[Cite as *Sanders v. Stover*, 2007-Ohio-6202.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89241

MORRIS SANDERS, ET AL.

PLAINTIFFS-APPELLANTS

vs.

GREGORY STOVER, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-507528

BEFORE: Celebrezze, A.J., Dyke, J., and Boyle, J.

RELEASED: November 21, 2007

JOURNALIZED:

[Cite as *Sanders v. Stover*, 2007-Ohio-6202.]

ATTORNEYS FOR APPELLANTS

Paul W. Flowers
Paul W. Flowers Co., L.P.A.
Terminal Tower - 35th Floor
50 Public Square
Cleveland, Ohio 44113

W. Craig Bashein
Thomas J. Sheehan
Bashein & Bashein Co., L.P.A.
Terminal Tower - 35th Floor
50 Public Square
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEES

Brett M. Mancino
1360 East 9th Street
1000 IMG Center
Cleveland, Ohio 44114

[Cite as *Sanders v. Stover*, 2007-Ohio-6202.]

FRANK D. CELEBREZZE, JR., A.J.:

{¶ 1} Appellant Morris Sanders appeals the jury verdict in favor of appellee Gregory Stover and the trial court's denial of his motion for a new trial. After a thorough review of the arguments, and for the reasons set forth below, we affirm.

{¶ 2} This appeal stems from two cases[1] involving an automobile accident that occurred on August 29, 1999 between a police cruiser and another vehicle. Officer Morris Sanders was a passenger in the police cruiser driven by Lieutenant Jeffrey Zappala, and Gregory Stover was the driver of the other vehicle.

{¶ 3} On August 6, 2003, Stover filed a complaint (Case No. 507502) against the City of Cleveland, Division of Police, and the estate of Lieutenant Jeffrey Zappala.[2] Stover alleged that he had been injured during an accident with a police car driven by Zappala. On December 9, 2003, the city and Zappala's estate filed an answer denying liability.

{¶ 4} Stover did not respond to a request for admissions. On August 2, 2004, the city and Zappala filed a motion for summary judgment. On October 14, 2004, they filed a motion to deem admissions admitted, which was granted on on October 28, 2004. On November 1, 2004, the trial court also granted the motion for summary judgment.

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[1] Case No. 507502 (*Stover, et al. v. City of Cleveland, Div. of Police, et al.*) and Case No. 507528 (*Sanders, et al. v. Stover, et al.*) were consolidated in the common pleas court. This appeal concerns Case No. 507528.

[2] Lt. Zappala later died from circumstances unrelated to the accident.

{¶ 5} On August 6, 2003, Sanders filed a complaint against Stover (Case No. 507528). He alleged that he was a passenger in the police car driven by Zappala and was seriously injured in the accident. Sanders claimed that Stover caused the accident. Stover's February 11, 2004 answer denied all liability.

{¶ 6} By the time this case went to the jury, the only claims remaining were the issue of Sander's negligence and a loss of consortium claim against Stover. On November 15, 2006, the jury returned a verdict in favor of Stover, who it found was zero percent at fault. Sanders filed a motion for a new trial, which was denied on December 12, 2006. On January 3, 2007, Sanders filed a notice of appeal.

{¶ 7} The facts that gave rise to this appeal occurred on August 29, 1999 on the east side of Cleveland. A police department "Code 1" emergency call went out to the police units in the area because of a report of shots fired from a vehicle. Officer Sanders and his partner, as well as other police units, including Zappala, responded to the call. After chasing a suspect on foot, Sanders apprehended him and placed him in Zappala's police car. Because Sander's partner's car was no longer nearby, Sanders got into Zappala's car instead.

{¶ 8} Zappala received a call that the suspect's vehicle had been found, and he headed toward that location. Sanders testified that the police car's overhead lights and sirens were on as they drove. He also testified that, as they approached each intersection, they carefully scanned for other cars. Twenty-five photographs of

the collision were submitted as evidence. The photos showed that, at the time of the accident, Zappala had swerved his vehicle toward the right, but struck Stover's car.

