[Cite as *Ciccarelli v. Miller*, 2004-Ohio-5123.]

STATE OF OHIO, MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

DOMINIC CICCARELLI, ET AL.	)	CASE NO. 03 MA 60
	)	
PLAINTIFFS-APPELLEES	)	
CROSS-APPELLANTS	)	
	)	
VS.	)	OPINION
	)	
DOROTHY MILLER	)	
	)	
DEFENDANT-APPELLEE	)	
	)	
AND	)	
	)	
JON T. WHEELER	)	
	)	
DEFENDANT-APPELLANT	)	
CROSS-APPELLEE	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from the Court of Common Pleas of Mahoning County, Ohio Case No. 00 CV 2604
JUDGMENT:	Reversed and Remanded
APPEARANCES: For Plaintiffs-Appellees/Cross Appellants, Dominic & Melanie Ciccarelli:	Atty. Anthony N. Gemma Gemma & Gemma South Common Professional Centre 1040 South Common Place, Suite 200 Youngstown, Ohio 44512
For Defendant-Appellee, Dorothy Miller:	Atty. Martin J. Boetcher Harrington, Hoppe & Mitchell, Ltd. 26 Market Street, Suite 1200 Youngstown, Ohio 44503-1769
For Defendant-Appellant/Cross Appellee, Jon T. Wheeler:	Atty. John T. DeFazio 6715 Tippecanoe Road

Building B, Suite 201
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JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: September 20, 2004

WAITE, P.J.

{¶1} Defendant-Appellee Dorothy Miller ("Miller") was granted summary judgment by the Mahoning County Court of Common Pleas in an automobile accident case. The accident occurred as Miller was backing out of a parking lot in Boardman, Ohio. Miller accelerated backward across all five lanes of traffic on Rt. 7. She struck Plaintiffs-Appellants Dominic and Melanie Ciccarelli (the "Ciccarellis"), who were driving southbound on Rt. 7. During the accident, Defendant-Appellee/Cross-Appellant Jon Wheeler ("Wheeler") was traveling behind the Ciccarellis' vehicle and their vehicles also collided. Miller argued at summary judgment that she had a complete defense to the accident due to a sudden emergency. She alleged that she unexpectedly blacked out while she backed out of the parking lot. Although Miller relies on the case of *Lehman v. Haynam* (1956), 164 Ohio St. 595, 133 N.E.2d 97, to establish the validity of the sudden emergency doctrine, that case does not support the trial court's decision to grant summary judgment in Miller's favor. There are numerous issues of material fact in dispute in this case, and the judgment of the trial court must be reversed.

{¶2} The accident occurred on April 20, 2000. Miller was backing out of the parking lot of the Boardman Hotel on Rt. 7. Miller acknowledges putting her car into reverse. (Miller Depo., p. 88.) She claims not to remember anything after that. (Miller Depo., p. 88.) It is clear that, instead of putting her car into drive and proceeding forward out of the hotel parking lot, she drove while the car was in reverse. She appears to have hit a brick flowerbed wall in the parking area, and continued in reverse across Rt. 7. She ended up driving northbound in the southbound lane, while still in reverse, colliding with the Ciccarellis.

{¶3} The Ciccarellis filed a complaint on October 4, 2000, in the Mahoning County Court of Common Pleas. Miller was the only named defendant. Wheeler was added as a defendant on January 26, 2001.

{¶4} On June 25, 2002, Miller filed a motion for summary judgment. She alleged the defense of sudden emergency as established by the *Lehman* case cited earlier. Miller supported her motion with general references to her own deposition on file with the court, and also relied on an affidavit of Dr. Richard G. Wise, D.O., who was Miller's physician starting in late 1999. Dr. Wise primarily treated Miller for diabetes. Miller had been a diabetic since approximately 1985, and took daily insulin shots. Although Miller had been in a diabetic coma for eight days approximately 13 years prior to the accident, she did not believe that this fact could be used to prove that she should have foreseen the blackout on April 20, 2000. She argued that the evidence from Dr. Wise left no material facts in dispute about whether she had a sudden loss of consciousness or about whether the blackout was foreseeable.

{¶5} Wheeler filed a motion in opposition to summary judgment on October 1, 2002, in accordance with extensions granted by the trial court. Wheeler relied in part on a deposition of Dr. Wise that had been previously filed with the court. Wheeler argued that there was evidence of disputed material facts concerning the foreseeability of Miller's blackout and whether Miller committed negligence prior to blacking out.

{¶6} On October 9, 2002, Miller filed a reply to Wheeler's memorandum in opposition to summary judgment.

{¶7} The Ciccarellis did not file a reply in opposition to Miller's motion for summary judgment.

{¶8} On November 27, 2002, the trial court sustained Miller's motion for summary judgment, stating simply that, "[p]laintiff has offered no evidence to demonstrate a genuine issue of fact regarding application of the doctrine of sudden emergency in this case." The judgment entry did not contain the "no just reason for delay" language required by Civ.R. 54(B) to enable the judgment to be immediately appealable.

{¶9} On December 13, 2002, the Ciccarellis filed a motion for reconsideration of the November 27, 2002, judgment entry. They argued that the court failed to consider evidence in Dr. Wise's deposition that tended to show that Miller had prior episodes of dizziness and blacking out, creating a jury question on the issue of foreseeability of the alleged blackout.

{¶10} The motion for reconsideration was denied on January 13, 2003.

{¶11} On January 21, 2003, Wheeler also filed a motion for reconsideration. Wheeler pointed to Dr. Wise's deposition which included information about numerous periods of dizziness experienced by Miller, some requiring hospitalization, and one occurring just three days before the accident.

{¶12} The trial court denied Wheeler's motion for reconsideration on March 26, 2003, but modified the prior judgment entry to reflect that there was no just reason for delay.

{¶13} Wheeler filed a notice of appeal on April 7, 2003. The Ciccarellis filed their notice of appeal on April 17, 2003. The two appeals were consolidated by this Court.

ASSIGNMENTS OF ERROR

{¶14} Wheeler and the Ciccarellis present essentially the same assignments of error on appeal, namely, that the trial court erred in granting summary judgment because material facts were in dispute as to whether Miller blacked out and whether she should have foreseen the likelihood of such an incident. The assignments of error are as follows:

{¶15} "The Trial Court erred in granting summary judgment in favor of Defendant Dorothy Miller because the record evidence created a material fact issue of whether she suffered a sudden medical emergency that caused her motor vehicle to crash into Plaintiff's car.

{¶16} "The Trial Court erred in granting summary judgment in favor of Defendant Dorothy Miller because the record evidence created a material fact issue of

whether she had reason to anticipate she might suffer a period of unconsciousness while operating her motor vehicle.

{¶17} "The Trial Court committed error in granting the motion of Defendant-Appellee Dorothy Miller for Summary Judgment."

{¶18} The law surrounding summary judgment is not in dispute. An appellate court reviews de novo the decision to grant a motion for summary judgment, using the same standards as the trial court as set forth in Civ.R. 56(C). *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. Before summary judgment can be granted, the trial court must determine that (1) no genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing the evidence most favorably in favor of the party against whom the motion for summary judgment is made, the conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 4 O.O.3d 466, 364 N.E.2d 267.

{¶19} "[T]he moving party bears the initial responsibility of informing the trial court of the basis for the motion, *and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim*." (Emphasis in original.) *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 296, 662 N.E.2d 264. If the moving party meets its initial burden, the nonmoving party bears a reciprocal burden to produce evidence on any issue for which that party bears the burden of proof at trial. Id. at 293, 662 N.E.2d 264.

{¶20} Miller questions whether the Ciccarellis are permitted to challenge summary judgment on appeal when they did not file a brief in opposition to summary judgment with the trial court. Miller is essentially correct that specific issues that are not raised in rebuttal to a motion for summary judgment are generally waived as issues on appeal. *Hack v. Gillespie* (1996), 74 Ohio St.3d 362, 658 N.E.2d 1046, fn. 5. Of course, this is not a hard and fast rule when it comes to summary judgment, as was evident in the Ohio Supreme Court's recent decision of *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256. Because an appellate court must review the law and facts de novo in an appeal of a summary judgment, it is difficult to determine how Appellee can successfully argue that a party can completely waive the general argument that summary judgment was not appropriate because of obvious material facts in dispute.

