[Cite as *Akers v. Saulsbury*, 2010-Ohio-4965.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
FAITH A. AKERS, ET AL	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J.
Plaintiffs-Appellants	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2008-CAE-12-0070
JULIA E. SAULSBURY, ET AL	:	
	:	
Defendants-Appellees	:	O P I N I O N

CHARACTER OF PROCEEDING:	Civil appeal from the Delaware County Court of Common Pleas, Case No. 06CVC030180
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 8, 2010

APPEARANCES:

For Plaintiffs-Appellants	For Defendants-Appellees
MICHAEL M. HEIMLICH 103 North Union Street, Ste. E Delaware, OH 43015	JOHN C. NEMETH 21 East Frankfort Street Columbus, OH 43206

Gwin, P.J.

{¶1} Faith and Dewey Akers appeal a judgment of the Court of Common Pleas of Delaware County, Ohio, entered in favor of defendants-appellees Julia and Brian Saulsbury and Grange Mutual Casualty Company after a jury verdict finding appellee Julia Saulsbury was not negligent in the operation of her vehicle. Appellants assign four errors to the trial court:

{¶2} "I. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANTS BY DENYING THE APPELLANTS' MOTION FOR DIRECTED VERDICT.

{¶3} "II. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANTS BY DENYING THE APPELLANTS' REQUESTS FOR ADDITIONAL JURY INSTRUCTIONS ON THE ISSUE OF RIGHT-OF-WAY.

{¶4} "III. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF THE APPELLANTS BY IMPROPERLY INSTRUCTING THE JURY ON THE ISSUE OF RIGHT-OF-WAY.

{¶5} "IV. THE JUDGMENT OF THE TRIAL COURT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶6} The record indicates on or about March 25, 2004, appellant Faith Akers was employed as a mail carrier for the United States Postal Service. She was delivering mail, traveling southbound on U.S. 23 just north of Delaware, Ohio. Appellant Akers was operating her vehicle on the berm, placing mail in the mailboxes. As she proceeded along the berm, appellee Julia Saulsbury made a left turn into a private drive in front of appellant's vehicle and the two vehicles collided.

{¶7} This is the second time this case is before us. In the first appeal, *Akers v. Saulsbury,* Delaware App. No. 07CAE080043, 2008-Ohio-4088, this court reversed the trial court for directing a verdict in the first trial in this matter, finding the evidence presented an issue of fact.

I.

{¶8} In their first assignment of error, appellants argue the trial court erred by overruling their motion for directed verdict. Civ. R. 50 (A)(4) provides:

{¶9} "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶10} Under Civ. R. 50, the standard of review on a ruling on a motion for a directed verdict is as follows: "The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions." *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 344 N.E.2d 334, This "reasonable minds" test calls upon a court to determine only whether there exists any evidence of substantial probative value in support of the claims of the

non-moving party. *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 119-120, 671 N.E.2d 252. Our review of the trial court's disposition of these motions is de novo.

{¶11} Appellants argue appellant Faith Akers was travelling within the dedicated right-of-way, and had the right to proceed uninterruptedly in the same direction of travel. Appellants concede if she were to proceed unlawfully, she would lose the right-of-way, but otherwise she had a preference over other drivers entering her path.

{¶12} In our prior case, we found appellant's presumptive right-of-way must be judged under the standard of ordinary care. We found it was a question of fact for the jury to decide whether appellant's presumptive right-of-way was negated by a lapse of ordinary care.

{¶13} The jury completed interrogatories in addition to their verdict form. With Jury Interrogatory #1, the jury found appellant Faith Akers did not have the right-of-way prior to the collision. We conclude the trial court did not err in refusing to direct a verdict.

{¶14} The first assignment of error is overruled.

II & III

{¶15} In their second assignment of error, appellant argues the trial court erred by refusing to give their requested jury instructions on the issue of right-of-way, and in their third assignment of error, appellants argue the court improperly instructed the jury on the issue of right-of-way.

