycle on the sidewalk. Adkins argues this ruling was tantamount to directing a verdict that she was negligent.

Adkins also moved the court for a directed verdict at the conclusion of the proof, asserting that Brandt was negligent *per se* as a result of his violation of Newport Ordinance § 71.27 which reads: “The operator of a vehicle entering a street from an alley or from a private road or drive shall yield the right-of-way to vehicles already approaching on the street.” In response, Brandt argued he did not fail to yield to Adkins. While he admitted that his view was obstructed by the high wall, Brandt testified that he came to a complete stop and then slowly crept out into the intersection. He further asserted that Adkins’ bicycle struck his vehicle only after he had started moving forward. The trial court denied Adkins’ motion for a directed verdict, concluding that a question for the jury existed as to whether Brandt yielded to Adkins. The jury returned a verdict in favor of Brandt. This appeal followed.

Adkins argues the trial court erred in failing to grant a directed verdict in her favor deeming Brandt to have been negligent *per se* as a result of violating Newport Ordinance § 71.27. In reviewing a motion for directed verdict, we are governed by the standard set forth in *Childers Oil Co., Inc. v. Adkins*, 256 S.W.3d 19 (Ky. 2008):

The appropriate standard for review of denial of a motion for directed verdict is set forth in *Lewis v. Bledsoe Surface Mining Company*, 798 S.W.2d 459 (Ky. 1990). In determining whether the circuit court erred in failing to grant the motion, all evidence that favors the prevailing party must be taken as true; and the reviewing court is not at liberty to assess the credibility of witnesses or determine what weight is to be given the evidence. *Id.* at 461. As the prevailing party, Adkins is entitled to all

reasonable inferences that may be drawn from the evidence. *Id.* The appellate court is limited to determining whether the verdict is ““palpably or flagrantly”” against the evidence so as ‘to indicate that it was reached as a result of passion or prejudice.’” *Id.* (quoting *NCAA v. Hornung*, 754 S.W.2d 855, 860 (Ky. 1988)).

Id. at 25.

Adkins asserts that Brandt should have been found negligent *per se* because the fact that a collision occurred means that neither Brandt nor Adkins yielded to the other. Adkins submits that Newport Ordinance § 71.27 puts the burden on the vehicle entering the street from the alley to yield. Ordinance § 71.27 reads, “The operator of a vehicle entering a street from an alley or from a private road or drive shall yield the right-of-way to vehicles already approaching on the street.”

However, there was enough evidence at trial justifying the submission of this evidence to the jury. First, a witness, Herb Seger, testified that he saw Adkins traveling on her bicycle along Sixth Street moments before the collision. Seger testified that she was “going pretty good” and he thought to himself that “she must be in a hurry.” In addition, Brandt submitted photographs of his car showing that the collision occurred on the left side of his vehicle, indicating that perhaps Adkins ran her bicycle into Brandt’s vehicle. Brandt also testified that he crawled out into the intersection after coming to a complete stop and that is when the collision occurred. Due to the relative position of a driver and the length of a vehicle, a driver would necessarily need to pull forward to see past the wall.

Finally, Adkins' testimony differed from Brandt's in that she stated she was riding along when Brandt's vehicle suddenly emerged from behind the wall running along the alley. Given these disputed issues of fact, there is enough evidence that reasonable minds could differ with respect to whether Brandt violated Newport Ordinance § 71.27 by failing to yield to Adkins. Thus, the trial court did not error in submitting the evidence to the jury.

Next, Adkins argues that the trial court erred in finding as a matter of law that she was not "handicapped" as anticipated by the ordinance. Specifically, she argues she was entitled to a directed verdict because there was ample evidence in the record of her disability both from her own testimony, the testimony of her daughter, the medical records, and her treating physician, Dr. Michael Grefer. Consequently, she asserts that the ordinance did not apply to her, and therefore the trial court erred by instructing the jury that she had a duty not to operate her bicycle on the sidewalk.

Adkins' argument is misplaced. As noted above, the jury was properly instructed as to whether Brandt was negligent in failing to yield his vehicle. The jury found that Brandt was not negligent. Therefore, it was not necessary for the trial court or the jury to address the question of whether or not Adkins was "handicapped" pursuant to the ordinance. Once the jury found that Brandt was not negligent, whether or not Adkins was or was not entitled to ride her bicycle on the sidewalk was no longer at issue as there was no need to apportion fault for the collision.

Regardless, we cannot say that the trial court erred in finding that Adkins was not “handicapped” as anticipated by the ordinance. Newport Ordinance § 70.35 reads, “It is unlawful for any person to ride a bicycle or operate any motorized device upon the sidewalks of the City, excluding those operated by any handicapped individual.” However, the ordinance is silent as to what constitutes “handicapped.” Further, the ordinance is poorly drafted as arguably “those operated by any handicapped individual” might only modify “operate any motorized device.”

In support of its finding that Adkins did not meet the definition of “handicapped,” the trial court turned to the requirements for obtaining a handicapped parking permit contained in KRS 189.456(3):

For every person seeking an accessible parking placard, proof of the disability shall be required by:

- (a) Evidence that the individual has a license plate for a person with a disability as provided by KRS 186.041 or 186.042;
- (b) The county clerk issuing the permit ascertaining that the applicant is obviously disabled; or
- (c) A statement from a licensed physician that the applicant is a person whose mobility, flexibility, coordination, respiration, or perceptiveness is significantly reduced by a permanent disability to that person’s arms, legs, lungs, heart, ears, or eyes.

Based on this statute, the trial court concluded that the term “handicapped” as used in the ordinance is not synonymous with the broader term “disability.” Rather, the

court concluded that a “handicap” must be a disability that impaired Adkins’ mobility, flexibility, or coordination.

The trial court’s interpretation of the ordinance is not unreasonable. The ordinance exempts “handicapped” individuals from the general prohibition against riding a bicycle or operating any motorized device on the sidewalk. While the term “handicapped” is not defined, the trial court properly looked to the use of the word in the statutes providing for handicapped parking permits, KRS 189.456(3), and for handicapped license plates, KRS 189.042. Both of those statutes anticipate that a “handicapped” individual is a person whose mobility is impaired. When viewed in this context, the clear purpose of the exemption in the ordinance is to allow persons with limited mobility to ride bicycles, or operate motorized devices such as a wheelchair or similar vehicles, on the sidewalk.

Accordingly, the order of the Campbell Circuit Court is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

R. Christian Macke
Newport, Kentucky

BRIEF FOR APPELLEE:

Stephen D. Wolnitzek
Covington, Kentucky