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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2005-CA-000221-MR

MARSHA GOODMAN

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE STEVEN D. COMBS, JUDGE
ACTION NO. 02-CI-00011

NANCY SWORD

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; DYCHE AND KNOPF, JUDGES.

KNOPF, JUDGE: In December 2000, a Buick Regal operated by Marsha Goodman collided with a Plymouth Neon, owned by Nancy Sword, which had become stranded broadside on an icy road outside of Pikeville. In January 2002, Goodman brought suit against Sword seeking personal injury and property damages. Following a two-day trial in November 2004, the jury returned a verdict in favor of Sword. On December 9, 2004, the trial court entered judgment in accord with the jury's verdict and

subsequently denied Goodman's motion for a new trial. It is from that judgment that Goodman has appealed. She contends that Sword should be deemed liable as a matter of law and that consequently the trial court erred when it denied her motions for directed verdict and a new trial. We affirm.

The facts of this case are not much in dispute. Sword resided in a trailer park on Ventors Lane at the bottom of a substantial hill. On the morning of the accident, December 19, 2000, Ventors Lane, which is a narrow two-lane road bounded on one side by a steep drop off and on the other by a gravel margin and a ditch, remained snowy and icy following a storm a few days before. Although Sword had no trouble driving up the hill to go shopping that day, when she descended the hill on her return trip, at about 11:00 a.m., the road had become treacherous. She saw neighbors walking along the side of the road near the bottom of the hill. She braked in order to pass them safely and immediately slid on the icy road. The Neon skidded and eventually came to a stop about three-quarters of the way down the hill athwart the road with its front end facing awkwardly toward one side. Sword's neighbor walked back up to her and told her that he, too, had slid going down the hill and had just extricated his car from the ditch and returned it home when he noticed her coming down. He suggested that if she obtained a portable winch, he might be able to pull her car's front end

properly onto the road. Sword then walked down to the trailer park, borrowed a winch from another neighbor, and walked back to her car. She estimated that the trip may have taken between ten and twenty minutes, although that was just a guess; she had returned, she testified, as quickly as she could. Her neighbor attached the winch to the car and to a suitable tree and was just preparing to tighten it when Goodman, the postal carrier on her way to deliver mail to the trailer park, crested the hill. Sword immediately waved to her to stop, but Goodman, too, slid as soon as she braked. Goodman testified that although she could not stop, she could steer. She chose not to steer toward the ditch, however, because that was where Sword and her neighbor were standing. Instead she steered straight into Sword's Neon, damaging both cars and aggravating, she alleges, prior back and neck injuries.

Goodman argues that Sword had a duty to warn her of the obstruction in the road in such a manner as to enable her to avoid a collision, that Sword breached that duty by failing to warn her at the top of the hill before she had entered upon the icy down-slope, and that the breach was a substantial factor causing the collision and Goodman's damages. Because it is undisputed that Sword did not give a warning at the top of the hill, Goodman maintains that the rest of her argument follows as a matter of law. We disagree.

As our Supreme Court has often observed,

[a]ppellate review of a trial court's denial of a motion for directed verdict is limited to a determination of whether the jury verdict was palpably or flagrantly contrary to the evidence presented at trial.¹

In making that determination, we are not at liberty to assess credibility or the weight which should be given to the evidence, but must accept as true all evidence and all reasonable inferences from that evidence that favor the prevailing party.² Even when there is little conflict in the evidence, "[t]he inferences and conclusions to be drawn from the evidence where reasonable minds may differ are for the jury."³

Under Kentucky's comparative fault tort regime, "every person owes a duty to every other person to exercise ordinary care in his [or her] activities to prevent foreseeable injury."⁴ As Goodman notes and as the trial court's jury instructions reflected, if approaching motorists are apt not to discover the hazard in time to protect themselves, the duty of ordinary care owed by a motorist whose vehicle obstructs the right of way

¹ Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 787 (Ky. 2004).

² *Id.*

³ Mahan v. Able, 251 S.W.2d 994, 997 (Ky. 1952).

⁴ Isaacs v. Smith, 5 S.W.3d 500, 502 (Ky. 1999) (citation and internal quotation marks omitted).

generally includes a duty to provide a reasonable warning.⁵ What is reasonable, of course, will depend on the circumstances. The cases upon which Goodman relies, Baker v. Willett⁶ and Armes v. Armes,⁷ involved non-emergency obstructions created in the dark on heavily traveled highways when the duty to warn was most imperative. Here, the emergency obstruction occurred during daylight on a lightly traveled side road. Goodman admitted that she saw Sword's car and Sword's signal in what would ordinarily have been plenty of time to stop.⁸ She maintains, however, that Sword should have foreseen the difficulty another car would likely have stopping on the icy slope and so should have given warning before that point.

The situation, however, was not as straight-forward as Goodman paints it. Sword's duty also included removing her car from the road as soon as reasonably possible.⁹ Sword was attempting to fulfill that duty when she walked to the trailer court to borrow the winch and when she stayed by her car to be

⁵ Croushorn Equipment Company, Inc. v. Moore, 441 S.W.2d 111 (Ky. 1969); Baker v. Willett, 393 S.W.2d 605 (Ky. 1965).

⁶ *Supra*.

⁷ 424 S.W.2d 137 (Ky. 1965).

⁸ Goodman described the distance to Sword's car when she first saw it as about the same as that from the witness stand "to the courtroom on the other side of the hall."

⁹ KRS 189.450; American Fidelity & Casualty Company v. Patterson, 243 S.W.2d 472 (Ky. 1951).

of assistance to her neighbor while he attached it. Unfortunately, she could not do that and be at the top of the hill serving as a lookout at the same time. With the benefit of hindsight, Sword may now wish that she had been at the top of the hill, but hindsight is not the standard. Generally, "where a person is confronted with two dangerous conditions [s]he is not required to select, in an emergency, the one which on mature reflection might appear to be the least dangerous."¹⁰ Here, Sword was confronted with a choice between attending to the removal of her stranded car and warning approaching cars of the dangerous condition of the road. Because reasonable minds could differ about the proper way to navigate that choice and about whether Sword's way satisfied her duty of ordinary care, and because the jury's verdict was thus not palpably or flagrantly against the evidence, we cannot say that the trial court erred when it denied Goodman's motions for a directed verdict. Accordingly, we affirm the December 9, 2004, judgment of the Pike Circuit Court.

ALL CONCUR.

¹⁰ Service Lines, Inc. v. Mitchell, 419 S.W.2d 525, 530 (Ky. 1967).

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