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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000639-MR

SHANE MCCAIN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE FREDERIC J. COWAN, JUDGE
ACTION NO. 07-CI-004141

BETH WADDELL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, LAMBERT AND VANMETER, JUDGES.

NICKELL, JUDGE: Shane McCain appeals from a judgment awarding Beth Waddell damages following an automobile accident. McCain argues: (1) the jury instructions were improper because they created a false impression that McCain owed a greater duty than ordinary care; and (2) a witness should not have been permitted to testify regarding measurements of the accident scene because the

information was not produced prior to trial. After reviewing the record and briefs, we affirm.

McCain and Waddell were involved in an automobile accident at the intersection of 21st and Duncan Streets in Louisville, Kentucky. McCain filed suit against Waddell in Jefferson Circuit Court alleging she operated her vehicle in a negligent manner. Waddell filed an answer and counterclaim alleging the accident was a result of McCain's negligence.

The case was tried before a jury. McCain testified Waddell made a wide right-hand turn, crossed into his lane, and struck his vehicle. Waddell testified she kept well to the right as she turned and that McCain crossed into her lane and struck her vehicle. The jury heard testimony from three other witnesses: (1) Matthew Tush, a passenger in McCain's vehicle; (2) Officer Chris Sheehan, the investigating officer; and (3) Cary Blanckaert, Waddell's fiancé. Over McCain's objections, Blanckaert testified regarding certain measurements he took of the accident scene.

The jury ultimately found that McCain was ninety percent at fault and Waddell was ten percent at fault. The jury awarded Waddell $6,774.75. This appeal followed.

McCain first argues the jury instructions were improper because they created the false impression that McCain owed a duty greater than ordinary care and that he had to anticipate Waddell's violation of his right-of-way. We disagree.

The pertinent portions of Instruction No. 4 stated as follows:

> It was the duty of the Plaintiff Shane McCain in driving his automobile to exercise ordinary care for his own safety and for the safety of other vehicles using the street, and this general duty included the follow (sic) specific duties:
>
> (a) To keep a lookout ahead for other vehicles in front of him or approaching so near his line of travel as to be in danger of collision;
>
> . . . .
>
> (d) To exercise ordinary care generally to avoid collision with other vehicles using the street.

McCain correctly cites *Smith v. Sizemore*, 300 S.W.2d 225, 228 (Ky. 1957), for the proposition "[t]he operator of a motor vehicle has the right to assume that the road is reasonably safe for ordinary travel and that other operators of motor vehicles will drive in accordance with their duties." However, "[a] driver approaching an intersection with the right-of-way has no absolute right to proceed so unconditional that she can ignore duties of reasonable lookout, sounding a horn when necessary, and avoiding collision when there is reasonable opportunity to do so." *Wittmer v. Jones*, 864 S.W.2d 885, 888 (Ky. 1993).

The jury instructions were entirely proper because the duty to maintain a reasonable lookout and the duty to avoid collision are recognized by Kentucky law. *Id.* Moreover, the evidence did not present a right-of-way issue. McCain was traveling eastbound on 21st Street proceeding straight through the intersection. Waddell made a right-hand turn from Duncan Street heading westbound onto 21st Street. The issue was which driver veered into the other's lane. McCain has not demonstrated that the jury operated under a misapprehension

of the law. Rather, the jury simply believed Waddell's testimony instead of McCain's. There was no error in the jury instructions.

McCain next argues the trial court erred by permitting Blanckaert to testify regarding measurements he took at the accident scene because the information was not disclosed prior to trial. McCain also complains about a diagram used to refresh Blanckaert's memory on the stand, but not introduced as a trial exhibit. McCain has not cited where this alleged argument was preserved for review nor does he support his argument with citations from the record.

Citing *Vires v. Commonwealth*, 989 S.W.2d 946 (Ky. 1999), McCain contends Kentucky law does not permit "trial by ambush." In *Vires,* the Supreme Court of Kentucky held there was no violation of a criminal discovery rule when the basis of an accident reconstructionist's opinions was provided to defense counsel prior to trial. *Id.* at 948. *Vires* dealt with an issue involving Kentucky Rules of Criminal Procedure (RCr) 7.24(1)(b) and, therefore, is not applicable to the present case.

In the present case, the record does not support McCain's argument. In response to McCain's Interrogatory No. 3, Waddell stated:

> Cary Blanckaert is expected to testify as to his observations at the accident scene including the tire/brake marks and fluid trail left by Mr. McCain's vehicle, the fact that this physical evidence showed that the McCain vehicle was in Ms. Waddell's lane of traffic at impact, photos taken of the accident scene, the damage to both vehicles and the condition of Ms. Waddell's car pre and post accident.

The diagram used to refresh Blanckaert's memory was not introduced as evidence. McCain's pretrial motion in limine to exclude Blanckaert's testimony dispels any notion of unfair surprise. Moreover, nothing prevented McCain from taking his own measurements or deposing Blanckaert or Waddell. The trial court did not abuse its discretion.

Accordingly, the judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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