{¶21} The Ohio Supreme Court has also held that: "a court of appeals may recognize error not assigned by the parties, [but] there must be sufficient basis *in the record* before it upon which the court can *decide* that error." (Emphasis in original.) *Hungler v. City of Cincinnati* (1986), 25 Ohio St.3d 338, 342, 496 N.E.2d 912.

{¶22} Further, the issues raised by the Ciccarellis are the same issues raised by Appellant Wheeler. Wheeler did file a timely motion in opposition to Miller's motion for summary judgment.

{¶23} Before examining the allegedly conflicting facts in this case, we must begin by noting the precise legal basis for Appellee's defense of sudden unforeseen

illness. Appellee's argument during summary judgment was based completely on *Lehman*, supra, 164 Ohio St. 595, 133 N.E.2d 97. *Lehman* held that:

{¶24} " 2. Where the driver of an automobile is suddenly stricken by a period of unconsciousness which he has no reason to anticipate and which renders it impossible for him to control the car he is driving, he is not chargeable with negligence as to such lack of control.

{¶25} "3. Where in an action for injuries arising from a collision of automobiles the defense of the defendant driver is that he was suddenly stricken by a period of unconsciousness, which rendered it impossible for him to control the car he was driving and which he had no reason to anticipate or foresee, the burden of proof as to such defense rests upon such driver." Id. at paragraphs two and three of the syllabus.

{¶26} Although Appellee would like to focus solely on the second paragraph of the syllabus of *Lehman*, the key issue under review in *Lehman* was resolved by the third paragraph of the syllabus. Based on the record here, summary judgment was not appropriate after an analysis of the specific reasoning found in the *Lehman* case.

{¶27} In *Lehman*, the defendant admitted he had caused a head-on automobile accident, but argued that he, "had lost consciousness from an unforeseeable cause, and that such loss of consciousness was unavoidable by him." Id. at 596. The defendant presented expert physician testimony that he had lost consciousness from an unforeseeable cause. Id. A jury rendered judgment in favor of the defendant, but the trial court granted a new trial because the judge failed to instruct the jury that the burden of proof was on the defendant to show that he was unconscious at the time of

the accident. Id. The trial court also struck from the record various motions that the defendant had filed, including a motion for directed verdict. The *Lehman* opinion primarily focuses upon the significance of the burden of proof being on the defendant to prove unforeseen unconsciousness, and why the defendant could not be granted a directed verdict.

{¶28} *Lehman* begins with the basic law of negligence, and proceeds to analyze the defense of unforeseen unconsciousness in light of those basic principles:

{¶29} "In order to base a recovery upon * * * negligence, it must be shown that it was the proximate cause of the injury, and any contributory negligence directly contributing to such injury will defeat such recovery.

{¶30} "Defendant claims, likewise, that if a person driving an automobile with due care becomes unconscious from an unforeseen cause, and during such unconsciousness his automobile collides with another, causing injury or damage, he is absolved from liability and the burden of proof is upon the one seeking recovery for such injury or damage to show negligence and that the driver was conscious. Furthermore, defendant claims that because his testimony as to his unconscious condition and the corroborating testimony of his witnesses on that point was uncontradicted, he was entitled to a directed verdict; * * *

{¶31} "* * * there was an entire failure upon the part of the trial court in the present case to properly charge upon the burden of proving the unconsciousness of defendant, the only fact which would have exonerated the defendant. In addition, *the statement of the court that there was no obligation on defendant to offer evidence to*

disprove anything until plaintiff had offered evidence which tended to disprove, is dangerously near stating the proposition for which, indeed, defendant contends, to wit, that plaintiff must disprove defendant's unconsciousness while driving before she can prevail.

{¶32} "*In our opinion, such is not the law.*" (Emphasis added.) Id., 164 Ohio St. at 598-599, 133 N.E.2d 97.

{¶33} The *Lehman* opinion went on to say:

{¶34} "It would be difficult, if not impossible, for a plaintiff to prove a defendant conscious, and particularly to prove that if he were unconscious whether such condition was foreseeable, such as sleepiness or an intoxicated condition, or resulted from an unforeseen cause." Id. at 600.

{¶35} The gist of this analysis is that the question of whether or not a defendant was unconscious at the moment the accident occurred is almost entirely based on the credibility of the defendant, because no one else can really verify that fact. Credibility issues are not resolved as a matter of law, but are left to the trier of fact to determine. Although *Lehman* was reviewing the denial of a directed verdict, the same reasoning applies to summary judgment, where the court must also determine that the facts have only one possible interpretation as a matter of law. *Lehman* specifically rejected any possibility that a defendant's assertions of unconsciousness must be believed as a matter of law:

{¶36} "The burden is upon defendant to prove his defense of unforeseen unconsciousness, and, although no one contradicted *in haec verba* defendant's

testimony that he blacked out from an unforeseen cause, nevertheless, his claim was hotly disputed. There were bits of evidence from which the jury might have found that it had a basis for not believing defendant or that his unconsciousness was due to drowsiness.

{¶37} "It would be an unrealistic situation if a driver claiming that he blacked out must be believed as a matter of law, because another driver could not positively say that the first driver did not black out.

{¶38} "In our opinion a jury question is squarely presented in the present case[.]" Id. at 601.

{¶39} Although there are appellate cases which have affirmed summary judgment or directed verdicts in favor of defendants who assert the "sudden loss of consciousness" defense, such opinions should be suspect in light of the holdings and analysis in *Lehman*, supra. See, e.g., *Jenkins v. Morgan* (1988), 57 Ohio App.3d 40, 566 N.E.2d 1244 (8th Dist.; upheld directed verdict in favor of defendant without discussing contrary result in *Lehman*); *Vinci v. Heimbach* (Dec. 17, 1998), 8th Dist. No. 73440 (summary judgment granted to defendant who had epileptic seizure; the only issue was the foreseeability of the seizure, not the credibility of defendant); *Fitas v. Estate of Baldridge* (1995), 102 Ohio App.3d 365, 657 N.E.2d 323 (11th Dist.; summary judgment upheld where defendant's fatal heart attack caused the accident; the credibility of defendant apparently was not an issue because the defendant had died). Appellee cites other examples of similar appellate cases, but it is the reasoning in *Lehman*, an Ohio Supreme Court case, which must prevail.

{¶40} In the instant case, just as in *Lehman*, Miller presented expert testimony from Dr. Wise that she had suffered an unforeseen blackout. It is clear, though, that Dr. Wise had no way of knowing when the blackout allegedly occurred, and whether it occurred before or after Miller's act of pressing the accelerator while her car was still in reverse. The only person who could testify about this was Miller, and her deposition testimony only reveals that she did not remember what happened. (Miller Depo., p. 88.) There are some indications in Miller's deposition that she may have left skid marks, which would tend to show that she was conscious enough to hit the brakes. (Miller Depo., pp. 85-86.) It is also clear that Miller hit her head during the collision, which could help to explain how and when she became unconscious. (Miller Depo., p. 10.) It is difficult to comprehend how this type of contradictory evidence could be the basis for granting summary judgment in Miller's favor.

{¶41} In addition, there are some credibility problems that arise from Miller's evidence. First, Miller relies heavily on the unrebutted expert opinion of Dr. Wise, who began treating Miller for diabetes in November 1999. This was only five months before the automobile accident. Miller stresses the importance of Dr. Wise's unrebutted affidavit which asserts that she had a, "syncopal episode and lost consciousness," on the day of the accident, and that there was no reason to foresee that this would happen. A "syncopal episode" is simply another way of saying "loss of consciousness." Dr. Wise submitted this affidavit before he knew that Miller had been in a diabetic coma for eight days approximately 13 years before the automobile

accident. (Wise Depo., p. 10.) Miller never shared this information with Dr. Wise and he eventually learned about it from other sources. (Wise Depo., p. 10.)

