[Cite as *Wallace v. Hipp*, 2012-Ohio-623.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Sheriss Wallace	Court of Appeals No. L-11-1052
Appellant	Trial Court No. CI0200904905
v.	
Nancy Hipp	**DECISION AND JUDGMENT**
Appellee	Decided: February 17, 2012

* * * * *

David C. Peebles, for appellant.

Cormac B. DeLaney, for appellee.

* * * * *

HANDWORK, J.

{¶ 1} This appeal is from a judgment issued by the Lucas County Court of Common Pleas granting summary judgment to appellee in a case where a pedestrian, who was not within a cross-walk area, was injured when she was struck by appellee's vehicle. Because we conclude that the trial court properly granted summary judgment, we affirm.

{¶ 2} Appellant, Sheriss Wallace, sued appellee, Nancy Hipp, for injuries sustained when appellee's vehicle struck appellant, who was crossing a street outside a marked cross-walk area. Appellee filed a motion for summary judgment, arguing that appellant was negligent per se under R.C. 4511.48. Appellant opposed the motion. The following facts were presented by depositions and other documents.

{¶ 3} Around 8:00 a.m., on October 1, 2007, appellant, pushing a stroller with a child, tried to cross Heatherdowns Boulevard, a five lane highway in south Toledo, Ohio. Heathergate Boulevard, a driveway which runs perpendicular to Heatherdowns, provides access to various businesses and apartments. Appellant attempted to cross from a grassy area on the north side of Heatherdowns, next to Heathergate Boulevard, to a grassy area next to a driveway of Toledo Masonic Center. She stepped from the curb of the outside westbound lane and walked south across the five lanes in an area with no marked cross-walk. According to witness James R. LaRiviere, a driver in a westbound vehicle, when appellant first stepped from the curb, a westbound car had to slow down and swerve to avoid hitting her. LaRiviere stated that appellant did not stop but continued "striding, walking" across the inner westbound lane, the center turn lane, and the inner eastbound lane.

{¶ 4} Just as appellant was entering the eastbound curb lane, she was struck by the right front headlight area of appellee's vehicle. Appellant was thrown approximately 50 to 60 feet from the point of impact. After the impact, appellee stopped her vehicle in her lane of travel, trying to avoid colliding with other vehicles traveling in the lane next to

hers. Appellant was transported from the scene and hospitalized with serious injuries. The stroller was not hit and the child was not injured.

{¶ 5} Discovery deposition testimony revealed that neither appellant nor appellee saw each other just prior to the collision. The speed limit in that area is 45 m.p.h. and appellee indicated that she was traveling between 30 to 40 m.p.h. just prior to the accident. Appellant was cited for crossing the roadway at an area other than in a crosswalk.

{¶ 6} The trial court ultimately granted summary judgment in favor of appellee, finding that because appellant was not within a crosswalk, she was required to yield the right of way to appellee, under R.C. 4511.48(A). The trial court further found that appellant was negligent per se, failed to produce sufficient evidence that appellee did not exercise due care upon discovering appellant in the roadway, and that appellee did not violate the assured clear distance statute, R.C. 4511.21.

{¶ 7} Appellant now argues the following two assignments of error:

> I. The trial court erred to the detriment of the plaintiff/appellant in granting defendant/appellee's motion for summary judgment in that there existed genuine issues of material fact as to whether (1) the appellee motorist was negligent pursuant to R.C. 4511.48(E); (2) the appellee failed to keep a proper lookout; (3) the appellee negligently failed in her duty to give her full time and attention to the reasonable operation of her car, including whether the appellee violated Toledo Municipal Traffic Code

331.32 and R.C. 4511.202; (4) the appellee negligently failed to properly keep and maintain an assured clear distance ahead; (5) the appellant was walking in an unmarked crosswalk pursuant to Ohio R.C. 4511.01(LL)(1); and (6) the trial court improperly relied extensively on an unauthenticated police report, and the hearsay contained therein, contrary to Civ.R. 56(C) in granting summary judgment.

II. The trial court erred to the detriment of the appellant in denying her motion to compel discovery.

I.

{¶ 8} Appellant's first assignment of error consists of six parts. We will first address parts one and two together.

Driver's Right of way versus Pedestrian's Duty

{¶ 9} Appellant essentially argues that, pursuant to R.C. 4511.48(E), appellee was required to keep a proper lookout to avoid colliding with pedestrians on the roadway.