{¶ 9} Sanders suffered injuries to his foot, ankle, and thigh. Sanders and Stover were taken to the hospital. Although Stover testified that he had spent the evening at the Camelot Lounge and had only had one alcoholic drink, his blood alcohol level was above the legal limit.[3] However, Stover was not charged with a DUI.

{¶ 10} Officer James Masella, a member of the Cleveland Police Department's Accident Investigation Unit ("AIU"), investigated the accident and determined that Stover had failed to stop at a red light and that the police car had its lights and sirens on. Another AIU member, Officer David Cornett also investigated the accident. He testified that because of Stover's position on the road, he should have seen and heard Zappala's car. According to Cornett, Stover drove through the intersection at 10-15 miles per hour, and Zappala's car was traveling at 25 miles per hour, which was under the speed limit. Cornett determined that Zappala could not have avoided hitting Stover.

{¶ 11} Stover testified that he entered the intersection on a green traffic light, and he did not hear or see the police car approaching. The only thing he remembered after that was waking up in the hospital. Photographs of the accident

[3] Because he failed to respond to the request for admissions in Case No. 507502, Stover was deemed to have admitted his blood alcohol level was above the legal limit.

scene after the collision indicated that, at the time the photos were taken, the police car's lights were off. One of the witnesses from the scene, Reginald Coleman, testified at his deposition that Stover's traffic light was green and that about 50 feet before the intersection, the police car's lights and sirens were turned off. Stover was not cited for failure to obey a red light.

Review and Analysis

{¶ 12} Sanders appeals, asserting four assignments of error for our review.

{¶ 13} "I. The trial judge abused her discretion, to plaintiff-appellant's substantial detriment, by allowing counsel for defendant-appellee to distract and mislead the jurors with an irrelevant policy and procedure manual."

{¶ 14} Sanders argues that the trial court abused its discretion when it admitted testimony regarding a police policy and procedure manual. More specifically, he alleges that this testimony distracted and misled the jurors.

{¶ 15} It is well established that, pursuant to Evid.R. 104, the admission or exclusion of evidence falls within the discretion of the trial court. *State v. Jacks* (June 12, 1989), Cuyahoga App. No. 55415. Therefore, "an appellate court which reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion." *State v. Finnerty* (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233. A trial court abuses its discretion when it acts in an unreasonable, arbitrary, or unconscionable manner. A reviewing court should not

substitute its judgment for that of the trial court. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 473 N.E.2d 264.

{¶ 16} Sanders challenges his testimony and the testimony of officers Masella and Cornett regarding a departmental policy that prohibits police officers from engaging in a pursuit while a prisoner is in the car. Only relevant evidence is admissible under Evid.R. 402. We find this evidence irrelevant. Under Evid.R. 401 "relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The admission of irrelevant evidence that substantially prejudices a party requires a new trial. *State v. Yost* (Dec. 22, 1986), 12th Dist. App. No. CA86-01-005.

{¶ 17} Departmental policy prohibits officers from engaging in a pursuit while having a prisoner in the car. Here, Zappala was not engaging in a pursuit, but responding to the scene of the suspect's car. However, more importantly, we find that the admission of testimony regarding the police policy manual was irrelevant to the issue of Stover's negligence. Whether Zappala violated departmental rules does not make the existence of any fact that is of consequence to the determination of the action more or less probable. Even if Zappala violated the rule, that violation does not make it more or less probable that Stover was negligent. In other words, Zappala's alleged violation of departmental policy was irrelevant to the issue of whether Stover acted negligently.

{¶ 18} Because we find the testimony irrelevant, we must determine whether the admission of that evidence substantially prejudiced Sanders. Errors that do not affect substantial rights must be disregarded by the reviewing court. *Nwabara v. Willacy,* Cuyahoga App. No. 87724, 2006-Ohio-6414. Under Civ.R. 61, "[n]o error in either the admission or the exclusion of evidence *** is ground for granting a new trial *** unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect *** which does not affect the substantial rights of the parties." See also, R.C. 2309.59.

{¶ 19} We find that the admission of this testimony was harmless. Because of the myriad of evidence in favor of Stover, we cannot say that the outcome of the case would have been different if this testimony had not been admitted. Twenty-five photographs showed that the lieutenant's car struck Stover's car, in the rear, as it almost cleared the intersection. Officer Masella testified that the police car struck Stover's car. Officer Cornett testified that police officers are required to use caution to avoid hitting a pedestrian or other vehicle in an intersection, even when they are responding to an emergency and have lights and sirens on. Stover testified that his traffic light was green and that he did not see or hear any lights or sirens. In addition, pictures taken of the scene after the accident show that the lights on the police car were off.

{¶ 20} Finally, amid the testimony regarding the police manual, there was also testimony that Zappala was not in pursuit; therefore, he was not even in violation of the policy. According to Sanders, "we were not in pursuit." Based on the amount of evidence in favor of Stover, we find that the admission of the irrelevant evidence was harmless. Accordingly, appellant's first assignment of error is overruled.

{¶ 21} "II. A further abuse of discretion was committed which seriously prejudiced plaintiff-appellant's case when his testifying physician was precluded from identifying medical diagnoses that had been made by other treating physicians."

{¶ 22} Appellant argues that the trial court abused its discretion when it refused to admit testimony from his physician that identified medical diagnoses, which had been made by other physicians. This argument is without merit.

{¶ 23} According to the transcript, Stover's attorney objected to the admission of parts of Dr. Theodore Mabini's testimony. The judge sustained his objection to Dr. Mabini's testimony that "Dr. Burney made a diagnosis of contusion of the right ankle and acute lumbosacral strain." According to trial counsel, "Basis, he's again bringing in hearsay. I don't know if there's any testimony he relied on. He's just [re]iterating what another doctor's diagnosis was without the other doctor testifying."

{¶ 24} Out-of-court medical diagnoses, contained within an otherwise authenticated medical report, that satisfy that foundational requirements of Evid.R.

803(6) come under the business record hearsay exception and are admissible. *Smith v. Dillard's Dept. Stores, Inc.* (Dec. 14, 2000), Cuyahoga App. No. 75787.

{¶ 25} We find that, as an out-of-court medical diagnosis, Dr. Mabini's testimony falls under this hearsay exception. However, we find that the exclusion of this testimony was harmless. Because of the myriad of evidence in favor of Stover, including the same reasons we discussed above, we cannot say that the outcome of the case would have been different if this testimony had been admitted. The photographs, the testimony of Officers Masella and Cornett, and Stover's testimony that the traffic light was green and that he did not see or hear lights and sirens support the jury's verdict. In light of that evidence, the introduction of the doctor's testimony would not have changed the verdict. Further, in this case, the jury found Stover not liable for Sander's injuries. Dr. Mabini's testimony only supports the issue of damages; therefore, the medical testimony was irrelevant for the purpose of establishing negligence. As a result, the admission of Dr. Mabini's testimony would not have changed the outcome. Accordingly, appellant's second assignment of error is overruled.

{¶ 26} Because assignments of error three and four are substantially interrelated, we address them together.

{¶ 27} "III. The jury's decision that defendant appellee was free from negligence notwithstanding his admittedly unlawful blood alcohol concentration was contrary to the manifest weight of the evidence.

{¶ 28} "IV. Due to the overwhelming evidence that an intoxicated motorist had been at least partly, if not fully, responsible for the automobile accident, the trial judge abused her discretion by declining to order a new trial."

{¶ 29} Appellant argues that the jury's verdict was against the manifest weight of the evidence. More specifically, he alleges that because the verdict was against the manifest weight, the trial judge abused her discretion by denying his motion for a new trial. We disagree.

{¶ 30} Civ.R. 59(A)(6) provides that a trial court may order a new trial if it is apparent that the verdict is not sustained by the manifest weight of the evidence. A reviewing court may reverse the trial court's order if the trial court abused its discretion in failing to order a new trial. *Antal v. Olde Worlde Products* (1984), 9 Ohio St. 3d 144, 145, 459 N.E.2d 223. The abuse of discretion standard defers to the trial court order because the trial court's ruling may require an evaluation of witness credibility, which is not apparent from the trial transcript and record. *Schlundt v. Wank* (April 17, 1997), Cuyahoga App. No. 70978. Therefore, as long as the evidence is supported by substantial competent, credible evidence, the jury verdict is presumed to be correct and the trial court must refrain from granting a new trial. Id.

{¶ 31} The knowledge a trial court gains through observing the witnesses and the parties in any proceeding (i.e., observing their demeanor, gestures and voice inflections and using these observations in weighing the credibility of the proffered

testimony) cannot be conveyed to a reviewing court by a printed record. *In re Satterwhite* (Aug. 23, 2001), Cuyahoga App. No. 77071. In this regard, the reviewing court in such proceedings should be guided by the presumption that the trial court's findings were indeed correct. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. As the Supreme Court of Ohio has stated, "it is for the trial court to resolve disputes of fact and weigh the testimony and credibility of the witnesses." *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, 550 N.E.2d 178. An appellant court should "abstain from encroaching upon the jury's fact finding function, unless it is quite clear that the jury has reached a seriously erroneous result." *Bland v. Groves* (Apr. 7, 1993), Summit App. No. 15586.

{¶ 32} The jury was presented with conflicting evidence regarding how the accident occurred. Stover's testimony and proffered evidence is competent, credible evidence that the jury is entitled to believe. Sanders called five witnesses during the two-and-a-half day trial. The jury heard the evidence and viewed the exhibits presented by both sides. Despite Sanders' evidence, the jury found in favor of Stover.

{¶ 33} The evidence in this case was clearly not against the manifest weight. There were 25 photographs offered into evidence that showed that the police car hit the rear of and "T-boned" Stover's car when it had nearly cleared the intersection. This evidence was corroborated by Officer Masella's testimony that the police car struck Stover's car. Further, Officer Cornett testified that police officers are required

to use caution to avoid hitting a pedestrian or other vehicle in an intersection, even when they are responding to an emergency and have lights and sirens on. Stover testified that he entered the intersection on a green traffic light, and he did not hear or see the police car approaching. Photographs of the accident scene after the collision indicated that, at the time the photos were taken, the police car's lights were off. Defense witness Reginald Coleman's deposition testimony indicated that he saw that Stover's traffic light was green and that 50 feet before the intersection, the police car's lights and sirens were turned off. Finally, Stover was not cited for failure to obey a red light or DUI.

{¶ 34} Sanders argues that the verdict is against the manifest weight because Stover was legally intoxicated at the time of the accident, thus, he had to be at least somewhat negligent. Stover testified that he had had only one drink; however, he was deemed to have admitted that he was legally intoxicated because his original counsel failed to answer a request for admissions. Even if he was intoxicated, the jury could have found that was not a contributing factor to the accident especially if the jury believed the evidence that the police car's lights were off and/or that Stover's traffic light was green.

{¶ 35} There was ample competent, credible testimony in support of the jury's verdict. The fact that Sanders also offered credible, yet conflicting testimony, does not mean that the jury's verdict was against the manifest weight. The jury weighed the testimony from both sides and found in favor of Stover. Therefore, we do not

believe that the trial court abused its discretion by denying Sander's motion for a new trial. Accordingly, appellant's third and fourth assignments of error are overruled.

Judgment is hereby affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

ANN DYKE, J., CONCURS;
MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY