

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

Joanne M. Walsh, etc.

Court of Appeals No. L-12-1214

Appellants

Trial Court No. CI0201003880

v.

Duane L. Reither, et al.

DECISION AND JUDGMENT

Appellees

Decided: May 3, 2013

* * * * *

Fritz Byers and Brian D. Vicente, and for appellants.

Robert J. Bahret, Christine M. Gaynor, and Andrew Ayers, for appellees.

* * * * *

JENSEN, J.

{¶ 1} Plaintiff-appellant, Joanne M. Walsh, appeals the July 3, 2012 Opinion and Judgment Entry of the Lucas County Court of Common Pleas after a bench trial in which the trial court determined that defendant-appellee, Duane L. Reither, was not liable for the accident that resulted in the death of appellant's decedent, Thomas Walsh, M.D. Appellant has submitted the following assignment of error and issue presented for our review:

Assignment of Error: The trial court erred in failing to apply Ohio statutory law to the undisputed facts regarding the accident. (Opinion and Judgment Entry with Findings of Fact and Conclusions of Law filed July 3, 2012).

Issue Presented for Review: Does a driver forfeit the presumptive right-of-way when he operates his vehicle in violation of a mandatory Ohio statute?

{¶ 2} For the reasons that follow, we affirm the judgment of the Lucas County Court of Common Pleas.

I. Background

{¶ 3} Appellant Joanne M. Walsh is the Executrix of the Estate of Thomas E. Walsh, M.D. Appellee, Ruth Reither, is the Administratrix of the Estate of Duane L. Reither, who is now deceased from causes unrelated to the accident giving rise to this litigation.

{¶ 4} On January 2, 2007, at 5:49 p.m., Dr. Walsh was crossing North River Road in Waterville, Lucas County, Ohio to his mailbox located on the other side of the road. He was struck and killed by a vehicle driven by Duane Reither and was pronounced dead at the scene. Mr. Reither was driving southwest on North River Road towards the Village of Waterville in a 1998 Pontiac TranSport minivan. At the time of the accident, the sun had set, the sky was dark, and there were no streetlights or other artificial lighting in the area. Although Mr. Reither's vehicle was equipped with both low-beam and high-beam headlamps, he had his low-beam headlamps activated. Mr. Reither was traveling at

40 miles per hour, five miles per hour below the posted speed limit. As Dr. Walsh attempted to cross River Road on foot, going from left to right, Mr. Reither did not see him and the right side of his minivan struck Dr. Walsh. Mr. Reither was not cited in connection with the accident.

{¶ 5} After conducting discovery, the parties tried the case to the bench. They stipulated to a number of facts including that the injuries resulting in Dr. Walsh's death were caused by the accident, and that recoverable damages in the case would exceed \$500,000, but that appellant was seeking only the available insurance proceeds--\$250,000. The contested issue was liability. Appellant claimed that Dr. Walsh had the right-of-way because Mr. Reither failed either to activate his high-beam headlamps or drive at a speed that would allow him to discern a pedestrian from a safe distance; appellee claimed that Mr. Reither had the right-of-way because Dr. Walsh was not within a crosswalk while attempting to cross the road and did not yield to Mr. Reither's vehicle.

{¶ 6} At trial, the parties examined a number of witnesses, including Larry Sweeney, Mr. Reither's passenger; Joanne Walsh, Dr. Walsh's surviving spouse; Trooper John Chaney, the first officer on the scene after the accident; Jack Holland, appellant's expert accident reconstructionist; Frederick Greive, appellee's expert accident reconstructionist; and Walter Kosmatka, a retired General Electric engineer who served as appellee's expert in automobile headlamp illumination. The transcripts of Mr. Reither's and Mr. Holland's depositions were submitted for the trial court's review.

{¶ 7} The trial court allowed the parties to brief their closing arguments and to submit proposed findings of fact and conclusions of law. After considering the testimony

of the witnesses, the exhibits offered at trial, the relevant statutes and caselaw, and the parties' arguments, the trial court issued a July 3, 2012 Opinion and Judgment Entry With Findings of Fact and Conclusions of Law entering judgment in appellee's favor.

A. The Trial Court's Findings of Fact

{¶ 8} As to the issues pertinent to this appeal, the trial court found that at the time of the accident, Dr. Walsh was wearing dark blue surgical scrubs with a reflectance factor of 16.5 percent and crossed the road at a pace faster than a mere walking pace in an area where there was no crosswalk. Mr. Reither's low-beam headlamps were activated and there was nothing obstructing Dr. Walsh's view of Mr. Reither's approaching vehicle. Because Mr. Reither was not anticipating to encounter a pedestrian or other obstacle, he was a "non-expectant" driver. The average time for a non-expectant driver to perceive and react to a pedestrian or other obstacle in the road is 1.1 seconds. At 40 miles per hour, a vehicle travels approximately 60 feet per second—this equates to approximately 66 feet in 1.1 seconds. Upon reacting, it takes an additional 75 to 100 feet before the driver is able to bring the vehicle to a stop. The time it takes to discern an object depends on its size, shape, and color. With his low-beam headlamps activated and under the circumstances and conditions at the time of the accident, Mr. Reither would have been able to discern Dr. Walsh from approximately 68 feet if he were standing stationary in the roadway.

{¶ 9} The court summarized the testimony of appellee's illumination expert, Mr. Kosmatka, who explained that 70% of a headlamp's light output is on the right side of the road. Headlamps are aimed straight down the road, parallel to the road exactly at the

headlamp point, but below the headlamps' horizontal centerline. High-beam headlamps more effectively illuminate both sides of the roadway, however, they cause a glare to oncoming drivers, so drivers tend not to use them because it is bothersome to switch back and forth from high-beam to low-beam headlamps. On cross-examination, Mr. Kosmatka acknowledged that low-beam headlamps were not of sufficient intensity to reveal a pedestrian in the roadway at a distance where a driver could react and either stop or redirect the vehicle. However, Mr. Kosmatka also testified that he had not been asked to perform calculations or provide opinions as to the distance at which Dr. Walsh would have been discernible had Mr. Reither's high-beam headlamps been used and further stated that he did not have the necessary information to make such calculations, especially considering that Dr. Walsh was moving from left to right and was not standing stationary in the middle of the road. He could only guess that the high-beams would have improved discernibility by about 60%--i.e., from 68 feet to 108 feet.

B. The Trial Court's Conclusions of Law

{¶ 10} The trial court described the applicable burdens of proof and explained that appellant could recover only if he established by a preponderance of the evidence that Mr. Reither was negligent, his negligence proximately caused the accident, the negligence attributable to Mr. Reither was at least 50% in comparison to Dr. Walsh's own negligence, and appellant suffered damages as a proximate result of Mr. Reither's negligence. The trial court also analyzed the statutes pertinent to appellant's claims, primarily focusing on who had the right-of-way under the circumstances presented.

{¶ 11} The court recognized that R.C. 4511.48(A) requires every pedestrian crossing a roadway at any point other than within a marked crosswalk or an unmarked crosswalk at an intersection to yield the right-of-way to all vehicles on the roadway. “Right-of-way” means the right of a vehicle or pedestrian to proceed uninterruptedly in a lawful manner in the direction in which it or he is moving and in preference to another vehicle or pedestrian approaching from a different direction into its or his path. R.C. 4511.01(UU). Despite R.C. 4511.48(A), a driver is not relieved from exercising due care to avoid colliding with any pedestrian upon any roadway. R.C. 4511.48(E).

{¶ 12} R.C. 4513.03(A) requires every vehicle to display lighted lights and illuminating devices from sunset to sunrise. Two headlamps are required under R.C. 4513.14 and R.C. 4513.15(A) requires that when operating a motor vehicle between dawn and dusk, the driver “shall use a distribution of light, or composite beam, directed high enough and of sufficient intensity, to reveal persons, vehicles and substantial objects at a safe distance in advance of the vehicle.” The driver must, however, use a distribution of light or composite beam aimed so that the glaring rays are not projected into the oncoming driver’s eyes. R.C. 4513.15(A)(1).

{¶ 13} The trial court explained that the person with the right-of-way has an absolute right to proceed uninterruptedly, but forfeits that right if he or she fails to proceed in a lawful manner. If a preferred party loses the right-of-way by not proceeding in a lawful manner, each party must use ordinary care under the circumstances. Under R.C. 4511.48(A) and (E), a driver need not look for pedestrians or vehicles violating his

right-of-way; 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.

{¶ 14} The court concluded that Mr. Reither had the right-of-way. The trial court dismissed appellant's arguments that Mr. Reither was required either to use his high-beam headlamps or to drive at a reduced speed that would have allowed him to discern Dr. Walsh from a further distance. Although the court acknowledged Mr. Kosmatka's opinions concerning the failure of the low-beam headlamps to provide sufficient intensity to reveal Dr. Walsh in time for Mr. Reither to stop or redirect his vehicle, it gave little weight to this testimony because Mr. Kosmatka had not performed any calculations establishing at what distance the high-beam headlamps would have made Dr. Walsh's presence discernible; he did not have the information needed to perform those calculations; he could provide only a "guesstimate" as to the improved discernibility offered by high-beam headlamps, especially in light of the fact that Dr. Walsh appeared in front of Mr. Reither's vehicle immediately before impact and was not standing stationary in the middle of the road at the time he was struck; and appellant failed to offer any evidence as to what speed Mr. Reither would have needed to drive to affect discernibility, reaction time, and breaking time in such a manner as to avoid striking Dr. Walsh. In other words, Mr. Kosmatka's testimony was speculative. Appellant not having established this information, the court was unable to conclude that Mr. Reither's failure to use his high-beam headlamps rendered his driving unlawful or proximately caused the accident.

{¶ 15} Because the only violation of statute that appellant claimed was with respect to the use of high-beam headlamps or reducing speed to improve reaction time, the court could not conclude that Mr. Reither was proceeding unlawfully so as to forfeit his right-of-way. That being the case, the trial court held that Mr. Reither had an absolute right to proceed uninterruptedly, to rely upon his preferred status, and to assume that Dr. Walsh would obey the law by yielding him the right-of-way and not entering his path of travel.

{¶ 16} It is from these findings and conclusions that appellant appeals.

II. Analysis

{¶ 17} Appellant's single assignment of error is as follows:

Assignment of Error. The trial court erred in failing to apply Ohio statutory law to the undisputed facts regarding the accident. (Opinion and Judgment Entry with Findings of Fact and Conclusions of Law filed July 3, 2012).

{¶ 18} "According to the Ohio Supreme Court, an appellate court should be 'guided by a presumption' that the fact-finder's findings are correct." *Tillimon v. Hasan*, 6th Dist. No. L-01-1455, 2002-Ohio-4650, ¶ 4, quoting *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 79-80, 461 N.E.2d 1273 (1984). If there exists competent and credible evidence supporting the trial court's findings of fact and conclusions of law, the trial court's decision should be affirmed. *Id.* As such, we must uphold the trial court's judgment unless it is against the manifest weight of the evidence. *Id.*

{¶ 19} Without citation, appellant claims that we must apply a de novo standard of review because there exists an error of law. But contrary to appellant's attempt to frame the issue as an error of law in which the court allegedly failed to apply an applicable statute, we do not find this to be the case. To the contrary, the trial court's opinion demonstrates that it considered the statute and specifically found that:

The Walsh Estate has not alleged that Mr. Reither violated any law other than the one that purportedly required him to use his high-beam headlamps or drive more slowly under the conditions that were in effect at the time of the accident. Given the lack of a preponderance of the evidence to that effect, the Court is unable to conclude that Mr. Reither was not proceeding in a lawful manner.

{¶ 20} The trial court's recitation of the law regarding the right-of-way as between a driver and a pedestrian closely mirrors our analysis of the law in *Wallace v. Hipp*, 6th Dist. No. L-11-1052, 2012-Ohio-623, and is accurate. However, the present case involves the added element of whether Mr. Reither properly used his headlamps. The trial court correctly summarized those statutory requirements as well.

{¶ 21} Appellant claims that the trial court failed to apply the statutory law. We disagree. The court considered the statutes, the trial testimony, the exhibits, and appellant's arguments but found that there was no credible evidence to support appellant's position that Mr. Reither violated the statute or that any alleged violation proximately caused the accident.

{¶ 22} Appellant had the burden of proof at trial. She argued that if Mr. Reither elected not to use his high-beam headlamps, it was incumbent upon him to reduce his speed so that he could detect a pedestrian in his path in enough time to avoid striking him (despite the fact that Mr. Reither was already driving five miles per hour under the speed limit). First, this “requirement” that the driver reduce his speed if he chooses not to use his high-beam headlamps does not appear in R.C. 4513.15(A). This argument is largely based on the Eighth District’s holding in *McFadden v. Elmer C. Breuer Transp. Co.*, 59 Ohio Law. Abs. 163, 98 N.E.2d 339 (8th Dist.1951), discussed in greater detail below. *McFadden* was specifically overruled by the Ohio Supreme Court, which analyzed the driver’s conduct primarily under the assured-clear-distance-ahead-rule. Moreover, appellant incorrectly summarizes the requirements of R.C. 4513.15(A). Appellant claims at page 3 of her brief that the statute requires that headlamps be “directed high enough and . . . bright enough to reveal a person (or vehicle or object) far enough in front of the car *to give the driver enough time to avoid the person.*” (Emphasis added.) In fact, that is not what the statute says. The statute says that the driver “shall use a distribution of light, or composite beam, directed high enough and of sufficient intensity to reveal persons, vehicles, and substantial objects *at a safe distance in advance of the vehicle.*” (Emphasis added.)

{¶ 23} Appellant essentially argues that R.C. 4513.15(A) requires a driver to use headlamps that reveal pedestrians, vehicles, and substantial objects at a “safe distance” in advance of the vehicle; Mr. Reither struck a pedestrian; therefore, his headlamps did not reveal the pedestrian at a safe distance in advance of the vehicle. What she appears to

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claim is that a violation of R.C. 4513.15(A) is itself established by the fact that Mr. Reither's vehicle struck Dr. Walsh. To apply the statute in the manner advocated by appellant, a driver would always be liable when a pedestrian is struck. This conclusion is at odds with Ohio Supreme Court and Sixth District case law. *See, e.g., Deming v. Osinski*, 24 Ohio St.2d 179, 180-181, 265 N.E.2d 554 (1970) (rejecting the notion that drivers in the right-of-way must "look, look effectively and continue to look and otherwise remain alert"); *see also Wallace*, 6th Dist. No. L-11-1052, 2012-Ohio-623, at ¶ 13 (explaining that "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.")

{¶ 24} Moreover, although defense expert Mr. Kosmatka conceded that the low-beam lights did not provide enough illumination for Mr. Reither to bring his vehicle to a stop in time to avoid striking Dr. Walsh, he was unable to calculate at what distance Dr. Walsh would have been discernible if high-beam headlamps had been used and he provided no information as to what speed Mr. Reither would have needed to travel to avoid striking Dr. Walsh. He also made clear that because Dr. Walsh darted into the street, moving from left to right, and was not standing stationary in the middle of the road, it would have been extremely difficult to make a reliable calculation. Appellant failed to establish that Mr. Reither violated R.C. 4513.15(A) by his choice of headlamps or speed, or that any alleged violation proximately caused the accident.

{¶ 25} Appellant cited one case in support of her position that Mr. Reither should have been driving more slowly while using his low-beam headlamps. That case was

specifically overruled by the Ohio Supreme Court and, significantly, the appellate court case provides support for the trial court's holding for appellee in the present case.

{¶ 26} Appellant cited *McFadden*, 59 Ohio Law. Abs. 163, 98 N.E.2d 339, an Eighth District opinion. In *McFadden*, on a dark night where there was no artificial lighting, except headlamps, plaintiff's decedent drove his car into a roll of steel lying within his lane of travel. *Id.* at 340. He and his two passengers were killed. *Id.* Plaintiff, the mother of the deceased driver of the car, sued the owner of the truck from which the roll of steel had fallen. The roll of steel weighed 13,410 pounds and was 34 inches wide with a diameter of three feet, 11 inches. *Id.* There were varying accounts as to the color of the steel in contrast with the road. *Id.* at 341. Defendant sought to prove that plaintiff was contributorily negligent by failing to maintain assured clear distance to avoid colliding with the roll of steel, but after a trial to the bench, the trial court entered judgment in plaintiff's favor. *Id.* at 340. Defendant appealed.

{¶ 27} The appellate court analyzed the then-applicable General Code provisions. Section 6307-21 provided that "no person shall drive any motor vehicle * * * upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead." *Id.* at 341. Section 6307-88 provided that a driver must use "a distribution of light, or composite beam, directed high and off and of sufficient intensity to reveal persons, vehicles and substantial objects at a safe distance in advance of his vehicle subject to the requirements and limitation that went approaching vehicles the driver shall use a composite beam so directed that the glaring rays are not projected into the eyes of the oncoming drivers." *Id.* at 344. The court explained that the effect of

this requirement is to cut down the assured clear distance ahead, requiring the driver to “slacken his speed” to comply with the rule. *Id.*

{¶ 28} Importantly, the Eighth District recognized that under certain circumstances, failure to comply with the rule may be excusable. *Id.* at 342. In such cases, “the burden is upon the operator of the vehicle who attempts to escape the legal effect of this mandatory provision, to prove such a state of facts over which he had no control that compliance therewith was made impossible.” The court, citing *Smiley v. Arrow Spring Bed Co.*, 138 Ohio St. 81, 33 N.E.2d 3 (1941), acknowledged the potential that an obstruction may enter into a driver’s path or line of travel which renders him unable, even with ordinary care, to avoid a collision. *Id.* The specific examples cited by the court were cases involving automobile-pedestrian collisions. In such cases, there is a jury issue as to proximate cause and as to the discernibility of a pedestrian who suddenly enters into the path of the driver. *Id.* citing *Glasco v. Mendelman*, 143 Ohio St. 649, 56 N.E.2d 210 (1944), and *Betras v. G. M. McKelvey Co.*, 148 Ohio St. 523, 76 N.E.2d 280 (1947).

{¶ 29} Despite recognizing certain exceptions, the court held that because of the size of the roll of steel, it was a discernible object and plaintiff was negligent per se in failing to avoid striking it. *Id.* at 344.

{¶ 30} Plaintiff appealed to the Supreme Court of Ohio. *McFadden v. Elmer C. Breuer Transp. Co.*, 156 Ohio St. 430, 103 N.E.2d 385 (1952). The Supreme Court reversed the Eighth District’s holding and affirmed the trial court’s judgment in favor of

plaintiff. The court acknowledged that defendant admitted in its answer that the roll of steel fell from its truck and stipulated that this constituted negligence. *Id.* at 432-433. Defendant claimed instead that plaintiff's decedent was contributorily negligent. *Id.*

{¶ 31} The court explained that the assured clear distance rule is violated if the driver drives "at such speed that he collides with a reasonably discernible object (1) which is located ahead of him in his lane of travel and which object is (a) static or stationary, or (b) moving ahead of him in the same direction, or (2) which appears in his path at a sufficient distance ahead of him to give him time, in the exercise of ordinary care, to bring his automobile to a stop and avoid a collision." *Id.* at 434. The court also recognized that "[t]he greatest difficulty in applying the statute arises in cases where the obstructing object enters the path of the operator from the side. * * * If the obstructing object does enter the path from the side, violation of the statute is not prima facie established in the absence of evidence that it entered the path at sufficient distance ahead of the operator to have given him time in the exercise of ordinary care to stop." *Id.* at 435-436.

{¶ 32} The court found that defendant had failed to present any evidence that the roll of steel was in the path of plaintiff's automobile a sufficient distance ahead of him and for a sufficient time to have made it possible for him, in the exercise of ordinary care, to stop his car before colliding with it. *Id.* at 442-443. The court went further and stated that if it had been necessary for the trial court to go beyond that and to consider whether the roll of steel was reasonably discernible, there was ample evidence, based on the

varying descriptions of the color of the steel as compared to the color of the roadway, to create a jury issue and to support the trial court's judgment in favor of plaintiff. *Id.* at 443. The Supreme Court affirmed the trial court's judgment and reversed the judgment of the appellate court.

{¶ 33} As in *McFadden*, we conclude that there was ample evidence supporting the trial court's conclusion that appellant failed to prove that Mr. Reither was proceeding unlawfully such that he lost the right-of-way. The evidence presented to the trial court indicated that Dr. Walsh darted into Mr. Reither's line of travel from the side and without warning. The mere fact that Mr. Reither's vehicle struck Dr. Walsh does not establish a violation of R.C. 4513.15(A), nor did Mr. Kosmatka's testimony establish a violation. It was proper for the trial court, as the fact-finder in this case, to conclude that Mr. Reither did not lose his right-of-way when Dr. Walsh ran into the path of his vehicle. The trial court's decision was not against the manifest weight of the evidence.

III. Conclusion

{¶ 34} The trial court's judgment in favor of appellee was supported by competent, credible evidence and was not against the manifest weight of the evidence. We, therefore, affirm the July 3, 2012 Opinion and Judgment Entry of the Lucas County Court of Common Pleas. The costs of this appeal are assessed to appellant 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.

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.