[Cite as *Ball v. Stark*, 2013-Ohio-106.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Zimara C. Ball, a minor et al.,	:	
Plaintiffs-Appellants,	:	
		No. 11AP-177
v.	:	(C.P.C. No. 08CVC-09-14024)
Jessica L. Stark et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

Nunc Pro Tunc
D E C I S I O N[1]

Rendered on January 17, 2013

Colley Shroyer & Abraham Co., LPA, David I. Shroyer; *Reddy, Baran & Kral Co., Brian Reddy* and *Donald Kral*, for appellants.

Gallagher, Gams, Pryor, Tallan & Littrell, L.L.P., Belinda S. Barnes and *M. Jason Founds*, for appellee Jessica L. Stark.

Sutter O'Connell Co., Lawrence A. Sutter and *Christina J. Marshall*, for appellee Maronda Homes of Ohio, Inc.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Plaintiffs-appellants, Zimara C. Ball, by and through Kelli T. Schreck and Deborah K. Craft, and Deborah K. Craft, individually, appeal from a judgment of the Franklin County Court of Common Pleas in favor of defendants-appellees, Jessica L. Stark

[1] This decision, which corrects a clerical error in the attorneys of record designation on page 1 in our original decision released on December 31, 2012, replaces that decision nunc pro tunc and is effective as of the original release date.

and Maronda Homes of Ohio, Inc. ("Maronda Homes"). For the following reasons, we affirm.

{¶ 2} At approximately 1:10 p.m. on June 3, 2006, an automobile being driven by Stark struck and seriously injured Ball. Prior to the collision, Stark was driving her 2002 black Audi A4 north on Brown Road. Stark, who was a new home sales consultant for Maronda Homes, was taking her client, Ann Herndon, to tour a new house. Stark became lost and was contemplating turning around when she saw two girls standing on the east side of Brown Road near the intersection with Tracy Circle. Those girls were later identified as 10-year-old Ball and her younger sister, six-year-old Alissa Mitchell. According to Stark, Ball and Mitchell remained in her field of vision as she approached them. She did not see either girl move. As Stark's automobile drew parallel to the girls, the passenger side of the windshield shattered. Stark immediately braked and pulled off the road. She ran from her automobile and saw Ball lying on the berm, motionless. Stark then called 911. While driving towards the girls and during the collision, Stark maintained her speed at the 35 m.p.h. posted speed limit.

{¶ 3} Herndon's recollection of the collision matched Stark's. As Stark drove down Brown Road, Herndon was looking straight ahead. She saw children by the side of the road, but she did not see them move toward the road. When the windshield shattered, Herndon did not know what had happened.

{¶ 4} At trial, the parties presented radically divergent versions of how the collision occurred. Appellants' version relied on the testimony of Ashley Chafin, who was a passenger in a truck stopped on Tracy Circle at the intersection with Brown Road. Chafin saw Ball and Mitchell travel along Tracy Circle to the intersection with Brown Road. Ball was walking while Mitchell was riding a bicycle. Ball and Mitchell stopped at the northeast corner of the intersection. Mitchell then "jump[ed] on her bike to take that pedal to go across" the road. (Tr. Vol. III, 102.) Ball moved in front of the bike and pushed it out of the road. As Ball was running back to the berm, the front of Stark's automobile struck her.

{¶ 5} Chandler Phillips, appellants' expert in biomechanical engineering, testified that Ball's injuries were consistent with Chafin's version of events. According to Phillips, the leading edge of Stark's bumper struck Ball's right leg and fractured Ball's femur just

above her knee. Ball then rotated 180 degrees and her left hip crashed into the passenger side of the automobile in front of the tire. The momentum of the automobile caused Ball to slide along the passenger side of the hood until her head impacted with the passenger side of the windshield and the A-pillar, the part of the automobile that runs alongside the windshield and connects the passenger side of the roof with the hood. Ball sustained serious injury to the left side of her head when it hit the windshield/A-pillar area of the automobile.

{¶ 6} Based on Chafin's version of events, appellants' accident reconstructionist, Henry Lipian, estimated that Mitchell started to move onto Brown Road approximately three to four seconds before Stark's vehicle struck Ball. At three to four seconds prior to impact, Stark's vehicle would have been 154 to 205 feet away, which Lipian testified would have given a driver paying reasonable attention enough space to stop after perceiving a hazard. Lipian opined that the cause of the accident was Stark's failure to maintain a proper lookout and drive at a speed that would allow her to stop in sufficient time to avoid a hazard.

{¶ 7} Appellees' version of events relied on the testimony of Mitchell, Ball's younger sister. Mitchell testified that the girls approached Brown Road and stood on the berm for about 20 seconds. Then, according to Mitchell, "Zimara said on the count of three, go. And she said one, two, and then she went." (Tr. Vol. VI, 759.) Mitchell did not run because she saw Stark's automobile. Mitchell saw Ball hit the side and windshield of Stark's automobile.

{¶ 8} Leon Kazarian, appellees' expert in biomechanical engineering, testified that the damage to Stark's automobile and the injuries to Ball were caused when Ball ran into the side of Stark's automobile. Ball's left hip and leg struck the passenger side of the automobile between the front tire and the edge of the front headlamp. Ball then slid up the hood and struck the left side of her head on the windshield/A-pillar area.

{¶ 9} Kazarian disputed Phillips' conclusion that the front of Stark's automobile initially hit Ball's right leg. Kazarian stated that such a collision would have destroyed Ball's leg, not merely fractured it. According to Kazarian, the June 3, 2006 x-ray of Ball's right leg did not show a fracture, but the slippage of the cartilaginous end of Ball's growth

plate and the associated bone. Kazarian attributed that injury to Ball's history of growth plate issues, not the collision.

{¶ 10} Appellees' accident reconstructionist, Carmen Daecher, concurred with Kazarian that Ball ran into the side of Stark's automobile. Both Kazarian and Daecher supported their opinions by pointing to photographs that showed a lack of any dents or scratches on the front of Stark's automobile. Daecher also testified that Ball began running toward Brown Road approximately two seconds before colliding with Stark's automobile. Daecher opined that neither Stark nor any average driver would have had sufficient time to respond to the hazard Ball presented.

{¶ 11} Appellants sued appellees for negligence and Maronda Homes for negligent hiring and supervision. Prior to trial, the trial court granted Maronda Homes' motion for partial summary judgment on appellants' claim for negligent hiring and supervision. After an eight-day trial, the jury returned a general verdict for appellees. The trial court entered judgment on that verdict. Appellants then moved for a judgment notwithstanding the verdict or, in the alternative, a new trial. On February 1, 2011, the trial court issued a judgment denying that motion.

{¶ 12} Appellants now appeal from the February 1, 2011 judgment, and they assign the following errors:

> [1.] THE TRIAL COURT ERRED IN DENYING APPELLANTS' MOTIONS FOR MISTRIAL, JNOV, AND NEW TRIAL WHICH MOTIONS WERE BASED UPON PROPER APPLICATION OF *O'Connell v. Chesapeake & Ohio Railroad Co.*, 58 Ohio St.3d 226 (1991).
>
> [2.] THE TRIAL COURT ERRED IN REFUSING TO GIVE APPELLANTS' PROPOSED JURY INSTRUCTIONS ON REASONABLE SPEED; ASSURED CLEAR DISTANCE; UNMARKED CROSSWALK; PEDESTRIAN RIGHT-OF-WAY, AND A DRIVER'S HEIGHTENED DUTY TO CHILDREN.
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> [3.] THE TRIAL COURT ERRONEOUSLY RULED ON OBJECTIONS TO PREJUDICIAL STATEMENTS BY DEFENSE COUNSEL DURING OPENING AND CLOSING ARGUMENT.
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> [4.] THE TRIAL COURT ERRED IN OVERRULING MOTIONS AND OBJECTIONS RELATING TO THE COMPETENCY OF A CHILD WITNESS.

