

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Carl Adkins, Jr., Administrator of the Estate of Sheri L. Miller,	:	
	:	
Plaintiff-Appellant,	:	
v.	:	No. 10AP-1158 (C.C. No. 2007-05512)
	:	
Ohio State Highway Patrol,	:	(ACCELERATED CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 11, 2011

The Donahey Law Firm and Mark E. Defossez; W. Joseph Edwards, for appellant.

Michael DeWine, Attorney General, and *William C. Becker*, for appellee.

APPEAL from the Court of Claims of Ohio.

DORRIAN, J.

{¶1} Plaintiff-appellant, Carl Adkins, Jr. ("appellant"), administrator of the estate of Sheri L. Miller ("Miller"), appeals from a judgment of the Court of Claims of Ohio in favor of defendant-appellee, Ohio State Highway Patrol ("OSHP"), on the issue of liability. For the following reasons, we affirm.

{¶2} On April 11, 2003, at approximately 2:20 a.m., OSHP Trooper Michael S. Munyon ("Trooper Munyon") stopped Eric Kovach ("Kovach"), for speeding and lane-change violations. Kovach was heading south on Route 23 from Columbus towards

South Bloomfield, and Miller was the only passenger in his vehicle. The record shows that, after pulling over, Kovach parked his vehicle in the well-lit parking lot of the South Bloomfield Dairy Queen, and Trooper Munyon pulled in behind him. Further, Trooper Munyon videotaped the entire stop from the dash-mounted camera in his police cruiser.

{¶3} According to the record, Trooper Munyon first suspected that Kovach had been drinking because he was speeding and swerving all over the roadway. In addition, Trooper Munyon testified that Kovach had a very strong odor of alcoholic beverage coming from his person, bloodshot and glassy eyes, and slowed and delayed speech and actions. Prior to arresting Kovach, Trooper Munyon administered three field sobriety tests, and Kovach failed them all. During this period of time, Miller remained seated in Kovach's vehicle.

{¶4} The record also indicates that Trooper Munyon did not administer any field sobriety tests to Miller. Trooper Munyon testified that, although he had previously administered field sobriety tests to passengers, he did not have probable cause to administer any field sobriety tests to Miller. Trooper Munyon explained that "as I was talking with her, I smelled no odor of alcoholic beverage coming from her person whatsoever. Her eyes were not bloodshot and glassy, her speech was not slowed and delayed, her actions were not slowed and delayed, which would lead me to believe that she was not intoxicated." (Tr. 22.) The following testimony ensued:

Q: Okay. What actions could she have performed * * *?

A: The fact that it didn't take her long to respond to my questions.

Q: If you had administered some portions of the field sobriety testing to her, for example, the gaze test, or you had asked her to blow into the portable breathalyzer that you had

with you, and she failed that, you would not have left her on the road, correct?

A: Again, I had no reason to administer any test to her.

Q: I understand that that's what you've testified to and that's your belief. * * *

A: If I had any probable cause to administer those tests to her, I would have at the time.

(Tr. 22-23.) Trooper Munyon also testified that "[i]f a passenger is drunk, they're going to jail along with the driver." (Tr. 30.)

{¶5} During his conversation with Miller, the record indicates that Trooper Munyon stood at the driver's side of Kovach's vehicle and was "two to three feet away from her, at the most." (Tr. 55-56.) At that time, Miller told him she would call her daughter to come pick her up. Further, Trooper Munyon testified that he believed South Bloomfield to be "a safe location, with lighted sidewalks, streetlights, establishments open, [and] gas stations," and "[t]o me and the highway patrol, [South Bloomfield is] considered a safe location. We're not required to take someone home." (Tr. 31.)

{¶6} Finally, Trooper Munyon testified that, although he did not see Miller step out of Kovach's vehicle, he observed her walk "around to the back of the * * * car that I had stopped and in front of my patrol car, and then she walked to the sidewalk, and I believe she started up the sidewalk." (Tr. 57.) According to the record, Trooper Munyon instructed Miller to walk to the UDF or Marathon gas station, because it was on the same side of the road as the stop.

{¶7} The record indicates that, at approximately 3:00 a.m., Miller stopped at the South Bloomfield Speedway on Route 23 and made several purchases prior to leaving the store. The record further indicates that, at approximately 3:59 a.m., Deputy Sheriff

Hunter Lane was dispatched to the scene of an accident involving a pedestrian struck by a motor vehicle on northbound Route 23. The pedestrian, subsequently identified as Miller, died from her injuries later that same morning.

{¶8} On June 6, 2007, appellant filed a complaint for negligence claiming that "The Ohio State Highway Patrol * * * failed to exercise ordinary care and were negligent in their handling of Sheri L. Miller after the arrest of Eric Kovach by failing to ensure her safety and return to home by abandoning her on a state road at approximately 3:00 am without any means of transportation." (See Complaint at ¶10.) On July 5, 2007, appellee filed an answer contending that: (1) Miller "assumed the risk of her injuries and death"; (2) Miller "was contributorily negligent"; and (3) "[t]he injuries and death alleged in Plaintiff's Complaint were not caused by the Defendant." (See Answer at ¶20, 21, and 22.) On December 6, 2007, the trial court bifurcated the issues of liability and damages, and on December 1, 2008, a bench trial commenced on the issue of liability alone.

{¶9} On November 17, 2010, the trial court issued a decision in favor of appellee, finding that "Trooper Munyon acted reasonably and appropriately given the circumstances known to him," and that "[appellee] did not breach any duty owed to [appellant]." (See Decision at 4.)