{¶ 10} R.C. 4511.48(A) states that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles, * * * upon the roadway." R.C. 4511.48(E) further provides that "[t]his section does not relieve the operator of a vehicle, streetcar, or trackless trolley from exercising due care to avoid colliding with any pedestrian upon any roadway."

{¶ 11} R.C. 4511.01(UU)(1) defines "right of way" as "the right of a vehicle * * * to proceed uninterruptedly in a lawful manner in the direction in which it or the individual is moving in preference to another vehicle * * * approaching from a different direction into its or the individual's path." Generally, a motor vehicle has the right to proceed uninterruptedly in a lawful manner in the direction in which it is traveling in preference to any vehicle or pedestrian approaching from a different direction into its path. R.C. 4511.01(UU)(1)." *Higgins v. Bennett*, 12th Dist. No. CA99–08–022, 2000 WL 253672 (Mar. 6, 2000).

{¶ 12} As noted previously, under R.C. 4511.48(A), pedestrians crossing a road at any point other than within a marked crosswalk must yield the right of way to all vehicles. R.C. 4511.46(B) prohibits a pedestrian from leaving a point of safety and walking into the path of a vehicle. Failure to comply with a legislative enactment designed to prevent accidents or perilous situations is negligence per se. See *Eisenhuth v. Moneyhon*, 161 Ohio St. 367, 119 N.E.2d 440, paragraph two of the syllabus; *Wolfe v. Baskin*, 137 Ohio St. 284, 296, 28 N.E.2d 629 (1940). Where "one party is negligent per se and there is no evidence of any negligence on the part of the other party, there is nothing to submit to a jury." *Copas v. McCarty*, 12th Dist. No. CA85-03-005, 1985 WL 7711 (Aug. 26, 1985).

{¶ 13} R.C. 4511.48(A) and (E) have been reconciled into the rule that a driver need not look for pedestrians or vehicles violating his right of way. See *Deming v. Osinki*, 24 Ohio St.2d 179, 180–81, 265 N.E.2d 554 (1970) (rejecting notion that drivers in the

right of way must "look, look effectively and continue to look and remain alert"). Rather, the operator of a motor vehicle must exercise due care to avoid colliding with a pedestrian in his right of way *only upon discovering a dangerous or perilous situation*. *Id*.; *Hawkins v. Shell*, 8th Dist. No. 72788, 1998 WL 289385 (June 4, 1998); *Markley v. Knutson*, 3d Dist. No. 9-96-29, 1996 WL 546875 (Sept. 26, 1996). Moreover, a driver has no duty to look for danger unless there is reason to expect it. *Hawkins*, *supra*. Therefore, despite a vehicle operator's duty to exercise due care to avoid colliding with a pedestrian, a driver need not keep a lookout for vehicles or pedestrians violating his right of way. *Lumaye v. Johnson*, 80 Ohio App.3d 141, 608 N.E.2d 1108 (1992).

{¶ 14} Recently, this court, in *Joyce v. Rough*, 6th Dist. No. L–10–1368, 2011-Ohio-3713, ¶ 16, stated it this way:

{¶ 15} "The operator of a vehicle does not have a duty to look for pedestrians violating his right of way unless he has reason to expect danger." *Id*., citing R.C. 4511.01(TT) and (UU)(1), and 4511.48(A); *Deming v. Osinki* (1970), 24 Ohio St.2d 179, 180–181, 265 N.E.2d 554; *Wall v. Sprague*, 12th Dist. No. CA2007–05–065, 2008–Ohio–3384, ¶ 12; *Snider v. Nieberding*, 12th Dist. No. CA2002–12–105, 2003–Ohio–5715, ¶ 9; *Dixon v. Nowakowski*, 6th Dist. No. L–98–1372, 1999 WL 652001 (Aug. 27, 1999); *Hawkins v. Shell* , *supra*. Furthermore, pedestrians are "prohibited by law from leaving the curb or place of safety and entering the right of way of a motor vehicle." *Joyce*, *supra*, citing R.C. 4511.46(B). "However, once a driver discovers a dangerous situation caused by a pedestrian in his right of way, the driver must exercise due care to

avoid injuring the pedestrian." *Joyce*, *supra*, citing R.C. 4511.48(E); *Meyer v. Rapacz*, 8th Dist. No. 95571, 2011–Ohio–2537, ¶ 19, citing *Deming v. Osinki*, *supra*. *Accord Morris v. Bloomgren* (1933), 127 Ohio St. 147, paragraph five of the syllabus.