> [5.] THE TRIAL COURT ERRED IN OVERRULING MOTIONS AND OBJECTIONS RELATING TO THE EXPERT TESTIMONY OF CHANDLER PHILLIPS, M.D.
>
> [6.] THE TRIAL COURT ERRED IN GRANTING A DEFENSE MOTION TO BIFURCATE THE TRIAL.
>
> [7.] THE TRIAL COURT ERRED IN GRANTING APPELLEE MARONDA HOMES, INC. OF OHIO'S MOTION FOR SUMMARY JUDGMENT ON APPELLANTS' NEGLIGENT HIRING AND SUPERVISION CLAIMS.
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> [8.] THE TRIAL COURT ERRED IN REFUSING TO ADEQUATELY ADDRESS MARONDA'S COUNSEL'S COMMENTS AND ACTIONS RELATING TO APPELLANTS' WITNESS ASHLEY CHAFIN.

{¶ 13} By their first assignment of error, appellants argue that the trial court erred in denying their motion for a judgment notwithstanding the verdict or, in the alternative, a new trial. Appellants contend that the general verdict is unconstitutional because less than three-fourths of the jury concurred with it. We disagree.

{¶ 14} Initially, we conclude that appellants' argument could not result in a judgment notwithstanding the verdict. A trial court will grant a motion for a judgment notwithstanding the verdict if, after construing the evidence most strongly in favor of the party against whom the motion is directed, it finds that "reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party." Civ.R. 50(A)(4); *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 679 (1998) (holding that the standard set forth in Civ.R. 50(A)(4) applies to motions for judgment notwithstanding the verdict). Thus, a court's task in deciding a motion for judgment notwithstanding the verdict is to determine whether the evidence is sufficient to sustain the verdict. *Environmental Network Corp. v. Goodman Weiss Miller*, L.L.P., 119 Ohio St.3d 209, 2008-Ohio-3833, ¶ 23. Appellants' motion did not challenge the sufficiency of the evidence; rather, it alleged that the general verdict was constitutionally infirm because less than three-fourths of the jury concurred with it. As appellants did not advance any argument that would justify a judgment notwithstanding the verdict, the trial court did not err in denying appellants that relief.

{¶ 15} Unlike Civ.R. 50, Civ.R. 59, which governs motions for new trial, lists multiple grounds for relief. Appellants' argument corresponds with Civ.R. 59(A)(7), which permits a trial court to grant a new trial if a judgment is contrary to law. Although appellants did not specify any ground for their motion before the trial court, they now rely on Civ.R. 59(A)(7) in arguing to this court that the trial court erred in denying them relief. Appellate courts review de novo a denial of a new trial on the ground that the judgment was contrary to law. *Rohde v. Farmer*, 23 Ohio St.2d 82 (1970), paragraph two of the syllabus; *Sully v. Joyce*, 10th Dist. No. 10AP-1148, 2011-Ohio-3825, ¶ 8.

{¶ 16} In the case at bar, the trial court submitted to the jury general verdict forms, as well as forms for six interrogatories. The first interrogatory asked if Stark was negligent. The second interrogatory asked if Stark's negligence was a proximate cause of Ball's injuries. The third interrogatory asked if Ball, a minor, was capable of negligence. The fourth interrogatory asked if Ball was negligent. The fifth interrogatory asked if Ball's negligence was a proximate cause of her injuries. Finally, the sixth interrogatory asked the jury to apportion fault between Stark and Ball.

{¶ 17} Five of the jurors answered affirmatively to the first five interrogatories. Those same five jurors then signed the sixth interrogatory, in which they apportioned 49 percent of the fault for the collision to Stark and 51 percent to Ball. One juror, juror No. 3, answered affirmatively only to the interrogatories asking if Ball was capable of negligence, Ball was negligent, and Ball was a proximate cause of her injuries. Juror No. 3 also signed the interrogatory that apportioned negligence between Stark and Ball. Together, the same six jurors that apportioned negligence in the sixth interrogatory also signed the general verdict form finding in favor of appellees.[2]

{¶ 18} Appellants base their objection to the jury verdict on *O'Connell v. Chesapeake & Ohio RR. Co.*, 58 Ohio St.3d 226 (1991). There, prior to trial on a negligence claim, the trial court and counsel had agreed to dispense with a general verdict, and instead, the trial court would render a verdict based on the jury's answers to the interrogatories. Six of the jurors signed an interrogatory finding that the plaintiff was seventy percent at fault and the defendant was thirty percent at fault. Of those six jurors,

[2] Of the remaining jurors, one juror found both Stark and Ball causally negligent, but she did not sign the interrogatory apportioning fault. The final juror only signed the interrogatories that found that Stark was negligent and that Stark's negligence was the proximate cause of Ball's injuries.

one juror, Bryson, took part in apportioning fault even though she had not found causal negligence on the part of either the plaintiff or the defendant. Another juror, Hall, took part in apportioning fault even though she did not find the defendant negligent. Nevertheless, given that six jurors had determined that the plaintiff was more than fifty percent at fault, the trial court entered judgment for the defendant.[3]

{¶ 19} On appeal, the plaintiff argued that neither juror Bryson nor juror Hall could participate in apportioning negligence since they had not affirmatively answered interrogatories finding both the plaintiff and the defendant causally negligent. The plaintiff contended that both juror Bryson's and juror Hall's votes were invalid, which left only four jurors in agreement on the apportionment of negligence. Three-fourths or more of a civil jury must concur in order to render a verdict. Ohio Constitution, Article I, Section 5 ("The right of trial by jury shall be inviolate, except that, in civil cases, laws may be passed to authorize the rendering of a verdict by the concurrence of not less than three-fourths of the jury."); Civ.R. 48 ("In all civil actions, a jury shall render a verdict upon the concurrence of three-fourths or more of their number."). Without juror Bryson's or juror Hall's votes, less than three-fourths of the *O'Connell* jury concurred as to the apportionment of fault. The plaintiff, thus, argued that the verdict was constitutionally infirm.

{¶ 20} The Supreme Court of Ohio agreed with the plaintiff's argument, stating that

> the determination of causal negligence on the part of one party [is] a precondition to apportioning comparative fault to that party. It is illogical to require, or even allow, a juror to initially find a defendant has not acted causally negligently, and then subsequently permit this juror to assign some degree of fault to that same defendant. Likewise, where a juror finds that a plaintiff has not acted in a causally negligent manner, it is incomprehensible to then suggest that this juror may apportion some degree of fault to the plaintiff and thereby diminish or destroy the injured party's recovery.

[3] The remaining two members of the jury had found both the defendant and the plaintiff causally negligent, but neither signed the interrogatory apportioning negligence. Their votes, therefore, provided no input as to which party prevailed.

O'Connell at 235. Based on this reasoning, the court found that the trial court should have disqualified jurors Bryson and Hall from apportioning fault as neither had found both the plaintiff and the defendant causally negligent. *Id.* at 236-37. Once the court excluded juror Bryson's and juror Hall's apportionment votes from consideration, less than three-fourths of the jury had concurred with the verdict. Consequently, the Supreme Court concluded that the trial court had violated Ohio Constitution, Article I, Section 5, in entering judgment for the defendant. *Id.* at 237.

{¶ 21} Applying *O'Connell* to this case, we agree with appellants that juror No. 3's answers to the first through fifth interrogatories precluded him from apportioning fault. Juror No. 3 did not find Stark causally negligent, yet he apportioned fault to her when he signed the sixth interrogatory. This vote was impermissible under *O'Connell*, and thus, we find Juror No. 3's vote on the sixth interrogatory invalid. The invalidity of juror No. 3's vote, however, does not alter the general verdict in appellees' favor. Based on the remaining votes on the six interrogatories, one juror, juror No. 3, found 100 percent of the tortious conduct attributable to Ball and none of the tortious conduct attributable to Stark. Five jurors found 51 percent of the tortious conduct attributable to Ball and 49 percent attributable to Stark. The five jurors' distribution of fault required judgment in appellees' favor. R.C. 2315.35. Thus, considering the interrogatories together, six jurors found for appellees. These findings are consistent with the general verdict for appellees, which the same six jurors signed. Because more than three-fourths of the jury concurred in the general verdict, the judgment entered on that verdict is constitutional. Accordingly, we overrule appellants' first assignment of error.

{¶ 22} By their second assignment of error, appellants argue that the trial court erred in refusing to instruct the jury as appellants requested. We disagree.

{¶ 23} Ordinarily, a trial court should give requested jury instructions if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusions sought by the instruction. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 591 (1991). Jury instructions must be based on the evidence presented in the case. "It is well established that the trial court will not instruct the jury where there is no evidence to support an issue." *Id.* Moreover, a trial court may refuse to give an

instruction that is redundant. *Bostic v. Connor*, 37 Ohio St.3d 144 (1988), paragraph two of the syllabus.

{¶ 24} When a party challenges the jury instructions on appeal, an appellate court considers the jury charge as a whole and determines whether the charge misled the jury in a manner that affected the complaining party's substantial rights. *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93 (1995); *Columbus Steel Castings Co. v. Alliance Castings Co.*, LLC, 10th Dist. No. 11AP-351, 2011-Ohio-6826, ¶ 15. The decision to give or refuse a particular instruction is within the trial court's discretion, and an appellate court will not disturb that decision absent an abuse of discretion. *Id.* at ¶ 15; *Eastman v. Stanley Works*, 180 Ohio App.3d 844, 2009-Ohio-634, ¶ 49 (10th Dist.).

{¶ 25} Appellants first argue that the trial court should have instructed the jury that a driver must operate her motor vehicle at a reasonable speed given the circumstances, and that a reasonable speed may be higher or lower than the speed limit set by statute. The trial court declined to give this instruction because it found it redundant. The trial court instructed the jury that a driver who knows or should know of the presence of children in or near the road must exercise a heightened duty of ordinary care. The trial court defined "ordinary care" as the care that a reasonably careful person would use under the same or similar circumstances. Finally, the trial court instructed the jury to consider what actions Stark did or did not do in determining whether she exercised the appropriate amount of care.

{¶ 26} We cannot find that the trial court abused its discretion when it refused to give the requested reasonable-speed instruction. Essentially, the jury was charged that, in the presence of children, all Stark's actions, which necessarily included her speed, had to match those of a reasonably careful person operating under the heightened duty owed to children. Logically, then, if a reasonably careful person would have slowed, then Stark breached her duty by not slowing. Thus, the instruction given incorporated the legal concept appellants wished to impart to the jury with the requested instruction. Consistent with the given instruction, appellants argued to the jury that Stark breached the heightened duty of ordinary care by failing to decrease her speed from the 35 m.p.h. posted limit to a lower, more reasonable speed.

{¶ 27} Second, appellants argue that the trial court should have instructed the jury regarding a driver's duty to operate her vehicle at a speed that would permit her to stop within the assured clear distance ahead of the vehicle. The requested instruction arises from 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." A plaintiff establishes a violation of R.C. 4511.21(A) 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 discernable.' " *Pond v. Leslein*, 72 Ohio St.3d 50, 52 (1995), quoting *Blair v. Goff-Kirby Co.*, 49 Ohio St.2d 5, 7 (1976).

{¶ 28} Here, the evidence does not support an assured-clear-distance-ahead instruction. According to appellants, Ball was moving from the road to the berm when Stark's automobile struck her. According to appellees, Ball ran from the berm to the road where she ran into Stark's vehicle. Under either side's version of events, Ball was moving in a direction perpendicular to Stark's path of travel. As Ball was neither stationary nor moving in the same direction as Stark, the trial court did not abuse its discretion in refusing to give the jury an instruction regarding assured clear distance ahead.

{¶ 29} Third, appellants argue that the trial court erred in instructing the jury regarding the circumstances under which a pedestrian has the right-of-way. Appellants assert that they requested an instruction that a driver must slow or stop to yield to a pedestrian crossing the roadway within a marked or unmarked crosswalk. That instruction is not part of either of appellants' sets of proposed jury instructions.[4] However, the trial transcript contains references to an "intersection argument" that counsel "extensively" argued to the trial court off the record. (Tr. Vol. VIII, 1031.) We infer that this argument centered on whether the trial court should give the instruction appellants wanted or the instruction that "[a] pedestrian crossing a roadway at any point other than that within a marked crosswalk must yield the right-of-way to all vehicles upon the roadway." (Tr. Vol. VIII, 1178-79.) The trial court rejected appellants' instruction and

[4] Appellants filed their first set of proposed jury instructions on October 20, 2010. (R. 203.) They submitted a second set during trial, which the trial court designated "Court Exhibit 1."

gave the latter instruction. Appellants contend that, at the very least, the trial court should have stated that a pedestrian crossing at any point other than within a marked *or unmarked* crosswalk must yield the right-of-way.

{¶ 30} The resolution of this argument turns on whether the evidence shows that a crosswalk existed at the junction of Brown Road and Tracy Circle and, if so, that Ball was within that crosswalk. Every party acknowledges that there was not a marked crosswalk, but they dispute whether there was an unmarked crosswalk. Appellants correctly state the law—a pedestrian must yield the right-of-way unless he or she is within a marked *or unmarked* crosswalk, in which case the pedestrian enjoys the right-of-way. R.C. 4511.46(A); R.C. 4511.48(A). In this case, however, where appellants failed to adduce evidence of the existence and boundaries of the alleged unmarked crosswalk, the trial court did not err in rejecting appellants' proposed instruction and, instead, instructing the jury as it did.

{¶ 31} The definition of "crosswalk" includes "[t]hat part of a roadway at intersections ordinarily included within the real or projected prolongation of property lines and curb lines or, in the absence of curbs, the edges of the traversable roadway[.]" R.C. 4511.01(LL)(1). Under this definition, unmarked crosswalks only exist at intersections. An "intersection" is

> [t]he area embraced within the prolongation or connection of the lateral curb lines, or, if none, the lateral boundary lines of the roadways of two highways that join one another at, or approximately at, right angles * * *. The junction of an alley or driveway with a roadway or highway does not constitute an intersection unless the roadway or highway at the junction is controlled by a traffic control device.

R.C. 4511.01(KK)(1).