{¶16} In general, a court should give party's requested jury instruction if it is a correct statement of the law as applied to the facts of the case. *Murphy v*. *Carrollton Manufacturing. Co.* (1991), 61 Ohio St.3d 585, 575 N.E.2d 828. The determination whether to give a jury instruction is a matter left to the sound discretion of the trial court.

State v. Guster (1981), 66 Ohio St.2d 266, 271, 421 N.E.2d 157 When we review the court's decision whether to give a requested instruction, we must determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction. *Feterle v. Huettner (1971),* 28 Ohio St.2d 54, 275 N.E.2d 340*,* syllabus. However, whether the jury instructions correctly state the law is a question of law, which we review de novo. *Murphy* at 591.

{¶17} Appellants asked the trial court to instruct the jury regarding R.C. 4511.01(UU). The statute defines the term in two different contexts. In one context , the term means "[t]he right of a vehicle, streetcar, trackless trolley, or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle, streetcar, trackless trolley, or pedestrian approaching from a different direction into its or the individual's path". Alternatively, "right-of-way" is "a general term denoting land, property, or the interest therein, usually in the configuration of a strip, acquired for or devoted to for transportation purposes. When used in this context, right-of-way includes the roadway, shoulders, or berm, ditch, and slopes extending to the right-of-way limits under the control of state or local authority."

{¶18} Appellees assert appellants are confusing "apples and oranges". The width of the dedicated right-of-way refers to the strip of property to be used as a road, and is different from the question of which driver has the right-of-way while driving.

{¶19} R.C. 4511.01 (EE) states" '[r]oadway' means that portion of a highway improved, designed, or ordinarily used for vehicular travel, except the berm or shoulder. If a highway includes two or more separate roadways the term 'roadway' means any such roadway separately, but not all such roadways collectively." R.C. 4511.44 (A)

provides a driver on a berm must yield the right-of-way to all traffic approaching on the roadway.

{¶20} The trial court instructed the jury that according to R.C.4511.01 (EE), the "roadway" means the portion of a highway improved, designed, or ordinarily used for vehicular travel except for the berm or shoulder. The trial court also instructed the jury that the driver of a vehicle about to enter a highway from any place other than the road must yield the right-of-way to all traffic lawfully approaching on the roadway.

{¶21} The trial court's instructions mirrored the language of the Revised Code, and correctly state the applicable law.

{¶22} The second and third assignments of error are overruled.

IV

{¶23} In their fourth assignment of error, appellants argue the verdict is against the manifest weight of the evidence.

{¶24} A reviewing court may not disturb the trial court's decision as against the manifest weight of the evidence if the decision is supported by some competent and credible evidence. *C.E. Morris Company v. Foley Construction Company* (1978), 54 Ohio St. 2d 279. The Supreme Court has repeatedly held the term abuse of discretion implies the court's attitude is unreasonable, arbitrary, or unconscionable. See, e.g., *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 450 N.E. 2d 1140. This court may not substitute our judgment for that of the trier of fact in reviewing arguments of manifest weight. *Pons v. Ohio State Medical Board* (1996), 66 Ohio St. 3d 619, 621, 614 N.E. 2d 748.

{¶25} We have reviewed the record, and we find there was sufficient competent and credible evidence from which the jury could determine appellant Faith Akers did not have the right-of-way and appellee Julie Saulsbury was not negligent in the operation of her vehicle. We conclude that the trial court did not err in entering judgment on the jury's verdict.

{¶26} The fourth assignment of error is overruled.

{¶27} For the forgoing reasons, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed.

By Gwin, P.J.,

Hoffman, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

_____

HON. JOHN W. WISE

WSG:clw 0915

[Cite as *Akers v. Saulsbury*, 2010-Ohio-4965.]

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO

FIFTH APPELLATE DISTRICT

FAITH A. AKERS, ET AL	:	
Plaintiffs-Appellants	:	
-vs-	:	JUDGMENT ENTRY
JULIA E. SAULSBURY, ET AL	:	
Defendants-Appellees	:	CASE NO. 2008-CAE-12-0070

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Delaware County, Ohio, is affirmed. Cost to appellants.

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HON. W. SCOTT GWIN

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HON. WILLIAM B. HOFFMAN

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HON. JOHN W. WISE