2013 IL App (5th) 120586-U

NO. 5-12-0586

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MARYLYNN S. DIXON, Plaintiff-Appellant, v. WILLIAM D. MAGGART, Defendant-Appellee.	)))))))))	Appeal from the Circuit Court of Madison County. No. 09-L-799 Honorable David A. Hylla, Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Welch and Justice Wexstten concurred in the judgment.

ORDER

¶ 1 *Held*: The jury was presented with factual questions regarding defendant's negligence and plaintiff's contributory negligence, and the evidence was sufficient to support a verdict in favor of defendant.

¶ 2 Plaintiff, MaryLynn S. Dixon, sued defendant, William D. Maggart, for negligence in the circuit court of Madison County. The lawsuit involved an accident in which plaintiff was a pedestrian and defendant a driver. After a jury trial, the circuit court entered judgment on a verdict in favor of defendant. On appeal, plaintiff raises issues as to whether the verdict was against the manifest weight of the evidence. We affirm.

¶ 3 FACTS

¶ 4 At approximately 7 a.m. on April 17, 2009, defendant attempted to make a left-hand turn from Brenda Lane onto Illinois Route 159. In the turn, he drove his pickup truck into the center lane of Route 159. There he collided with two pedestrians, plaintiff and Lois

Foster.

¶ 5 Plaintiff and Foster had been in the habit of taking morning walks several times a week for several years. Plaintiff lives in a subdivision east of Route 159. Foster lives on the west side of Route 159 where it intersects with Brenda Lane.

¶ 6 After meeting on plaintiff's side, the two decided to go to the west side of Route 159 to avoid the muddy east side. At the intersection with Brenda Lane, where the two crossed, Route 159 is five lanes–two lanes north and south and one marked center lane. The nearest marked crosswalk was approximately one half mile away. At trial, plaintiff testified that she had crossed Route 159 on numerous occasions and that one could do so safely, despite fairly heavy traffic, as long as one checks the traffic. On the morning of the accident, both she and Foster looked left and right before proceeding across the two northbound lanes. They stopped in the center lane to allow southbound traffic to proceed.

¶ 7 Plaintiff admittedly did not see defendant's pickup truck while it was on Brenda Lane, nor at anytime before the accident. While in the center lane, plaintiff monitored southbound traffic and kept an eye on distant stoplights to her north that regulated traffic. Plaintiff described what happened immediately after she had waited for one last southbound vehicle to go past her:

> "A. It passed, and I started to step out, and all of a sudden Lois grabbed me, and she said he doesn't see us; he doesn't see us.
>
> Q. [Attorney for plaintiff:] Okay.
>
> A. And I said, who. And then behind me this roar, and I turned around, and I saw the young gentleman looking down this way, and then I looked straight ahead and realized I was looking at my face in the mirror, and I just ducked."

A side mirror of defendant's pickup truck struck plaintiff's head. Plaintiff described feeling the sensation of being lofted in the air, and the next thing she remembered she was on the

ground with defendant walking towards her. Plaintiff stated that defendant looked concerned, but she could not remember what he said.

¶ 8 Defendant was called as a witness by plaintiff. Defendant testified that he was 19 years old at the time of the accident and had received his driver's license a couple of years beforehand. Defendant described stopping at the stop sign on Brenda and waiting more than half a minute before making a left turn. Defendant stated that he repeatedly checked his left and right to monitor traffic, but did not see the pedestrians in the center lane at any time before the collision. In fact, he did not realize that anyone was in the center lane.

¶ 9 Defendant admitted that his focus was on the traffic, as it was heavy and his vision of both directions of Route 159 was limited by dips and hills in the road. Defendant also admitted that he told plaintiff and Foster that he had not seen either of them before the collision, but asserted that he did not see the pedestrians because the sun was to his east and directly in his eyes.

¶ 10 Plaintiff's walking partner, Lois Foster, testified about crossing Route 159. As with plaintiff and defendant, Foster described the crossing by referring to photographs that were in front of the jury. Foster had crossed Route 159 on foot on many occasions and remarked that other pedestrians likely crossed in that area because of bus stops on both sides. On the other hand, Foster also described Route 159 as having slopes in the terrain as it approached the intersection and commented that defendant faced the difficulty of dealing with fast and heavy cross-traffic.