{¶10} On December 15, 2010, appellant filed a timely notice of appeal setting forth the following assignment of error for our consideration:

The trial court's ruling is against the manifest weight of the evidence in that there is no competent, credible evidence to support the trial court's liability finding (that a state trooper conducted a reasonable assessment of the condition of appellant's decedent).

{¶11} In *Cady v. Ohio State Highway Patrol* (June 8, 1989), 10th Dist. No. 88AP-934, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus, this court stated that "[t]he general rule for a reviewing court is that '[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.' " Further, "[w]hen reviewing a judgment under the civil manifest weight of the evidence standard, the court must presume that the findings of the trier of fact are correct, as the trial judge had the opportunity to view and observe the witnesses and to use those observations in weighing the credibility of the testimony." *Mayle v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-541, 2010-Ohio-2774, ¶39. Therefore, "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court." *Id.*, quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 81.

{¶12} In his sole assignment of error, appellant contends that the trial court's liability finding in favor of appellee is against the manifest weight of the evidence because Trooper Munyon "breached his twin duties to exercise reasonable care and to offer or render assistance to a person in need; that is, a 44 year old woman suddenly without transportation at 3:00 am." (See appellant's brief at 8-9.) In support of this argument, appellant cites Ohio Adm.Code 4501:2-6-02(C), which provides, in part, that "[a] member [of the OSHP], while on duty, shall offer and render appropriate assistance to anyone in need."

{¶13} However, appellee contends that it did not breach any duty of care because (1) Trooper Munyon's assessment of Miller was reasonable, and (2) Miller was not in

need of assistance. In support of its argument, appellee relies upon Trooper Munyon's testimony regarding his observations of Miller and that he believed South Bloomfield to be a safe location.

{¶14} It is well-settled Ohio law that, in order to prevail upon a claim of negligence, appellant must prove that (1) OSHP owed Miller a duty of care, (2) OSHP breached that duty, and (3) said breach was the proximate cause of Miller's injuries. See *Mayle* at ¶16.

{¶15} Here, the trial court held that "[t]he duty owed by the Highway patrol to those drivers and passengers encountered within the scope of the Highway Patrol's official duties is one of ordinary care, bearing in mind that the patrol must enforce the law so as to maximize the safety of all the motoring public." (See Decision at 2-3.) Further, in determining whether appellee breached any duty of care owed to Miller, the trial court referenced this court's decision in *Hartman v. State Highway Patrol* (Dec. 19, 1991), 10th Dist. No. 91AP-721. In *Hartman*, we stated "[t]he general rule is that there is no duty of affirmative action absent a special relation which gives rise to a duty to aid or protect another person. A law enforcement officer having custody of a person stands in a special relation to that person and owes that person a duty of reasonable care and protection."

{¶16} In the present matter, the trial court held that, because "Miller was not arrested or taken into custody, the court finds that no special relationship between Miller and defendant existed." (See Decision at 4.) As such, the trial court focused its discussion on whether "Trooper Munyon negligently failed to assess whether Miller was intoxicated." (Decision at 4.) In deciding that Trooper Munyon acted reasonably and did not breach any duty owed to Miller, the trial court cited the following evidence:

* * * Trooper Munyon stated that he had been employed with the OSHP for 11 years and that he had participated in hundreds of DUI arrests. Trooper Munyon testified that Miller was coherent, cooperative, and willing to make her own arrangements for transportation home. In addition, Trooper Munyon testified credibly that Miller's appearance and behavior during the traffic stop did not give him a clear indication that she was impaired or intoxicated.

(See Decision at 4.)

{¶17} Here, the evidence supports the trial court's finding that "Trooper Munyon acted reasonably and appropriately given the circumstances known to him," and that "[appellee] did not breach any duty owed to [appellant]." (See Decision at 4.) Specifically, Trooper Munyon's testimony that he "smelled no odor of alcoholic beverage coming from [Miller's] person whatsoever," and that "[h]er eyes were not bloodshot and glassy, her speech was not slowed and delayed, her actions were not slowed and delayed, which would lead me to believe that she was not intoxicated," demonstrates some competent, credible evidence that Trooper Munyon reasonably assessed Miller's condition on the evening of the accident and, as such, believed that Miller was not intoxicated. (Tr. 22.) In addition, Trooper Munyon's testimony that South Bloomfield is "a safe location, with lighted sidewalks, streetlights, establishments open, [and] gas stations," demonstrates some competent, credible evidence that he considered Miller to be in a safe place and not in further need of his assistance. (Tr. 31.) Finally, Trooper Munyon's testimony that Miller indicated "she would call her daughter to come pick her up" further demonstrates some competent, credible evidence that Trooper Munyon acted reasonably under the circumstances known to him at the time of the traffic stop. (Tr. 42.)

{¶18} In addition, the trial court had the opportunity to view a recording of the traffic stop, which included both audio and video footage of: (1) Trooper Munyon

speaking to Miller; (2) Miller exiting Kovach's vehicle; and (3) Miller walking in front of Trooper Munyon's vehicle to access the sidewalk. We note that this court also viewed the footage of the traffic stop and, although appellant relies upon this recording to claim that Trooper Munyon should have known Miller was intoxicated, we must presume that the trial court weighed this evidence, along with the other evidence presented at trial, in reaching its conclusion.

{¶19} Based upon the foregoing, we find that the trial court's decision is based on some competent, credible evidence going to all the essential elements of the case and, therefore, will not be reversed as against the manifest weight of the evidence.

{¶20} For these reasons, appellant's sole assignment of error is overruled, and the judgment of the Court of Claims of Ohio is affirmed.

Judgment affirmed.

BRYANT, P.J., and BROWN, J., concur.
