

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Robert L. Guthrie,	:	
Plaintiff-Appellant,	:	
v.	:	No. 04AP-243 (C.P.C. No. 02CVC11-13328)
Leanne D. Wheeler, and Aldi, Inc.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

O P I N I O N

Rendered on December 2, 2004

Wilcox, Schlosser & Bendig Co., L.P.A., and Jacob A. Schlosser, The Boyd Law Firm, and Jeffrey D. Boyd, for appellant.

Wiles, Boyle, Burkholder & Bringardner Co., L.P.A., Thomas E. Boyle and Dale D. Cook, for appellee Aldi, Inc.

APPEAL from the Franklin County Court of Common Pleas.

BOWMAN, J.

{¶1} Plaintiff-appellant, Robert L. Guthrie, filed a complaint against Leanne D. Wheeler and her employer, defendant-appellee, Aldi, Inc. ("Aldi"), as the result of a motor vehicle collision on December 11, 2000. Appellant was a passenger in the front

seat of a Ford Thunderbird traveling northbound on Interstate 270. Brenda Baxa was driving a vehicle traveling southbound and lost control of her vehicle, crossed the median and hit the Thunderbird, causing it to turn clockwise. Wheeler was traveling northbound behind the Thunderbird and collided with the front passenger door after it was hit by the Baxa vehicle. Wheeler was dismissed as a party prior to the trial pursuant to a stipulation that Wheeler was an employee of Aldi and was acting within the course and scope of her employment at the time of the collision. A jury returned a general verdict in favor of Aldi. Appellant filed a notice of appeal and raises the following assignments of error:

Assignment of Error No. 1

The Trial Court Committed Prejudicial Error By Denying Appellant's Motion For A Directed Verdict With Respect to Appellee's Negligence Per Se Under R.C. 4511.21(A).

Assignment of Error No. 2

The Trial Court Committed Prejudicial Error By Submitting The Issue of Appellee's "Sudden Emergency" Defense To The Jury By Way Of Evidence, Argument And Instruction.

Assignment of Error No. 3

The Arguments of Defense Counsel that the Motivation Behind this Trial was that Appellant had an Uncollectible Judgment against Brenda Baxa, and The Argument:

" * * Do not be fooled. [Plaintiff's] point in this case is to ask you for money. And that is what this is about. It is about money" adversely Affected the Substantial Rights of the Appellant and Were Improper and Prejudicial.*

Assignment of Error No. 4

The Verdict And Judgment In Favor Of Appellee Was Against The Manifest Weight Of The Evidence.

{¶2} The first and second assignments of error are related and shall be addressed together. By the first assignment of error, appellant contends that the trial court erred by denying appellant's motion for a directed verdict with respect to Wheeler's negligence per se under R.C. 4511.21(A). By the second assignment of error, appellant contends that the trial court erred by submitting the issue of Wheeler's sudden emergency defense to the jury.

{¶3} Civ.R. 50(A)(4) governs the standard for directed verdicts and provides that:

* * * When a motion for 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.

In ruling on a motion for a directed verdict, a trial court is required to construe the evidence most strongly in favor of the nonmovant. Civ.R. 50(A)(4); *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284. The motion must be denied where there is substantial evidence to support the nonmoving party's case and reasonable minds may reach different conclusions. *Posin v. A.B.C. Motor Court Hotel* (1976), 45 Ohio St.2d 271, 275. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon the motion. *Id.* A motion for directed verdict tests whether the evidence presented is legally sufficient to take the case to the jury. *Wagner v. Midwestern Indemn. Co.* (1998), 83 Ohio St.3d 287, 294.

{¶4} The basis for the motion for directed verdict as to negligence was the alleged violation of the assured clear distance statute in R.C. 4511.21(A), which

provides that "no person shall drive any motor vehicle * * * in and upon any street or highway at a greater speed than will permit the person to bring it to a stop within the assured clear distance ahead."

{¶5} "[A] person violates the assured clear distance ahead statute if 'there is evidence that the driver collided with an object which (1) was ahead of him in his path of travel, (2) was stationary or moving in the same direction as the driver, (3) did not suddenly appear in the driver's path, and (4) was reasonably discernible.' " *Pond v. Leslein* (1995), 72 Ohio St.3d 50, 52, quoting *Blair v. Goff-Kirby Co.* (1976), 49 Ohio St.2d 5, 7. A driver violates the statute as a matter of law when uncontroverted evidence as to all the elements is provided, but, if there is conflicting evidence and reasonable minds could differ as to any one of the elements, a jury question exists with regard to that element. *Pond*, at 52.

{¶6} A legal excuse for failure to comply with the assured clear distance statute is the sudden emergency doctrine. The sudden emergency doctrine provides that "one who in a sudden emergency acts according to his best judgment, or who, because of want of time in which to form a judgment, omits to act in the most judicious manner, is not chargeable with negligence." *Mapes v. Opper* (1983), 9 Ohio App.3d 140, 141, citing *Scott v. Marshall* (1951), 90 Ohio App. 347, 365. "In order to invoke the sudden emergency doctrine at trial, [appellee] was required to show: (1) compliance with a specific safety statute was rendered impossible, (2) by a sudden emergency, (3) that arose without the fault of the party asserting the excuse, (4) because of circumstances over which the party asserting the excuse had no control, and (5) the party asserting the excuse exercised such care as a reasonably prudent person would have under the

circumstances." *Steffy v. Blevins*, Franklin App. No. 02AP-1278, 2003-Ohio-6443, at ¶27, citing *Bush v. Harvey Transfer Co.* (1946), 146 Ohio St. 657, 664-665. It is not enough for a defendant to demonstrate that he acted as a reasonably prudent person would have acted under the circumstances, a defendant must show that something over which he had no control or an emergency not of his making made it impossible for him to comply with the statute. *Spalding v. Waxler* (1965), 2 Ohio St.2d 1, 4-5. Aldi bears the burden of proving the elements of the legal excuse by a preponderance of the evidence. *Id.*

{¶7} When determining whether a trial court erred in its jury instructions, an appellate court reviews the instruction as a whole. *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410. A trial court has broad discretion in instructing the jury. *State v. Smith* (2002), Franklin App. No. 01AP-848. If an instruction is a correct statement of the law and is applicable to the facts in evidence and reasonable minds might reach the conclusion sought by the instruction, a requested jury instruction should be given to the jury. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591.

{¶8} The testimony in this case began with Wheeler who testified that, on December 11, 2000, she was traveling northbound on Interstate 270 at approximately 60 m.p.h. in the far left lane, or passing lane, approximately two car lengths or 40-50 feet behind a Ford Thunderbird. She saw the Baxa vehicle in the median, it appeared out of control and she "stood on [her] brakes." (Tr. at 40.) She drove left of the lane to the berm because there was traffic in the lane on her right. When she began driving to the left, there were no obstructions in her path; however, after the Baxa vehicle hit the Thunderbird, the Thunderbird spun clockwise and rotated into her path of travel and she

hit it on the passenger side. Although she was not sure whether the accident occurred in the left lane or in the berm, when her vehicle came to a stop, it was partially in the berm and the rear end was in the left lane. From the time she saw the Baxa vehicle in the median until the point of her impact with the Thunderbird was approximately 2-5 seconds, with only a second or two between the time she started to steer left on the berm and the time the Thunderbird rotated within her directional path.

{¶9} Dale Thum was driving a Dodge Ram pickup truck and traveling behind Wheeler. He saw the Baxa vehicle in the median traveling perpendicular to traffic, it hit the Thunderbird in its front end and turned it sideways before Wheeler hit it on the passenger side door. He did not see the crash between Wheeler and the Thunderbird because he was trying to stop his vehicle and get out of the way. As far as he could recall, Wheeler's vehicle did not leave the left lane but he recalls the Thunderbird stopping after the accident facing northeast with its rear tires on the yellow line between the berm and the left northbound lane.

{¶10} Appellant testified that he was riding in a Thunderbird when he saw the Baxa vehicle heading southbound erratically and it began hydroplaning across the median. The Baxa vehicle hit the front corner of the Thunderbird and the Thunderbird slid clockwise and was mostly in the left lane when it stopped. He saw Wheeler's vehicle coming toward the car and, upon impact, his leg became pinned between the floor and passenger door. He suffered a fracture of both his tibia and his fibula in his right leg and a vertebrae in his back.

{¶11} In this case, Wheeler testified that, when she saw the Baxa vehicle, she attempted to brake and drove left of the lane to the berm and there were no obstructions

in her path when she began driving to the left. It was not until after the Baxa vehicle hit the Thunderbird that the Thunderbird entered into her new path of travel on the berm. There was testimony that the vehicles were not traveling in the same direction, Wheeler testified that her vehicle was traveling northwest and the Thunderbird was facing northeast and traveled into the berm. Thus, there was conflicting evidence which created an issue of fact for the jury with regard to the elements of a violation of the assured clear distance statute as to whether the Thunderbird suddenly appeared in Wheeler's path and whether the vehicles were traveling in the same direction.

{¶12} Not only are there questions of fact concerning whether Wheeler violated the assured clear distance statute, but, also, whether she was entitled to the sudden emergency defense. Appellant argues that Wheeler created the emergency by violating the assured clear distance statute, but the accident was caused by the Baxa vehicle. "When a defendant offers evidence of facts from which it may be inferred that his violation of such legal requirement was due to the existence of a sudden emergency arising without his fault, the questions of his liability in the premises, and of the proximate cause of injury resulting from such violation, are for the jury." *Nomic v. Pettry* (1972), 32 Ohio App.2d 152, 155, quoting *Satterthwaite v. Morgan* (1943), 141 Ohio St. 447, paragraph three of the syllabus.

{¶13} Here, the sudden emergency defense was warranted by the evidence and reasonable minds could reach the conclusion sought by the instruction, thus, the requested jury instruction should have been given to the jury. The trial court did not err in denying appellant's motion for a directed verdict, nor in giving the instruction for the

sudden emergency defense. Appellant's first and second assignments of error are not well-taken.

{¶14} By the third assignment of error, appellant contends that defense counsel's arguments that appellant's motivation behind the trial was an uncollectible judgment against Baxa were improper and prejudicial. During his opening statement, defense counsel argued, as follows:

Gee, that seems kind of strange that they would be claiming this is Leanne Wheeler's fault. The evidence is going to show that, in fact, Mr. Guthrie did sue Brenda Baxa, who was the real cause of this accident. Anybody with any common sense realizes she is the real cause of this entire episode. He did sue her and got a judgment against her in this court for monetary damage. But he can't collect that judgment against her.

So, what has he done? He has filed suit against Leanne Wheeler.

(Tr. at 22-23.)

{¶15} The trial court then instructed the jury, as follows:

THE COURT: Ladies and gentlemen, counsel has referred to a third party, Miss Baxa, I believe, who may have been negligent in the case and caused damages, and that a judgment was taken against that person.

Well, the only relevancy on that issue is that it may go to the credibility of any witness presented by the plaintiff. The fact of whether or not this third party was negligent is not relevant as to whether or not the defendant in this case was negligent.

Do you understand that?

So, it is admissible only for the issue of the credibility as to why this suit may have been brought in this case, not as to this party is to blame and this party is not.

Do you understand that?

Go ahead.

MR. BOYLE: I trust, though, I can argue to the jury the real cause of this entire event is the sole negligence of Brenda Baxa?

THE COURT: The only real relevancy, based upon your argument of the negligence, is whether or not it was a proximate cause of the damages here on the third party's part.

(Tr. at 23-24.)

{¶16} Defense counsel, during opening statement, later argued:

But what they are doing here in court is they are trying to blame somebody else for it. And do not be fooled. Their point in this case is to ask you for money. And that is what this is about. It is about money. And in order for them to get any money, they have to somehow convince you that this accident was Leanne Wheeler's fault. And that is what they are really attempting to do. We don't think they can prove that.

(Tr. at 32-33.)

{¶17} Defense counsel questioned appellant concerning the action against Baxa, as follows:

Q. Now, so the jury understands this, Mr. Guthrie, in terms of this auto accident of December 11th, 2000, you not only filed this lawsuit against Leanne Wheeler that was filed in November of the year 2002, but in addition right after the accident you filed a lawsuit against Brenda Baxa, the driver of the car that came through the median, correct?

A. That was not my choice. But, yes, sir, that was what happened.

Q. You filed a lawsuit against her, correct?

A. Yes, sir.

Q. In fact, in that case you obtained what is called a judgment against Brenda Baxa, and you haven't recovered any money on that judgment, is that correct, sir?

A. Yes, that's correct.

(Tr. at 130.)

{¶18} After an objection, the trial court instructed the jury, as follows:

THE COURT: Ladies and gentlemen, both sides have alluded to here of the fact that another party was sued out of this and the judgment was gotten against another party, which was not collected, or uncollectible, okay. That has nothing to do with whether or not the defendant in this case was negligent, whether that was the proximate cause of the injuries, and whether or not you find her liable or not liable. That is not relevant to your determination, okay. It is relevant on a very limited basis. It is relevant only as it may affect the credibility of this witness as to his testimony in this case, okay.

So, you won't consider the fact there is another judgment out there, what it was for, how much it was for, except as to how it may affect the credibility of this witness if you care to consider it. That is up to you. All right.

Do you understand that?

A JUROR: Can you give an example of how it would affect the credibility?

THE COURT: The issue here is, ma'am, quite honestly, does the fact that this plaintiff brought a lawsuit, got a judgment which he can't collect, is that a reason for him to fabricate in this case. That is for you to determine, okay. But that is the only reason you can consider it.

(Tr. 131-132.)

{¶19} Appellant contends that defense counsel's closing argument was inappropriate, as follows:

Does he [Mr. Guthrie] have any reason to attribute everything to the second impact? Of course he does.

I think there is an issue here of the credibility or the recollection, whether it is shaded in some degree by the fact this man did sue Brenda Baxa in another lawsuit and was unable to collect any money in that case and is now trying to sue somebody to get money. It is about money. I understand that in a case such as this, we can't go back and take away his injuries. But, in fact, this case is about money.

(Tr. at 334-335.) A witness' bias and prejudice by virtue of pecuniary interest in the outcome of the proceeding is a matter which affects credibility, pursuant to Evid.R. 611(B), which permits cross-examination on all relevant matters and matters affecting credibility. *State v. Ferguson* (1983), 5 Ohio St.3d 160, 165. The trial court, in this case, gave two limiting instructions. The jury is presumed to follow instructions given by the court. *Pang v. Minch* (1990), 53 Ohio St.3d 186, paragraph four of the syllabus. Thus, appellant has not demonstrated that defense counsel's arguments were improper and prejudicial, and appellant's third assignment of error is not well-taken.

{¶20} By the fourth assignment of error, appellant contends that the verdict and judgment were against the manifest weight of the evidence. Judgments which are 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. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus. In order to find that the trial court abused its discretion, we must find more than an error of law or judgment, an abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Most instances of an abuse of discretion result in decisions that are unreasonable as opposed to arbitrary and capricious. *AAAA Enterprises, Inc. v. River*

Place Community Urban Redevelopment Corp. (1990), 50 Ohio St.3d 157. A decision that is unreasonable is one that has no sound reasoning process to support it.

{¶21} Appellant again argues that, because Wheeler testified that she was approximately two car lengths or 40-50 feet behind the Thunderbird, when she saw the Baxa vehicle in the median she had no escape because she had voluntarily placed herself in a trap. Wheeler testified that she saw the Baxa vehicle, used her brakes and drove left of the lane to the berm because there was traffic in the lane on her right. When she began driving to the left, there were no obstructions in her path. However, after the Baxa vehicle hit the Thunderbird, the Thunderbird spun clockwise and rotated into her path of travel and she hit it on the passenger side.

{¶22} Dale Thum testified that he saw the Baxa vehicle hit the Thunderbird in its front end and turned it sideways before Wheeler hit it on the passenger side door, but he did not see the crash between Wheeler and the Thunderbird because he was trying to stop his vehicle and get out of the way. As far as he could recall, Wheeler's vehicle did not leave the left lane, but he recalls the Thunderbird stopping after the accident facing northeast with its rear tires on the yellow line between the berm and the left northbound lane.

{¶23} Appellant testified that he was injured during the second impact with Wheeler, not the first impact with the Baxa vehicle. The Columbus police officer who investigated the accident testified that, when he arrived at the scene after the accident, the Wheeler vehicle was on the berm with only the right rear corner in the passing lane. Most of the damage to the Thunderbird was in the front center. Dr. John F. Wiechel, a mechanical and biomechanical engineer testified that, in his opinion, based upon

appellant's medical records and deposition transcripts, appellant's injuries were caused by the frontal impact rather than the side impact. He believed that, to have a fracture of this nature, there has to be force applied to the bottom of the foot along with dorsa flexing of the foot, matching forces, which would occur in a frontal impact but not a side impact. Wiechel believed appellant was just incorrect in thinking the injuries occurred during the side impact because there was too little time between the two accidents to assess his injuries.

{¶24} Given all this evidence, the jury was presented with some competent, credible evidence upon which it could have relied to find that Wheeler was relieved of her duty to comply with the assured clear distance statute because of a sudden emergency presented when the Baxa vehicle hit the Thunderbird and sent it into Wheeler's new path of travel, that Wheeler was not negligent and, thus, the verdict is not against the manifest weight of the evidence. Appellant's fourth assignment of error is not well-taken.

{¶25} For the foregoing reasons, appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KLATT and McCORMAC, JJ., concur.

McCORMAC, J., retired of the Tenth Appellate District,
assigned to active duty under authority of Section 6(C),
Article IV, Ohio Constitution.