{¶ 32} Here, numerous witnesses spoke of the intersection of Brown Road and Tracy Circle. However, appellants presented no evidence that the junction of Brown Road and Tracy Circle qualified as an intersection under the statutory definition. The evidence, instead, demonstrated that Tracy Circle served as an entrance to an apartment complex. This purpose suggests that Tracy Circle constituted a driveway, not a roadway. *See* R.C. 4511.01(DD) (" 'Private road or driveway' means every way or place in private ownership used for vehicular travel by the owner and those having express or implied permission

from the owner but not by other persons."). In the absence of a traffic control device, the point at which a driveway meets a roadway is not an intersection under R.C. 4511.01(KK).[5] *Wallace v. Hipp*, 6th Dist. No. L-11-1052, 2012-Ohio-623, ¶ 29.

{¶ 33} Even if an intersection as defined in R.C. 4511.01(KK) existed, appellants failed to set forth evidence demonstrating the boundaries of the unmarked crosswalk on the north side of that intersection. Such a crosswalk would be between the "real or projected prolongation of property lines and curb lines or, in the absence of curbs, the edges of the traversable roadway[.]" R.C. 4511.01(LL)(1). Here, Tracy Circle did not have curbs, so the edge of the roadway, projected across Brown Road, served as the southern boundary of the purported crosswalk. The placement of the northern boundary depended upon where the property line was located. Appellants, however, did not present any evidence of the location of the property line. Absent such evidence, no factfinder could determine the boundaries of the unmarked crosswalk or whether Ball was within that crosswalk when Stark's vehicle struck her. The trial court, thus, declined to instruct the jury regarding unmarked crosswalks. The record simply lacked the evidence needed to apply the law on unmarked crosswalks. Given that lack of evidence, we conclude that the trial court did not abuse its discretion in limiting its instruction to marked crosswalks.

{¶ 34} Finally, appellants argue that trial court incorrectly stated the law when it instructed the jury that

> [t]he heightened standard of care does not require an attentive motorist who prudently manages and controls her vehicle at all times to go to such lengths as to ignore customary traffic rules and perhaps even the safety of other motorists in order to keep perpetual guard of children near the roadway when it is clearly unrealistic to do so. This is especially true when there is no sign that children may dart out into traffic.

(Tr. Vol. VIII, 1175-76.) Appellants assert that, by this instruction, the trial court essentially told the jury that no duty, much less a heightened duty, was owed to Ball. Appellants misconstrue the meaning of the disputed instruction.

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[5] There was no traffic control device at the junction of Brown Road and Tracy Circle.

{¶ 35} Prior to giving the instruction at issue, the trial court told the jury that a driver owes a heightened duty of ordinary care to children she sees in the area of the roadway. The trial court also instructed the jury that "children do not exercise the same degree of care for their safety as do adults" and that a driver "should anticipate the ordinary behavior of children of the same or similar age as would be anticipated by a person of ordinary care under * * * the same circumstances." (Tr. Vol. VIII, 1176.) The foregoing instructions accurately summarized the heightened duty.[6] The trial court did not negate those instructions by additionally instructing the jury that the heightened duty does not require an attentive motorist to ignore traffic rules or other motorists' safety when it is unrealistic to do so. That caveat to the heightened duty arose when a plaintiff argued that, under the heightened duty, a trucker making a legal right-hand turn should have stopped in the midst of her turn and, possibly, exited her truck to ascertain the location of the two children she saw earlier before continuing on. *Nordyke v. Martin Bird Ents., Inc.*, 3d Dist. No. 16-2000-5 (Aug. 23, 2000). The appellate court rejected this argument, concluding that, while the heightened duty necessitates greater precaution, it does not require unrealistic actions that are contrary to traffic rules or that might endanger others. *Id.* We concur with that conclusion. Therefore, we find that the trial court did not abuse its discretion in giving the disputed instruction.

{¶ 36} In sum, we conclude that the trial court appropriately instructed the jury. Accordingly, we overrule appellants' second assignment of error.

{¶ 37} By appellants' third assignment of error, they argue that the trial court erred in ruling on objections to statements that defense counsel made during opening statement and closing argument. We disagree.

{¶ 38} Attorneys have great latitude in the presentation of closing argument to the jury. *Pang v. Minch*, 53 Ohio St.3d 186 (1990), paragraph two of the syllabus. The determination of whether an attorney has exceeded the bounds of permissible argument is, in the first instance, a discretionary function to be performed by the trial court. *Id.* at paragraph three of the syllabus. An appellate court will not reverse such a determination absent an abuse of discretion. *Id.* In reviewing an objection to a statement made during

[6] We, thus, reject appellants' argument that the totality of the heightened duty instruction was unreasonable and arbitrary.

closing argument, an appellate court reviews the argument in its entirety. *West v. Curtis*, 7th Dist. No. 08 BE 28, 2009-Ohio-3050, ¶ 89; *Syphax v. Kirkland*, 12th Dist. No. CA99-05-049 (May 22, 2000).

{¶ 39} Initially, appellants argue that the trial court erred when ruling on their objection in the following portion of appellees' closing argument:

> THE COURT: On behalf of the Defendants, closing arguments, please.
> [DEFENSE COUNSEL]: Thank you, You Honor. May it please the Court, counsel, members of the jury: My sister looked at me and said we're going to cross on three. One, two, and then she ran. Right into the side of that car. That incredibly innocent, completely honest six year old girl told the truth. And she told that truth on the day of the accident and she told that truth afterwards to her family.
>
> [PLAINTIFFS' COUNSEL]: Objection, Your Honor. * * * This is not the evidence.

(Tr. Vol. VIII, 1120.)

{¶ 40} Out of the hearing of the jury, the trial judge told counsel that he could not remember if appellees had adduced evidence that Mitchell had told others the same story that she had testified to in trial. Therefore, the trial judge said that he would give the jury a curative instruction. Defense counsel asked the trial judge for a short recess so he could regroup. The trial judge granted that request. When defense counsel recommenced his closing argument, the following occurred:

> [DEFENSE COUNSEL]: My sister looked at me and said we're going to cross the road on three. One, two, and then my sister ran into the side of the car. That little girl has told that story over and over.
>
> [PLAINTIFFS' COUNSEL]: Objection.
>
> THE COURT: Overruled. Thank you. Wait a second. I'm going to give a limiting instruction here.
> Folks, this is very simple. To the extent that there's any disagreement about what the facts are in this case, it is your province, as the jury, to determine what those facts are. I suspect obviously they're of some disagreement.
> With that in mind, you may continue.

[DEFENSE COUNSEL]: Every expert in this case has indicated that that little girl told that story to the police officers.

[PLAINTIFFS' COUNSEL]: Objection.

[DEFENSE COUNSEL]: Every expert in this case has admitted that little girl told that story in her deposition.

[PLAINTIFFS' COUNSEL]: Objection.
* * *

THE COURT: Overruled.

[DEFENSE COUNSEL]: [And every] person in this room heard that sweet little pure and innocent girl sit right there and tell that story again.

[PLAINTIFFS' COUNSEL]: Same objection.

[DEFENSE COUNSEL]: Folks, that in and of itself is the crippling fact to the Plaintiff's case. That is why they're running so hard from it. That is why they're hiding from it. That is why they don't want you to believe her. Because that version of the events completely and totally exonerates Jessica Stark from any liability in this case. And it's a story from a person right there. It's a person who's actually closest to the impact. And it's a version of the offense from a member of her own family who has nothing to gain and everything to lose.
Yet the innocence of a six year old girl and then an eight year old girl and now a ten year old girl, she's told us that that's what occurred. And if Alissa Mitchell is correct, folks, Jessica Stark had no chance. This was a dart out into the side of a car. And it doesn't matter what Jessica would have done because that occurred after the point of no return. And not a single person could have done anything to avoid that accident.