{¶ 16} Even under the common-law duty to exercise ordinary care to avoid a collision, the contributory or comparative negligence of the driver with the right of way does not become an issue for trial without evidence that the driver with the right of way was also driving unlawfully. *See Lydic v. Earnest*, 7th Dist. No. 02 CA 125, 2004-Ohio-3194, applying the principles in *Morris*, *supra*, and *Deming*, *supra*. For example, the Ninth District Court of Appeals held the following:

> [W]hether or not the driver exercised his common-law duty of ordinary care is not a consideration in determining whether the vehicle was proceeding in a lawful manner. Only after it has been found that the vehicle is not proceeding in a lawful manner, by violating a law or ordinance, does the consideration of the driver's common-law duty to use ordinary care come into play. *Holding v. Chappel*, 41 Ohio App.3d 250, 252, 535 N.E.2d 350 (9th Dist. 1987). *See also Roehm v. Cramer*, 1st Dist. No. C-980009, 1998 WL 906342 (Dec. 31, 1998); *Mid-American Nat. Bank and Trust Co. v. Chrysler Corp.*, 6th Dist. No. 94WD007, 1994 WL 455657 (Aug. 19, 1994); *Ramos v. Kalfas*, 8th Dist. No. 64806, (May 19, 1994).

{¶ 17} Thus, a driver with the right of way must use ordinary care not to injure another who has blocked the right of way and has created a perilous condition. *Deming*, 24 Ohio St.2d 179, paragraph five of the syllabus. This duty only arises, however, after the other driver or pedestrian has failed to yield and after the driver with the right of way has realized that there is a clearly dangerous condition in the right of way. See *Mid-American Nat. Bank and Trust Co., supra*. Therefore, the driver with the right of way is not required to anticipate that this situation might occur, and may proceed along the right of way under the assumption that the right of way will be respected. *Timmins v. Russomano*, 14 Ohio St.2d 124, 127, 236 N.E.2d 665 (1968); *Deming*, *supra*, at 181, 265 N.E.2d 554.

{¶ 18} In the present case, appellee was lawfully traveling in her lane of traffic and had no duty to keep a lookout for pedestrians violating her right of way. The moment appellant stepped off the curb into an area without a crosswalk, she was violating the right of way of any oncoming vehicle and was cited. Since appellee failed to comply with both R.C. 4511.46(B) and 4511.48(A), we conclude that the trial court correctly found that she was negligent per se.

{¶ 19} Furthermore, there is nothing in the record to show that appellee actually saw appellant prior to the collision or that there was any expected hazard or danger present which would have required her to be on the lookout for appellee. The mere presence of a bus stop, further down and on the opposite side of the street, does not require all vehicle drivers to scan all areas of the roadway. Unlike a school zone or

playground area, where drivers are required to exercise heightened caution for children, in a bus stop area drivers may expect adults to exercise due care for their own safety. Nothing in the record indicates that appellee should have anticipated the danger of appellant crossing the five lane highway in that area.

{¶ 20} Therefore, we conclude that, under the facts of this case, appellee was lawfully in the right of way and had no duty to look for appellant, who was violating that right of way.

Failure to Control the Vehicle

{¶ 21} Appellant next argues that appellee violated R.C. 4511.202 and Toledo Municipal Code Section 331.32(c). R.C. 4511.202 provides:

> (A) No person shall operate a motor vehicle, trackless trolley, streetcar, agricultural tractor, or agricultural tractor that is towing, pulling, or otherwise drawing a unit of farm machinery on any street, highway, or property open to the public for vehicular traffic without being in reasonable control of the vehicle, trolley, streetcar, agricultural tractor, or unit of farm machinery.

{¶ 22} Toledo Municipal Code Section 331.32(c) states that "No person shall operate a motor vehicle or motorcycle without giving his full time and attention to the operation of such."

{¶ 23} Nothing in the record indicates that appellee was not in control of her vehicle or was not paying attention to her driving. As we noted previously, no evidence

was presented that she was speeding or that she was otherwise operating her vehicle in an unsafe manner. This is not a case where a driver was talking on a cell phone, fiddling with the radio, or engaged in any other distracting behavior. There is simply no evidence that appellant was not paying attention or lost control of her vehicle. Therefore, summary judgment was properly granted as to this claim and appellant's argument is without merit.