¶ 11 Like plaintiff, Foster testified that she checked left and right before walking onto Route 159 and stopped in the center lane because of southbound traffic. Unlike plaintiff, Foster saw defendant pull up to the stop sign on Brenda while the two were standing in the center lane. Foster stated that they waited for what she testified was a minute to a minute and a half because of the cross-traffic on Route 159. Foster testified that she watched defendant

the entire time, paying particular attention to his eyes. Foster commented that her training as a bus driver led her to believe that if another driver does not make eye contact, they do not see you. According to Foster, defendant was checking the traffic on Route 159 the entire time he sat at the stop sign and did not appear to be distracted by such things as his radio or a cell phone.

¶ 12 Foster stated that as defendant began to pull out onto Route 159 for a left-hand turn she yelled to plaintiff "my God, he doesn't see us" and grabbed plaintiff by the shoulder of her jacket in an attempt to move away. Plaintiff responded "who," and before Foster could get clear, plaintiff was struck, and both were knocked down, by defendant's truck. Defendant then exited his truck, apparently shaken and crying, stating, "Oh, my God; I didn't see you; I didn't see you; I'm so sorry."

¶ 13 Foster testified that there were no physical structures that obstructed defendant's view of the center lane as he sat waiting at Brenda, but that the rising sun would have been facing him as he looked out across Route 159. Foster described the positioning of the parties by reference to photographs, and upon plaintiff's counsel describing the sun as being off to the right of where the two were standing, Foster replied, "Yeah, right in his face is where it is." Foster commented that the defendant was paying attention to his driving as he waited at the stop and that "the young man did everything he was supposed to do."

¶ 14 On cross-examination, Foster described the difficulties she has had making a left-hand turn at the intersection. Her cross-examination concluded with this exchange:

> "Q. [Attorney for defendant:] Okay. Would you have done anything differently than Mr. Maggart?
>
> A. I would not have done anything different physically, but I can't say that I would have been driving that truck.
>
> Q. Okay. If you're driving your car, you know?

A. But I'm saying physically as far as the left turn signal sitting there watching the traffic and then pulling out when I felt that it was clear to pull out, no, I wouldn't have done anything differently."

The jury returned a verdict in favor of defendant. Plaintiff appeals.

¶ 15 ANALYSIS

¶ 16 Illinois has long recognized that pedestrians have a duty to exercise ordinary care in crossing a street. *Larson v. Fell*, 55 Ill. App. 2d 418, 427, 204 N.E.2d 475, 480 (1965) (citing *Moran v. Gatz*, 390 Ill. 478, 485, 62 N.E.2d 443, 446 (1945)). This duty initiates with the decision to enter the roadway and continues with a responsibility to maintain a proper lookout while crossing. See *Malpica v. Sebastian*, 99 Ill. App. 3d 346, 349, 425 N.E.2d 1029, 1032 (1981); *Albaugh v. Cooley*, 87 Ill. 2d 241, 249, 429 N.E.2d 837, 840 (1981).

¶ 17 The responsibilities of pedestrians were aptly stated in *Larson*. *Larson v. Fell*, 55 Ill. App. 2d 418, 427, 204 N.E.2d 475, 480 (1965). In *Larson*, a pedestrian testified that she proceeded to cross a street after checking in several directions, but did not check cross-traffic again after stepping off the curb. *Larson* laid out several rules of law that guide our disposition:

"In crossing a street or highway, a pedestrian must make reasonable use of all senses in order to observe impending danger. In *Moran v. Gatz*, 390 Ill. 478, 485-86, 62 N.E.2d 443, 446 (1945) [citation], the Court stated:

'The generally accepted rule is that while a statute such as ours gives pedestrians the right of way, it does not confer upon them an advantage which necessarily absolves them from guilt of contributory negligence. Each case must be determined from its particular facts...

'The rule seems to be quite universal that a pedestrian's failure to keep a constant lookout, or to look again after having determined that he can safely

cross ahead of approaching traffic, is not contributory negligence as a matter of law but it is a question for a jury whether he was in the exercise of ordinary care for his own safety... (Citing cases.)' " *Larson*, 55 Ill. App. 2d at 427, 204 N.E.2d at 480.

Larson concluded:

" 'Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. [Citation.] The question of contributory negligence of a pedestrian is one which is preeminently for the consideration of a jury. *Moran v. Gatz*, 390 Ill. 478, 62 N.E.2d 443.' " *Larson*, 55 Ill. App. 2d at 428, 204 N.E.2d at 480 (quoting *Johnson v. Skau*, 33 Ill. App. 3d 280, 285, 179 N.E.2d 40, 42-43 (1962)).

¶ 18 Plaintiff points out that defendant's duty is not discharged simply by looking but failing to see. *Pantlen* described this principle:

"It is equally well established by the law in Illinois[ ] that one cannot look with unseeing eye and not see the danger which he could have seen by the proper exercise of his sight, or stated another way, one will be deemed to have observed that which would necessarily have been seen if he had looked, and will not be absolved of the charge of negligence in failing to look by testimony that he looked and did not see. [Citations.]" *Pantlen v. Gottschalk*, 21 Ill. App. 2d 163, 170, 157 N.E.2d 548, 551 (1959).

See *Wallace v. Weinrich*, 87 Ill. App. 3d 868, 874, 409 N.E.2d 336, 341 (1980).

¶ 19 *Pantlen* does not call for the question of due care to be removed from the jury. In *Pantlen*, two vehicles collided in the middle of an intersection. *Pantlen* looked at conflicting accounts as to when the vehicles entered the intersection and found that this created a

question of fact. *Pantlen* rejected the defendant's argument that the plaintiff failed to establish the absence of contributory negligence as a matter of law. *Pantlen*, 21 Ill. App. 2d at 170, 157 N.E.2d at 551. Instead, *Pantlen* commented that no hard or fast rule could be laid down because the particular facts of each case determine whether due care was exercised. *Pantlen*, 21 Ill. App. 2d at 172, 157 N.E.2d at 552. Thus, *Pantlen* indicates that the question of proper lookout often presents issues of the respective contribution of each party that must be submitted to the fact finder.

¶ 20 Illinois has long recognized that the actions of a driver and the care exercised by a pedestrian often pose interrelated factual questions regarding negligence and contributory negligence. *Zeller v. Durham*, 33 Ill. App. 2d 273, 279, 179 N.E.2d 34, 37 (1962); *Albaugh,* 87 Ill. 2d at 249, 429 N.E.2d at 840. Again, this was best stated several decades ago:

> "It has long been the rule in this state that the driver of a vehicle on a city street is charged with a duty to exercise reasonable care in the operation of his vehicle and to have his vehicle under such control as will enable him to avoid collision with pedestrians. He is charged with notice that pedestrians may cross the street over which he is driving and it is, therefore, his duty to so drive his car as to have it under control and to keep a proper lookout ahead so as to enable him to avoid colliding with pedestrians. Whether or not the defendant in the instant case was driving in accordance with his duty or was guilty of negligence was a question of fact for the jury. Similarly, there was a duty upon the part of the decedent to so conduct himself as to be free from contributory negligence. *Moran v. Gatz*, 390 Ill. 478, 62 N.E.2d 443 .
>
> The questions of negligence and contributory negligence ordinarily and pre-eminently present questions of fact. It is not the function of the reviewing court to substitute its judgment for that of the jury upon controverted questions of fact. It

is fundamental law in our jurisprudence that all controverted questions of fact, in a jury trial, must be submitted to the jury for decision. This is primarily the exclusive function of the jury and to withdraw such questions from its consideration is to usurp its function." *Zeller*, 33 Ill. App. 2d at 279, 179 N.E.2d at 37.

¶ 21 In the case at hand, the jury was presented with factual questions regarding the degree of care exercised by defendant and the contributory negligence of plaintiff. Considering the evidence presented to the jury, *Pantlen* does not call for the verdict to be overturned.

¶ 22 The jury was presented with a factual question of whether defendant exercised due care or, in other words, engaged in "proper exercise of his sight." *Pantlen*, 21 Ill. App. 2d at 170, 157 N.E.2d at 551. Defendant's assertion that he exercised diligence in his lookout was couched in terms of the conditions at the time of the accident. Given the evidence on the traffic, the terrain and the sun facing defendant, defendant's plight was not simply one of an "unseeing eye." *Pantlen*, 21 Ill. App. 2d at 170, 157 N.E.2d at 551. Plaintiff contends that defendant's lack of due care was well established, particularly pointing to the opinion testimony of a responding officer. Nonetheless, the jury was presented with questions regarding the degree of care exercised by defendant and whether there were any other actions he could have taken. The jury was presented with sufficient evidence to agree with Foster's testimony that "the young man did everything he was supposed to do."

¶ 23 Moreover, the jury was presented with related questions of fact regarding plaintiff's contributory negligence. Plaintiff asserts that a driver entering the roadway must yield the right of way to a pedestrian who has established herself. For this proposition, plaintiff turns to *Wallace*. *Wallace*, 87 Ill. App. 3d at 873, 409 N.E.2d at 340.

¶ 24 In *Wallace*, a driver struck a two-year-old after backing out of his driveway into the street. *Wallace* recited the principle explicated in *Pantlen*, but offers no support for plaintiff's claim. *Wallace*, 87 Ill. App. 3d at 874, 409 N.E.2d at 341. Instead, *Wallace* found

that as a matter of law no contributory negligence could be imputed to the two-year-old, as toddlers are conclusively presumed to be incapable of contributory negligence. Thus, the conduct of the minor plaintiff was not to be considered and the question of whether the defendant backed into the street without looking or looked and failed to see was irrelevant. *Wallace*, 87 Ill. App. 3d at 872, 409 N.E.2d at 339.

¶ 25 In the case at hand, the question of plaintiff's contributory negligence was squarely before the jury. Even when a pedestrian uses a crosswalk, the issue of whether she exercised due care is ordinarily a question of fact. *Albaugh*, 87 Ill. 2d at 249, 429 N.E.2d at 840; see *Larson*, 55 Ill. App. 2d at 427-28, 204 N.E.2d at 480 ("while a statute such as ours gives pedestrians the right of way, it does not confer upon them an advantage which necessarily absolves them from guilt of contributory negligence" (internal quotation marks omitted)). The ordinary care due from pedestrians must take into account the dangers of the roadway they enter. See *Malpica*, 99 Ill. App. 3d at 349, 425 N.E.2d at 1032 (plaintiff who had to stop in middle of four-lane road due to cross traffic had "assumed a position of peril").

¶ 26 The jury was presented with conflicting testimony regarding the dangers assumed by plaintiff when she began her crossing. Although plaintiff asserts that she and others had crossed at that location on other occasions, defendant presented evidence of dangers presented by the heavy traffic, terrain of the road, and position of the sun at the time of the accident. Furthermore, plaintiff knew when she first stepped on the road that she would not be able to traverse the entire course, but would have to stop in the middle. Thus, the jury could have justifiably concluded that plaintiff assumed a position of some peril when she entered the roadway. The issue of whether plaintiff exercised ordinary care when entering the roadway was a question for the jury.

¶ 27 Moreover, plaintiff had a continuing obligation to maintain a proper lookout during her crossing. *Albaugh*, 87 Ill. 2d at 249, 429 N.E.2d at 841. Plaintiff's argument that her

obligations only extend to traffic that was already on the roadway when she began to cross is without support. Even in instances where a pedestrian has a right of way, they are not absolved from guilt for contributory negligence. See *Larson*, 55 Ill. App. 2d at 427, 204 N.E.2d at 480; *Albaugh*, 87 Ill. 2d at 249, 429 N.E.2d at 841. The heightened perils from an interrupted crossing of a busy roadway with a rising sun in the backdrop added to plaintiff's need to make reasonable use of her senses to observe impending danger–and the jury was presented with evidence that plaintiff failed to keep a proper lookout. Plaintiff herself testified that she had not observed defendant before the collision and was just resuming her walk across the remaining lanes when the accident occurred. As with the issue of what peril plaintiff assumed by deciding to cross, the contribution made by a lack of proper lookout was a question for the jury to determine. Although the record is susceptible to several conclusions, the determination of the contributory negligence of plaintiff as the proximate cause of her injury is not against the manifest weight of the evidence.

¶ 28 The risk of serious injury faced by pedestrians requires drivers to always be diligent. As *Pantlen* explained, a driver merely maintaining a lookout for unseen pedestrians does not fulfill this duty, but rather, raises a question of fact regarding the reasonableness of the driver's actions under the circumstances. In the case at hand, the evidence of the dangers of the crossing and plaintiff's failure to keep a proper lookout made the reasonableness of the actions of the parties a matter for determination by the jury.

¶ 29 This is not a case where the claim of a pedestrian's contributory negligence, and the correlated assertion of the driver's due care, is attenuated. On appeal, plaintiff phrases the issues in terms of whether the circuit court properly denied her motion for a judgment notwithstanding the verdict and failed to grant a new trial. The circuit court properly denied these motions. The record displays that the jury was presented with substantial factual disputes and that the verdict was not against the manifest weight of the evidence. *Maple v.*

Gustafson, 151 Ill. 2d 445, 453, 603 N.E.2d 508, 512 (1992). Such motions do not call for reweighing the evidence or setting aside a verdict just because the jury could have drawn different inferences or conclusions. *Ford v. Grizzle*, 398 Ill. App. 3d 639, 650, 924 N.E.2d 531, 542 (2010). The circuit court properly denied both motions. The record presents questions of fact that were the primary function of the jury to resolve, and the evidence was sufficient to support its verdict.

¶ 30 Accordingly, the judgment of the circuit court of Madison County is hereby affirmed.

¶ 31 Affirmed.