* * *

We're not basing our entire defense on Alissa Mitchell. But it's a darn good place to start. An eyewitness at the scene who watched and saw exactly what occurred. And a witness who, by all accounts, should be favorable to them. But instead, tells the truth that destroys their claim.

[PLAINTIFFS' COUNSEL]: Objection.

THE COURT: Overruled.

(Tr. Vol. VIII, 1127-29.)

{¶ 41} On appeal, appellants challenge the above argument on two grounds: (1) defense counsel relied on facts not in evidence, and (2) defense counsel vouched for Mitchell's credibility. We will address the arguments in order.

{¶ 42} Argument crosses the bounds of fairness when it is not supported by the evidence to the extent that there is a substantial likelihood that the jury will be misled. *Hyden v. Kroger Co.*, 10th Dist. No. 06AP-446, 2006-Ohio-6430, ¶ 21; *Barnett v. Thornton*, 10th Dist. No. 01AP-951, 2002-Ohio-3332, ¶ 29; *see also Drake v. Caterpillar Tractor Co.*, 15 Ohio St.3d 346, 347-48 (1984), quoting *Maggio v. Cleveland*, 151 Ohio St. 136 (1949), paragraph two of the syllabus (holding that an attorney's " 'recital of matters foreign to the case' " during closing argument may constitute the basis for reversing a judgment favorable to the party represented by such attorney). An attorney's advocacy should not go beyond the evidence and the reasonable inferences that may be drawn from the evidence. *Barnett* at ¶ 30.

{¶ 43} Here, the record does not contain any evidence to support defense counsel's assertions that Mitchell repeatedly told others that Ball ran into the side of Stark's vehicle. However, we do not find that defense counsel's reliance on facts outside the record created a substantial likelihood that the jury was misled. First, plaintiffs' counsel reminded the jury of the lack of evidence that Mitchell had repeated her story. On rebuttal, plaintiffs' counsel stated

> [l]et's talk about Alissa. Counsel first got up here and said to you that Alissa made this statement that her sister said one, two, three. And then he stood up here and told you that she's made that statement on other occasions. There's been absolutely no evidence in this case.

(Tr. Vol. VIII, 1147.)

{¶ 44} Second, we find no substantial likelihood that the jury was misled because the trial court gave the jury an instruction that they, not the attorneys, were to decide the facts of the case. The trial court reiterated this point in a later instruction, given during appellants' rebuttal closing argument:

> What the facts are in the case are to be determined by you. The statements of counsel on any side are not evidence. There are clearly disputes here. Those are disputes that you will have to take into account and you will have to determine what is correct and what is not correct. That is, of course, your job as judges of the facts.
>
> If any counsel has misstated facts in any way, that doesn't mean that they should either win or lose the case * * * because this isn't a contest about who's got the better lawyer. But you should make your determinations of fact in this case and set aside any errors that any counsel makes with regards to the facts as you find them to be.

(Tr. Vol. VIII, 1145-46.)

{¶ 45} "A presumption always exists that the jury has followed the instructions given to it by the trial court." *Pang* at paragraph four of the syllabus. Therefore, we presume that the jury disregarded any facts referred to in closing argument that were unsupported by the evidence introduced at trial. A jury cannot be misled by facts it disregards. *See Striff v. Luke Med. Practitioners, Inc.*, 3d Dist. No. 1-10-15, 2010-Ohio-6261, ¶ 36 ("When a trial court properly instructs the jury that the attorneys' statements throughout the trial are not evidence, such an instruction defuses the possibility that any alleged improper statements made by counsel during trial will have a prejudicial impact.").

{¶ 46} Next, appellants argue that defense counsel impermissibly vouched for Mitchell's credibility. "An attorney may not express a personal belief or opinion as to the credibility of a witness." *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, ¶ 165; *accord* Prof.Cond.R. 3.4(e) ("A lawyer shall not do any of the following: * * * in trial, * * * state a personal opinion as to * * * the credibility of a witness * * * [.]"). An attorney may, however, fairly comment on the credibility of witnesses when the comment is rooted in evidence. *State v. Loughman*, 10th Dist. No. 10AP-636, 2011-Ohio-1893, ¶ 38; *State v. Kenney*, 10th Dist. No. 09AP-231, 2010-Ohio-3740, ¶ 12.

{¶ 47} Here, defense counsel called Mitchell "honest" and stated that her version of events was the "truth." Without context, these comments appear to reflect defense counsel's personal opinion of Mitchell's credibility. When we consider the comments with the totality of the argument, however, we conclude they flowed from defense counsel's

explanation of how the evidence corresponded with Mitchell's testimony. After the portion of the argument quoted above, defense counsel expounded on how Ball's injuries and the damage to Stark's vehicle supported Mitchell's version of events. Defense counsel concluded his remarks about Mitchell by stating, "Folks, there is a mountain of evidence, both physical and from the witness stand, that indicates that the accident happened just as Alissa said." (Tr. Vol. VIII, 1132.) Because defense counsel based his statements about Mitchell's credibility on the evidence, and not personal opinion, those statements do not provide a ground to reverse the judgment.

{¶ 48} Appellants also argue that defense counsel improperly relied on evidence outside the record in another portion of the closing argument. When discussing the injury to Ball's right leg, defense counsel stated that

> [t]here was no crack in that leg. There was widening of a growth plate in a knee that this young lady had had trouble with for the last five years before the incident.

(Tr. Vol. VIII, 1141.)

{¶ 49} In this instance, appellees introduced evidence that supported the disputed statement. Kazarian, appellees' biomechanical engineering expert, testified that Ball had had "issues" with the cartilaginous ends of her growth plates in the past. (Tr. Vol. VII, 900, 905.) Kazarian also opined that the x-ray of Ball's right leg did not show a fracture caused by the accident, but a slipping of the growth plate attributable to her previous problem. Therefore, we conclude that the disputed statement was within the parameters of permissible argument.

{¶ 50} Finally, appellants argue that the trial court erred in overruling an objection that they made during appellees' opening statement. During appellees' opening statement, the following occurred:

> [DEFENSE COUNSEL]: Folks, it's not easy to stand up here and represent somebody when there's a child involved. But there are times in life when you have to stand up and do the right thing. Maronda Homes and Jessica Stark believe that she did the right thing on that day. They believe –
>
> [PLAINTIFFS' COUNSEL]: I object to believes, opinions.
>
> THE COURT: It's not his. * * * He said it was their. He did not say it was his objective belief. * * * Overruled.

(Tr. Vol. III, 89.)

{¶ 51} An attorney cannot state "a personal opinion as the justness of a cause." Prof.Cond.R. 3.4(e). Here, in the challenged statement, defense counsel set out appellees' opinion that Stark "did the right thing," not his own personal opinion. Therefore, we conclude that the trial court did not err in overruling appellants' objection.

{¶ 52} In sum, we find no error in the manner in which the trial court dealt with appellants' objections to statements in appellees' opening statement and closing argument. Accordingly, we overrule appellants' third assignment of error.

{¶ 53} By appellants' fourth assignment of error, they argue that the trial court erred in allowing Mitchell to testify and reassuring her after her emotional outburst on the stand. We disagree.

{¶ 54} Mitchell was only six years old when she saw Ball collide with Stark's automobile. By the time Mitchell testified at trial, she was eleven years old. A child older than ten is presumptively competent to testify. Evid.R. 601(A); *State v. Clark*, 71 Ohio St.3d 466, 469 (1994). Prior to age ten, a child may only testify if the trial court determines that the child is "capable of receiving 'just impressions of the facts and transactions respecting which they are examined' and capable of 'relating them truly.' " *Id.*, quoting *Turner v. Turner*, 67 Ohio St.3d 337, 343 (1993). A child witness who is ten years of age or older at the time of trial, but who was under the age of ten at the time the incident in question occurred, is presumed competent to testify about the incident. *Clark* at paragraph one of the syllabus.

{¶ 55} At one point in the lengthy pre-trial proceedings, it appeared that trial would occur prior to Mitchell's tenth birthday. The trial court, therefore, held a competency hearing and determined that Mitchell was competent to testify. Now, on appeal, appellants argue that the trial court erred in refusing to allow appellants to ask Mitchell certain questions during the competency hearing. Once Mitchell turned ten and became presumptively competent to testify, any error arising from the competency hearing was rendered moot. We, therefore, decline to consider the alleged error.

{¶ 56} During Mitchell's direct examination, the trial court allowed appellees' counsel to ask leading questions. Appellants now argue that that was error. Pursuant to Evid.R. 611(C), "[l]eading questions should not be used on the direct examination of a

witness except as may be necessary to develop the witness' testimony." The decision to allow leading questions is with the trial court's control and subject to the trial court's discretion. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 138; *Ramage v. Cent. Ohio Emergency Servs., Inc.*, 64 Ohio St.3d 97 (1992), paragraph six of the syllabus. Generally, it is not an abuse of discretion for a trial court to permit leading questions during the direct examination of a child witness. *In re J.M.*, 3d Dist. No. 12-11-06, 2012-Ohio-1467, ¶ 30; *State v. Lortz*, 9th Dist. No. 23762, 2008-Ohio-3108, ¶ 30.

{¶ 57} Here, the trial court allowed leading questions, over objection, until Mitchell began testifying to the events immediately prior to the girls reaching the berm of Brown Road. After that, the trial court sustained appellants' objections to appellees' leading questions. We conclude that the trial court did not abuse its discretion in its determination of when to allow and prohibit leading questions of Mitchell.

{¶ 58} At the beginning of cross examination, Mitchell started to cry on the stand. The trial judge recessed court and met with Mitchell and counsel in chambers. There, the following occurred:

> THE COURT: Alissa, my name is Pat. My nickname is Duffy. All right. * * *
>
> [PLAINTIFFS' COUNSEL]: Your Honor, I don't mean to be rude –
>
> THE COURT: I don't want anybody to interrupt me. I don't care what it is unless the building is on fire. We understood [sic] on that? Thank you.
> This is outside the presence of the jury. Time-out. Let me try again.
> You've been asked to come in and testify. What that means is you just sit down in that seat and you answer questions. I'll bet that that's a little difficult. But when you answer the questions for one side, it's only fair that the other side gets to ask you some questions. And when you do that by way of a deposition, that's that sworn statement you gave before, it's not the same thing. Okay?
>
> THE WITNESS: (Indicates affirmatively.)
>
> THE COURT: So I understand that this might make you feel a little uncomfortable. I understand that very well. You take

> the time you need to answer whatever is asked as truthfully as you can. Can you do that? Can you try to do that?
>
> THE WITNESS: (Indicates affirmatively.)
>
> THE COURT: Do I scare you? Go ahead, if you think I do. Go ahead and tell me. I'm not going to be upset.
>
> THE WITNESS: No.
> THE COURT: I've had children of my own. And I understand that all those adults there, that's probably not something that you're used to. Have you ever acted in a school play?
>
> THE WITNESS: Yes.
>
> THE COURT: Okay. Well, at least then you're used to being in front of people. That's okay. You're one witness. There are a lot of other witnesses who have come in and testified. So this is not just all you. I want you to understand that. You're a part of what everybody needs to hear and that would be something very good and something very right for you to do that. Can you do that for me, please?
>
> THE WITNESS: (Indicates affirmatively.)
>
> THE COURT: Thank you. Go ahead. You can take her outside. And just walk her back around to the courtroom. If she needs water or anything else, you just let me know.

(Tr. Vol. VI, 761-63.)

{¶ 59} After Mitchell left the judge's chambers, appellants' counsel moved to strike Mitchell's testimony and exclude her as a witness because he believed that she was incompetent. Appellants' counsel then represented that Mitchell's counsel had previously told the judge that Mitchell did not remember anything. The judge responded that Mitchell's counsel had said that Mitchell did not remember much, not that she did not remember anything. The judge then refused to strike Mitchell's testimony. Everyone returned to the courtroom, where appellants' counsel cross-examined Mitchell.

{¶ 60} Now, on appeal, appellants argue that the trial judge impermissibly coerced Mitchell into testifying and influenced her testimony. We disagree. Rather than prejudicing the jury by allowing the questioning of an obviously distressed child, the judge took Mitchell into chambers to calm down. The judge then impartially reassured her so

that she could retake the stand. We conclude that the judge adroitly handled a difficult situation in the most humane way possible. Contrary to appellants' arguments on appeal, we find that the trial judge said nothing to influence Mitchell's testimony or encourage her to embellish the truth.

{¶ 61} Appellants also argue that the trial court erred in failing to conduct a second competency hearing. A trial court may conduct a voir-dire examination of a child witness who is ten years of age or older if the judge has reason to question the child's competency. *Clark*, 71 Ohio St.3d at paragraph two of the syllabus. We review the decision to not conduct such a voir-dire examination under an abuse of discretion standard. *Id.* Absent a compelling reason to act otherwise, the failure to conduct a voir-dire examination of a child witness who is ten years of age or older is not reversible error. *Id.*

{¶ 62} Here, appellants claim that the court should have conducted a voir-dire examination because Mitchell's counsel stated that Mitchell did not remember anything. The trial court, however, disagreed with appellants' counsel's recollection of what Mitchell's counsel said. Moreover, the very fact that Mitchell had just testified on direct examination demonstrated that she did remember the major events surrounding the collision. Then, on cross-examination, the following colloquy occurred:

> Q: During the break did you tell someone that you weren't remembering things properly?
>
> A: It was almost four years ago so I really – I don't remember like specific – I remember some – I can't say it.
>
> Q: Specifics.
>
> A: Yeah.
>
> Q: It's a tough word.
>
> A: Details, but not a lot.
>
> Q: There's a lot about the whole incident that you don't remember?
>
> A: Partial details.

(Tr. Vol. VI, 785.) Mitchell's answers establish that, no matter what exactly her attorney said, she had memory of the incident. We, therefore, find no abuse of discretion in the trial court's decision not to explore Mitchell's competency for a second time.

{¶ 63} In sum, we conclude that the trial court did not err in its treatment of Mitchell or her testimony. Accordingly, we overrule appellants' fourth assignment of error.

{¶ 64} By appellants' fifth assignment of error, they argue that the trial court erred in not allowing Phillips, their biomechanical engineering expert, to testify that Ball's head injury would not have been as severe had Stark been traveling at 25 m.p.h. instead of 35 m.p.h. We disagree.

{¶ 65} " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Relevant evidence is admissible; irrelevant evidence is inadmissible. Evid.R. 402. The determination of whether evidence is relevant or irrelevant is within the sound discretion of the trial court. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 35.

{¶ 66} In the case at bar, the trial court bifurcated the liability and damages phases of the proceedings. Thus, to prevail on their negligence claim, appellants had to prove the existence of a duty, a breach of that duty, and proximate cause. *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, ¶ 19. Although appellants' argument is difficult to decipher, they seem to assert that Phillips' testimony would have assisted them in proving both breach and proximate cause.

{¶ 67} " 'The amount of care required of a person to establish whether he has discharged his duty to another is variously referred to as the 'amount of caution,' the 'degree of care' or the 'standard of conduct' which an ordinarily careful and prudent person would exercise or observe under the same or similar circumstances.' " *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285 (1981), quoting *Di Gildo v. Caponi*, 18 Ohio St.2d 125, 127 (1969). The amount of care required to discharge a duty owed to a child is greater than that required to discharge a duty owed to an adult. *Sargent v. United Transp. Co.*, 56 Ohio App.2d 159, 163 (10th Dist.1978). In the case at bar, no party disputed that Stark maintained her speed at 35 m.p.h. from the point she saw the girls

until her automobile struck Ball. Thus, appellants had the burden of proving to the jury that, by continuously driving 35 m.p.h., Stark exercised less care than an ordinarily careful person would when driving in the vicinity of children. Phillips' testimony, which focused on what would have happened if Stark had slowed to 25 m.p.h., has no bearing on that question.

{¶ 68} To prove proximate cause, a plaintiff must show that an injury is the natural and probable consequence of a negligent act and it is such that should have been foreseen in the light of the attendant circumstances. *Mussivand v. David*, 45 Ohio St.3d 314, 321 (1989). "It is not necessary that the defendant should have anticipated the particular injury. It is sufficient that his act is likely to result in an injury to someone." *Id.* Thus, appellants had the burden of showing that Stark should have foreseen that driving at 35 m.p.h. past the girls would result in an injury. What kind of injury Ball would have sustained had Stark been driving 25 m.p.h. has no bearing on the foreseeability of any injury to Ball due to Stark's 35 m.p.h. speed.

{¶ 69} Appellants assert that they wanted to argue that Stark's 35 m.p.h. speed, as opposed to a 25 m.p.h. speed, was the proximate cause of Ball's head injury. We are perplexed by this argument. As we stated above, appellants only needed to show that Stark should have foreseen that her actions would cause *an* injury, not a particular injury. Moreover, we cannot discern how this evidence would affect the comparative fault determination. In an action where only the plaintiff and defendant are involved in an accident, once a factfinder finds both the parties casually negligent, it must determine what percentage of the combined tortious conduct is attributable to the plaintiff and what percentage is attributable to the defendant. R.C. 2307.23. Thus, the comparative fault analysis requires the factfinder to decide the degree to which each party's causal negligence contributed to the plaintiff's overall injuries, not assign a particular injury to a particular act.

{¶ 70} In sum, we conclude that the trial court did not abuse its discretion by finding Phillips' testimony irrelevant and excluding it. We thus overrule appellants' fifth assignment of error.

{¶ 71} By appellants' sixth assignment of error, they argue that the trial court erred in granting appellees' motion to bifurcate the trial. We disagree.

{¶ 72} Pursuant to Civ.R. 42(B), a trial court has the discretion to order a separate trial of any claims or issues in civil actions. *Flynn v. Fairview Village Retirement Community, Ltd.*, 132 Ohio St.3d 199, 2012-Ohio-2582, ¶ 6. Appellants contend that the trial court's decision to order separate trials on the issues of liability and damages precluded them from presenting evidence that, if the collision had occurred at a slower speed, Ball would not have sustained a serious head injury. Appellants, however, wrongly assume that the bifurcation kept Phillips' testimony out of evidence. Although a trial of both liability and damages would have necessarily included evidence of the extent of Ball's injuries, testimony regarding what Stark could have done to avoid a specific injury would remain inadmissible. That testimony would have no bearing on the type and severity of Ball's injuries or the monetary value of her loss. Accordingly, we conclude that the trial court did not abuse its discretion in bifurcating the issues of liability and damages for trial, and we overrule appellants' sixth assignment of error.

{¶ 73} By appellants' seventh assignment of error, they argue that the trial court erred in granting Maronda Homes summary judgment on appellants' claims for negligent hiring and supervision. Appellants assert that Maronda Homes is liable for negligent hiring and supervision because it employed an incompetent driver to perform a job that involved driving. We disagree.

{¶ 74} Summary judgment is appropriate when the moving party demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion when viewing the evidence most strongly in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Hudson v. Petrosurance, Inc.*, 127 Ohio St.3d 54, 2010-Ohio-4505, ¶ 29; *Sinnott v. Aqua-Chem, Inc.*, 116 Ohio St.3d 158, 2007-Ohio-5584, ¶ 29. Appellate review of a trial court's ruling on a motion for summary judgment is de novo. *Hudson* at ¶ 29. This means that an appellate court conducts an independent review, without deference to the trial court's determination. *Zurz v. 770 W. Broad AGA, L.L.C.*, 192 Ohio App.3d 521, 2011-Ohio-832, ¶ 5 (10th Dist.); *White v. Westfall*, 183 Ohio App.3d 807, 2009-Ohio-4490, ¶ 6 (10th Dist.).

{¶ 75} Ohio courts have previously recognized the torts of negligent hiring, retention, and supervision. *See, e.g., Ford v. Brooks*, 10th Dist. No. 11AP-664, 2012-Ohio-

943, ¶ 22; *Wagner v. Ohio State Univ. Med. Cent.*, 188 Ohio App.3d 65, 2010-Ohio-2561, ¶ 28 (10th Dist.); *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶ 13 (10th Dist.). Under these torts, "if an employer, without exercising reasonable care, employs an incompetent person in a job that brings him into contact with others, then the employer is subject to liability for any harm the employee's incompetency causes." *Id.* at ¶ 14; *accord* Restatement of the Law 3d, Agency, Section 7.05(1) (2006) ("A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.").

{¶ 76} To prove the claims of negligent hiring, retention, and supervision, a plaintiff must establish: (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employer's actual or constructive knowledge of the incompetence, (4) the employee's act causing the plaintiff's injuries, and (5) the employer's negligence in hiring, retaining, or supervising the employee as the proximate cause of the plaintiff's injuries. *Ford* at ¶ 22. These elements correspond with the basic elements of negligence—duty, breach, proximate cause, and damages. By establishing the first three elements, a plaintiff proves that the employer had a duty to protect the plaintiff from or to control the acts of a third person. Such a duty arises if: (1) an employment relationship exists between the defendant and the third person who injured the plaintiff, and (2) the injury to the plaintiff was foreseeable given the employee's incompetence and the employer's knowledge of that incompetence. *Wagner* at ¶ 23-24; *Abrams* at ¶ 15-16. "The test for foreseeability is whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of an act." *Menifee v. Ohio Welding Prods., Inc.*, 15 Ohio St.3d 75, 77 (1984). The foreseeability of harm usually depends on the defendant's knowledge of unreasonable risk. *Id.* Thus, liability for negligent hiring, retention, or supervision only arises if the employer knew or should have known of the employee's incompetence and the particular incompetence manifested by the employee would cause a reasonably prudent person to anticipate the employee's misconduct. *Wagner* at ¶ 23-36; *Staten v. Ohio Exterminating Co., Inc.*, 123 Ohio App.3d 526, 530-31 (10th Dist.1997); *Evans v. Ohio State Univ.*, 112 Ohio App.3d 724, 740-43 (10th Dist.1996).

{¶ 77} Here, no party disputed that an employment relationship existed between Maronda Homes and Stark. Thus, whether Maronda Homes owed appellants a duty turned on whether a reasonably prudent person with Maronda Homes' knowledge would have anticipated that Stark would strike a pedestrian based on her alleged incompetence.[7] Appellants argued that Stark was incompetent given her driving record at the time Maronda Homes hired her. In judging that driving record, the trial court considered the three accidents in which Stark was involved in 2005 and 2006. As the trial court noted, two of those accidents were extremely minor; one occurred when Stark backed into a mailbox and the other occurred after Stark slid on ice and hit a parked car. The third accident occurred when Stark rear-ended a vehicle stopped on I-670 because of another accident. The trial court also considered that Stark had a valid Ohio driver's license, which was free from points or citations, and insurance coverage when Maronda Homes hired her.

{¶ 78} Appellants now argue that the trial court should have also considered: (1) three traffic citations and a suspended license that Stark received in 1994 when she was 16 years old,[8] (2) a speeding ticket that Stark received in 2000 or 2001, and (3) an accident that occurred when a drunk driver hit the side of Stark's automobile. We find that none of these incidents are relevant to Stark's competence as a driver when she was hired and employed by Maronda Homes. These incidents are either remote in time or not the fault of Stark.

{¶ 79} Given Stark's more immediate driving history, we conclude that the record contains no evidence from which a reasonably prudent person could have anticipated that Stark would collide with a pedestrian while driving on the job. None of Stark's previous accidents involved a pedestrian. Two of the three were minor. Stark had a driver's license free of points or citations when in Maronda Homes' employ. Accordingly, the trial court did not err in granting Maronda Homes summary judgment on the claims for negligent hiring and supervision. We thus overrule appellants' seventh assignment of error.

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[7] For purposes of this analysis, we will assume, without deciding, that Maronda Homes had constructive knowledge of Stark's driving record.

[8] Stark received one of those tickets for rear-ending another car.

{¶ 80} By appellants' eighth assignment of error, they argue that the trial court erred in allowing defense counsel to characterize witness Ashley Chafin as coming "out of the woodwork" in the opening statement and denying the introduction of a statement from Maronda Homes' attorneys that they knew Chafin's location in 2008. We disagree.

{¶ 81} As we explained above, Chafin was a passenger in a truck stopped at the intersection of Brown Road and Tracy Circle when Stark's automobile collided with Ball. Chafin and the driver of the truck, Jeremy Beck, left the scene prior to the arrival of the police and emergency medical personnel. The parties first learned of Chafin's identity during Beck's July 14, 2008 deposition. Beck, however, did not know Chafin's whereabouts. Appellants' attorneys searched for Chafin in July and August 2008, but they were unable to locate her. On July 1, 2009, appellants' attorneys hired Gary Phillips, a private investigator, to find Chafin. Phillips finally located Chafin on March 31, 2010.

{¶ 82} When appellants scheduled a deposition of Chafin, Maronda Homes moved to exclude Chafin's testimony at trial. Maronda Homes argued that appellants should not be allowed to introduce Chafin's testimony since her deposition would take place after the discovery cut-off date. In the course of briefing their motion, Maronda Homes represented that, "[i]n 2008 when Mr. Beck identified Ashley Chafin, the Defendants were able to locate her immediately." Defendant Maronda Homes, Inc. Response to Plaintiff's Surreply to Defendant's Response to Plaintiff's Reply to Defendant's Motion to Exclude Ashley Chafin, at 2. Ultimately, the trial court overruled the motion.

{¶ 83} Maronda Homes also moved to exclude the testimony of Phillips, the private investigator who found Chafin. Maronda Homes argued that Phillips' testimony was irrelevant. At a pre-trial hearing, appellants opposed Maronda Homes' motion, stating that

> [appellees are] going to stand up in trial and say oh, here's this Johnny-come-lately witness, their star witness, blah, blah, and all we want to do is let the jury know if it becomes relevant based upon what they may argue that we were looking for her all along and we finally found her. This isn't some person that we just made up or something.

(Tr. Vol. II, 94-95.) Maronda Homes' attorney responded that "[n]o one is going to argue that Ashley Chafin is a Johnny-come-lately witness." (Tr. Vol. II, 95.)

{¶ 84} Then, during appellees' opening statement, appellees' attorney stated that

> [Chafin] never told her story until four years after the accident. Ashley Chafin's – the father of her child is a gentleman who had a relationship with a member of the Plaintiff's family and she came out of the woodwork four years after the incident and told a completely different story than anybody else who was at the scene.

(Tr. Vol. III, 86.) Appellants did not object. However, appellants later cited that passage when arguing to the trial court that it should allow Phillips to testify. The trial court granted appellants' request. On the stand, Phillips stated that he had difficulty finding Chafin, but he located and interviewed her in March 2010.

{¶ 85} Appellants also asked the trial court to admit into evidence the statement from Maronda Homes' brief that appellees located Chafin in 2008. Under the trial court's questioning, Maronda Homes' attorney admitted that, in 2008, she had located an address for Chafin on the internet, but she did not know whether or not Chafin actually lived at that address. The trial court did not allow the statement from the brief into evidence.

{¶ 86} Now, on appeal, appellants first argue that the trial court erred in allowing defense counsel to characterize Chafin as coming "out of the woodwork" during appellees' opening statement. Because appellants did not object to that statement, we review it for plain error. *Hudson v. P.I.E. Mut. Ins. Co.*, 10th Dist. No. 10AP-480, 2011-Ohio-908, ¶ 12-13. In civil actions, the plain error doctrine is disfavored. *Id.* at ¶ 13. Appellate courts "will not reverse a jury verdict in a civil action based on the assertion of plain error * * * except 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.' " *Gable v. Gates Mills*, 103 Ohio St.3d 449, 2004-Ohio-5719, ¶ 43, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122-23 (1997).

{¶ 87} We agree with appellants that the phrase "came out of the woodwork" has a negative connotation. It is, however, an essentially correct description of Chafin. She did not tell her story of the accident until almost four years had passed. While Chafin was not hiding, she admitted that she left the scene prior to the arrival of the police because she did not want to be involved. Appellees could, and did, use the late telling of Chafin's story

to cast an unfavorable light on Chafin's testimony. Thus, the trial court did not commit error, much less plain error, by allowing appellees to do so.

{¶ 88} Second, appellants argue that the trial court erred in excluding the statement of Maronda Homes' attorneys regarding their location of Chafin in 2008. We do not find this argument persuasive.

{¶ 89} The admission or exclusion of evidence is within the discretion of the trial court. *Banford v. Aldrich Chemical Co.*, 126 Ohio St.3d 210, 2010-Ohio-2470, ¶ 38. Because a trial court is in the best position to make evidentiary rulings, an appellate court will not reverse such a ruling absent an abuse of discretion. *Id.*

{¶ 90} Here, the trial court ascertained that Maronda Homes' attorneys had actually overstated appellees' knowledge of Chafin's whereabouts. Although the attorneys had an address for Chafin in 2008, they did not know whether that address was valid. Therefore, the attorneys' statement would only serve to mislead the jury. We thus find no abuse of discretion in the trial court's decision to exclude the statement.

{¶ 91} In sum, we conclude that the trial court did not err in how it resolved the issues surrounding Chafin. Consequently, we overrule appellants' eighth assignment of error.

{¶ 92} For the foregoing reasons, we overrule all of appellants' assignments of error, and we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and FRENCH, JJ., concur.