Unmarked Crosswalk

{¶ 24} Appellant also claims that she was in an "unmarked crosswalk" and, therefore, had the right of way. This argument is also without merit. R.C. 4511.48 provides that:

{¶ 25} "(A) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles, trackless trolleys, or streetcars upon the roadway."

{¶ 26} R.C. 4511.01(LL) provides that:

"Crosswalk" means:

(1) That 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;

(2) Any portion of a roadway at an intersection or elsewhere, distinctly indicated for pedestrian crossing by lines or other markings on the surface; * * *." (Emphasis added.)

{¶ 27} R.C. 4511.01(KK) defines "intersection" as:

(1) The area embraced within the prolongation or connection of the lateral curb lines, or, *if none*, then the lateral boundary lines of the roadways *of two highways* which join one another at, or approximately at, right angles, or the area within which vehicles traveling upon different highways joining at any other angle may come in conflict. (Emphasis added.)

{¶ 28} R.C. 4511.01(BB) states that "street" or "highway" means "the entire width between the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular travel." R.C. 4511.01(DD) provides that a "private road or driveway" is "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."

{¶ 29} In this case, appellant claims that Heathergate Boulevard is a street and that the area where she crossed Heatherdowns constitutes an unmarked crosswalk. As noted in the affidavit of Robert A. Babcock, Chief Surveyor with the City of Toledo Division of Engineering Services, Heathergate Boulevard is a private drive, is not maintained by the city of Toledo, and is used by the owner, Central Toledo Affordable Housing Partners, L.P., and its invitees. Even though Heathergate Boulevard may provide access to other streets, this does not change its character as a private driveway. As a result, it is not a *highway* for the purposes of creating an "intersection" under R.C. 4511.01(KK), which is required to create an unmarked crosswalk. Thus, the trial court correctly determined that

appellant was not in an unmarked crosswalk when she was crossing the five lanes of Heatherdowns. Therefore, appellant's argument is without merit.

Assured Clear Distance

{¶ 30} Appellant next argues that she presented sufficient evidence to show that appellee violated the assured-clear-distance statute. R.C. 4511.21 provides, in pertinent part, that:

> (A) No person shall operate a motor vehicle, trackless trolley, or streetcar at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no person shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance.

{¶ 31} A violation of R.C. 4511.21(A) requires evidence that the driver collided with an object which (1) was ahead of her in her 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. *Blair v. Goff-Kirby Co.*, 49 Ohio St.2d 5, 7, 358 N.E. 634 (1976), citing *McFadden v. Elmer C. Breuer Trans. Co.*, 156 Ohio St. 430, 103 N.E.2d 385 (1952).[1] In other words, a pedestrian walking outside a crosswalk and

[1]We are aware that the Supreme Court of Ohio ruled that the assured clear distance rule applied to a pedestrian crossing a roadway outside of a crosswalk. See *Glasco v. Medelman*, 143 Ohio St. 649, 56 N.E.2d 210 (1944). That case was interpreting a municipal ordinance regarding a driver's duty to look and to "exercise due care for the safety of pedestrians." The statutory language in this case and in Ohio statutes is now

perpendicular to roadway containing a moving vehicle, is not stationary and is not moving in the same direction of the driver.

{¶ 32} In the present case, at the least, appellant was not stationary or moving in the same direction as the driver. Moreover, witnesses described appellant as traveling quickly without stopping and neither appellant or appellee saw each other prior to the accident. Appellant was also negligent per se, since she violated the statutory right of way of the oncoming vehicles as soon as she stepped off the curb. The collision occurred because appellant failed to observe appellee's clear right of way. As a result, appellant has not met at least two of the four evidentiary requirements to establish a violation under the assured clear distance statute, R.C. 4511.21. Appellee, who was proceeding lawfully in her lane and had no reason to think a pedestrian would be crossing in that area, had the right to expect that appellant would exercise an ordinary duty of care for herself, and regarding vehicles in the right of way. Therefore, appellant's argument as to the violation of the assured clear distance statute is without merit.

