[Cite as *Mull v. Madkins*, 2010-Ohio-6360.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94554

DONALD MULL

PLAINTIFF-APPELLANT

vs.

TAKARA MADKINS, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-634713

BEFORE: Boyle, J., Gallagher, A.J., and Sweeney, J.

RELEASED AND JOURNALIZED: December 23, 2010

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MARY J. BOYLE, J.:

{¶ 1} Plaintiff-appellant, Donald Mull, appeals from the jury's verdict finding in favor of defendants-appellees, Takara Madkins and Westfield Insurance Company, on his negligence action arising out of Madkins's vehicle

striking him while he was crossing the street. He raises the following two assignments of error:

{¶ 2} "[I.] The jury's verdict in favor of [Madkins] was against the manifest weight of the evidence.

{¶ 3} "[II.] The court abused its discretion and erred by failing to instruct the jury on a pedestrian's right of way."

{¶ 4} We find his arguments unpersuasive and affirm.

Procedural History and Facts

{¶ 5} Mull commenced the underlying case against (1) Madkins, asserting a single claim of negligence, and (2) Westfield Insurance Company, asserting a claim for underinsured motorists coverage, as a result of injuries he sustained when Madkins's vehicle struck him. The matter proceeded to a jury trial where the following evidence was presented.

{¶ 6} The accident occurred at the intersection of Ontario Street and Huron Road. At this location, Ontario Street has eight lanes, five heading northbound and three lanes heading southbound. Of the five northbound lanes, two of the lanes are for traffic turning left onto Huron, while the other three northbound Ontario lanes proceed straight or turn right. There are three marked crosswalks at three corners of this intersection, but no marked crosswalk for pedestrians to cross west to east across Ontario at the south end of the intersection.

{¶ 7} On September 23, 2005, around 9:00 a.m. and during rush hour, Mull was dropped off at the southwest corner of the intersection and attempted to cross the eight lanes of traffic to reach the Gund Arena, proceeding west to east, while the cars were stopped at the light. He was not in a marked cross-walk. Prior to reaching his destination, Mull was struck by Madkins's vehicle, which was the first car in the second lane from the east curb of northbound traffic. Mull testified that he later measured the specific distances and, according to him, the distance from the southwest corner to the southeast corner of the intersection was 100 feet. He further testified that he had crossed 88 feet at the point where he was hit and that Madkins had traveled "30 feet from where she was stopped [at the light] to the point of impact."

{¶ 8} On cross-examination, however, Mull admitted that he never looked at the traffic lights before proceeding across the eight lanes of traffic; he relied solely on the fact that the vehicles were stationary. And the defense elicited further testimony that, despite seeing some vehicles start to move, Mull did not stop crossing the intersection; he simply "quickened" his pace.

{¶ 9} Mull's theory at trial was that Madkins was not paying attention when the light turned green because she was talking on her cell phone. His case was essentially that she failed to exercise due care and that if she had, she would have seen him walking in front of her. He offered into evidence Madkins's cellular phone records for the day of the accident, demonstrating that

Madkins made five calls that morning "at or around the time of the accident." Mull also offered the testimony of Henry Lagunzad, who testified that, while stopped at the intersection, he observed Mull crossing the left turn lanes, designated as lanes four and five. He also observed the car to Madkins's left, which was in front of him, proceed through the intersection prior to Madkins's vehicle striking Mull. He further observed Madkins's head cocked in a position consistent with being on a cellular phone. But Lagunzad admitted on cross-examination that he never saw Madkins on the phone. He further testified that Madkins could not have been going more than three to five miles per hour and traveled no more than ten feet before hitting Mull.

{¶ 10} Daniel Shephard, who was driving a school bus and stopped in lane one (facing northbound) at the time of the accident, also testified that he saw Mull walking across the intersection before being struck by Madkins's vehicle. On cross-examination, he acknowledged that Madkins traveled between only three and four feet before striking Mull. He further acknowledged that being in the bus, he sat higher up than the other cars in the intersection. Shephard also reiterated that Mull was not walking in a marked crosswalk when crossing the intersection.

{¶ 11} Madkins testified that she was not on her cell phone and that Mull came out of nowhere. She acknowledged being on the phone earlier in her commute but denied talking on the phone at the time of the accident. She

testified that she stopped at the intersection and then, after the light turned green, she "proceeded to go through the green light very slow." She then saw the tail of Mull's raincoat out of the corner of her eye and then she felt a bump. She immediately stopped and discovered Mull laying on the ground.

{¶ 12} At the conclusion of the trial, the jury returned a verdict in favor of the defense, which Mull now appeals.

Manifest Weight of the Evidence

{¶ 13} In his first assignment of error, Mull argues that the jury's verdict is against the manifest weight of the evidence. He contends that the evidence overwhelmingly demonstrates that Madkins breached an ordinary duty of care when she struck him. We disagree.

{¶ 14} In *State v. Wilson*, 113 Ohio St.3d 382, 387, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court clarified the civil manifest weight of the evidence standard, stating the following:

{¶ 15} "[T]he civil manifest-weight-of-the-evidence standard was explained in *C.E. Morris Co. v. Foley Constr. Co.* [1978], 54 Ohio St.2d 279, 8 O.O.3d 261, 376 N.E.2d 578, syllabus ('Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence'). We have also recognized when reviewing a judgment under a manifest-weight-of-the-evidence standard, a court has an obligation to presume

that the findings of the trier of fact are correct. * * * This presumption arises because the trial judge [or finder-of-fact] had an opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' * * * 'A reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court. A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not.'" Id. at ¶24. (Internal citations omitted.)

{¶ 16} Here, the jury obviously believed Madkins's testimony, finding that she was not on her cell phone and that she exercised due care in proceeding forward at a green light. The facts are undisputed that, at the time that Madkins struck Mull, he was crossing the intersection against the light. Further, there was no evidence presented that Madkins recklessly applied the gas when the light turned green or that she was not paying attention. And contrary to Mull's claim, neither the phone records nor the eyewitness testimony conclusively established that Madkins was on the phone at the exact moment of the accident. And while two eyewitnesses observed Mull crossing the intersection, these witnesses had different vantage points than Madkins. But notably, these witnesses directly contradicted Mull's claim that Madkins traveled 30 feet prior to impact.

{¶ 17} To the extent that Mull argues that he had a right to proceed in the unmarked crosswalk through the intersection "uninterrupted" as a matter of law, we find no authority that supports his claim. Again, he was going against the light, and, furthermore, he opted to cross eight lanes of traffic in an unmarked crosswalk, despite three marked crosswalks with signals available for him to utilize. Notably, R.C. 4511.48(C) expressly provides that "[b]etween adjacent intersections at which traffic control signals are in operation, pedestrians shall not cross at any place except in a marked crosswalk." Thus, under this statutory provision, Mull's conduct was negligent.

{¶ 18} Moreover, the mere fact that Madkins struck Mull does not in of itself establish that she breached a duty of ordinary care. As this court has previously recognized, "a driver need not look for vehicles or pedestrians violating his right of way unless there is a reason to expect it." *Hawkins v. Shell* (June 4, 1998), 8th Dist. No. 72788.

{¶ 19} Mull's first assignment of error is overruled.

Jury Instruction

{¶ 20} In his second assignment of error, Mull argues that the trial court committed plain error in failing to provide a jury instruction regarding a pedestrian's right of way while crossing within a crosswalk. Mull, however, neither requested nor objected to the jury instructions provided related to the parties' respective duties and right of way. In fact, he agreed to the instructions

provided. To the extent that he now argues that it was plain error for the court not to provide an alternative instruction, we disagree.

{¶ 21} "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 679 N.E.2d 1099, at the syllabus. Therefore, to constitute plain error, the error must be "obvious and prejudicial error, neither objected to nor affirmatively waived," and, "if permitted, would have a material adverse effect on the character and public confidence in judicial proceedings." *Hinkle v. Cleveland Clinic Found.*, 159 Ohio App.3d 351, 2004-Ohio-6853, 823 N.E.2d 945, ¶78.

{¶ 22} Here, we cannot say that the trial court committed plain error in failing to provide alternative instructions when (1) such instructions were not requested, and (2) Mull's counsel agreed to the instructions provided. Indeed, assuming that other jury instructions should have been provided, any error would have been invited by Mull.

{¶ 23} The second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

MARY J. BOYLE, JUDGE

SEAN C. GALLAGHER, A.J., and
JAMES J. SWEENEY, J., CONCUR