{¶42} According to Miller, the coma came on very suddenly. (Miller Depo., p. 28.) In contrast, Dr. Wise testified that the information he received from Miller was that she had never had an incident where she suddenly blacked out. (Wise Depo., p. 11.) A sudden diabetic coma that lasts for eight days certainly seems like something an expert witness would need to know about prior to giving an expert opinion. Miller may have been less than completely forthcoming with Dr. Wise.

{¶43} Miller also failed to tell Dr. Wise that she was having regular dizzy spells in the few months prior to the accident. (Wise Depo., p. 71.) Although Dr. Wise only treated Miller twice for dizziness prior to the accident, he learned from another source that she regularly complained of dizziness. (Wise Depo., pp. 16, 39, 71.)

{¶44} Based on the analysis in *Lehman*, and based on the credibility issues surrounding Miller's evidence, the trial court should not have granted summary judgment in favor of Miller.

{¶45} The additional cases Wheeler cites in his brief reinforce the principles outlined above. In *Castle v. Seelig* (July 9, 1993), Sixth Dist. No. H-92-059, the trial court granted summary judgment to two separate defendants based on the "sudden loss of consciousness defense." The Sixth District Court of Appeals reversed the trial court based on *Lehman.* Id. at 9-10. The Sixth District noted that the defendants established some evidence to prove that they blacked out and that the blackout was not foreseeable. Id. at 10-11. Nevertheless, the appellate court found that there were

credibility issues with the defendants' testimony about when and if they blacked out, and found it significant that one of the defendants had suffered a head injury during the accident. Id. at 11. Although Appellee would like to distinguish the facts of *Castle* from those of the instant case, the two cases appear to be quite similar.

{¶46} Similarly, in *Radsick v. Estate of Kuester* (July 10, 1998), 7th Dist. No. 686, this Court reversed summary judgment in favor of the defendant on the basis of the sudden emergency defense. The defendant allegedly had a heart attack sometime prior to the automobile accident. This Court relied heavily on the analysis of the *Lehman* opinion in concluding that there were material questions of fact about precisely when the heart attack occurred and whether the accident could have happened prior to the heart attack. Id. at 5.

{¶47} Based on the analysis above, Appellant Wheeler's first assignment of error is sustained.

{¶48} Wheeler also asserts that there are material issues of fact surrounding the foreseeability of Miller's sudden blackout. The main evidence showing that Miller could have foreseen a blackout consists of: 1) the diabetic coma that occurred thirteen years prior to the accident; 2) repeated cases of dizziness in the few months prior to the accident; 3) Miller's report of dizziness just days prior to the accident (Wise Depo., p. 39); 4) the fact that Miller had some type of viral infection requiring antibiotics just three days prior to the accident; 5) Miller's surgery just three days prior to the accident, for which she was taking painkillers; 6) the multiple drugs that Miller was taking, including anti-depressants and pain killers, that could cause dizziness, light-

headedness and loss of motor functions (Wise Depo., p. 38); and 7) Miller's refusal to follow the dietary plans essential to controlling her diabetes, leading to possible consequences of very high or very low blood sugar, including blackouts and coma (Wise Depo., pp. 11, 12, 15, 19, 24, 25, 27).

{¶49} Although Dr. Wise did not recall ever telling Miller that she should avoid operating a motor vehicle, it might be possible for a jury to decide that a person who has diabetes, is constantly dizzy, has the flu, has just had surgery, is taking painkillers and anti-depressants, is not controlling her diabetes, and has suffered a diabetic coma, should be aware of the risk of blacking out. Looking at all this evidence in a light most favorable to Appellants, it is possible that a jury could conclude that Miller should have foreseen some type of problem similar to the blackout that allegedly occurred on April 20, 2000. For these reasons, Appellant Wheeler's second assignment of error is also sustained.

{¶50} Due to the numerous factual disputes in this case, summary judgment was inappropriate and the judgment of the Mahoning County Court of Common Pleas is hereby reversed and the case is remanded for further proceedings.

Donofrio, J., concurs.

DeGenaro, J., concurs.