Police Report

{¶ 33} Appellant contends that the trial court relied on hearsay in an "unauthenticated police report." When ruling on a motion for summary judgment, a trial court may consider a document which is not of the type listed under Civ.R. 56(C), if there

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different, removing the driver's duty to look beyond the lane of traffic unless the driver is aware of the pedestrian or is otherwise driving unlawfully. Moreover, over the years since *Glasco* was issued, the Supreme Court has interpreted current statutes to require that the pedestrian be stationary or traveling in the same direction for the assured clear distance rule to apply.

is no objection. It is also within the trial court's discretion to ignore such documents. *Trimble-Weber v. Weber*, 119 Ohio App.3d 402, 406, 695 N.E.2d 344 (11th Dist.1997). Since a police report is not evidence authorized by Civ.R. 56(C), a trial court may consider it where the opposing party did not dispute its authenticity. Even where such report is properly authenticated, inadmissible hearsay contained in the police report should not be considered for summary judgment purposes. *See Petti v. Perna*, 86 Ohio App.3d 508, 621 N.E.2d 580 (3d Dist.1993).

{¶ 34} In this case, contrary to appellant's suggestion, the police report was authenticated by the custodian of those public records. Nevertheless, we agree that the portion of the report which states that appellant was "driving 40 miles per hour" is hearsay and was inadmissible for purposes of summary judgment. The report also indicated, however, that the road was "straight, level and dry" with a posted speed limit of 45 m.p.h., the description of the direction of travel of each of the parties, the location of the accident, and where the vehicle struck appellant. In addition, the report shows that appellant was charged with "crossing other than crosswalk" in violation of Toledo Municipal Code 371.03(a). The majority of the report was, in fact, based upon the officer's observations at the scene.

{¶ 35} Appellant's main objection to the information considered by the trial court is the speed estimated by the officer. Nothing in the record indicates that appellee was speeding. At most, appellee estimated that at the time of impact she was traveling 40 m.p.h. Appellant's own expert chose to presume that she was traveling at 30 m.p.h.

Since we have already determined that appellee was unaware of appellant and had no duty to look for appellant, and that appellant failed to see appellee, we conclude that the police report became irrelevant to the issue of speed. Therefore, the trial court's error, if any, in relying on it in its decision, is harmless.

{¶ 36} Therefore, as a result of the previous discussion, we conclude that no genuine issues of material fact remain in dispute and appellee was entitled to judgment as a matter of law. Accordingly, appellant's first assignment of error is not well-taken.

II.

{¶ 37} In her second assignment of error, appellant claims that the trial court's denial of her motion to compel discovery of appellee's medical records was a "detriment" to appellant.

{¶ 38} Generally, a trial court's discovery decision is reviewed under an abuse of discretion standard. *See State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 469, 692 N.E.2d 198 (1998); *Patterson v. Zdanski*, 7th Dist. No. 03BE1, 2003–Ohio–5464, ¶ 10–11. Questions of law on the scope of privilege, however, are reviewed de novo. *Ward v. Summa Health Sys.*, 128 Ohio St.3d 212, 2010-Ohio-6275, 943 N.E.2d 514, ¶ 13.

{¶ 39} Pursuant to Civ.R. 26(B)(1), parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. It is not ground for objection that the information sought will be inadmissible at the trial as long as the information appears reasonably calculated to lead to the discovery of admissible evidence. Communications between doctor and patient are generally

privileged. *See* R.C. 2317.02(B)(1). Where a *patient* files a civil action, the testimonial privilege is lifted to a certain extent. *See* R.C. 2317.02(B)(1)(a)(iii). However, the patient's physician can be compelled to testify or submit to discovery only as to communications that are "related causally or historically to physical or mental injuries that are relevant to issues" in the civil action. R.C. 2317.02(B)(3)(a).

{¶ 40} In this case, the trial court properly denied the motion to compel discovery for two reasons. First, the requested medical records, including a list of medications, were privileged communications between patient and physician. Since appellee is not the plaintiff, she is not automatically subject to waiver of the doctor/patient privilege under R.C. 2317.02. Second, even if such discovery could be compelled, appellant must show that such information was causally related to the collision. The mere fact that appellee was involved in an accident does not, by itself, establish any relationship to her medical condition or medications. Nothing in the police report, in appellee's deposition testimony, or the description by other witnesses indicated that the accident was causally connected to any medical condition affecting appellee.

{¶ 41} In addition, appellee is not asserting any defense to the accident based upon a diminished ability caused by such medications or medical conditions. Appellant is not entitled to a "fishing expedition" for privileged medical information, where no direct causal relationship has been shown, in an attempt to create such relationship through innuendo and speculation. Therefore, the trial court properly denied appellant's motion to compel discovery.

{¶ 42} Accordingly, appellant's second assignment of error is not well-taken.

{¶ 43} The judgment of the Lucas County Court of Common Pleas is affirmed.

Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE