

IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA, ON RELATION
OF ITS DEPARTMENT OF MOTOR
VEHICLES AND PUBLIC SAFETY,
HIGHWAY PATROL DIVISION,
Appellant,
vs.
TAMMY DODSON, INDIVIDUALLY,
AND AS ADMINISTRATRIX FOR THE
ESTATE OF ROBERT DALE DODSON,
DECEASED, AND AS NATURAL
PARENT FOR JESSICA DODSON AND
DAVID DODSON, MINORS; AND
ELSIE FAYE TANNAHILL,
INDIVIDUALLY,
Respondents.

No. 40823

FILED

DEC 21 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a final judgment entered following a bench trial in a wrongful death action. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Respondents Tammy Dodson, Jessica Dodson, David Dodson, and Elsie Tannahill (collectively "the Dodsons") filed a wrongful death action against appellant Department of Motor Vehicles and Public Safety, Highway Patrol Division ("DMV") for the death of their husband, father, and son-in-law, respectively, Robert Dodson ("Dodson"). The DMV asserted comparative negligence as an affirmative defense.

On December 26, 1997, Robert Dodson secured a bicycle to the top of his vehicle with bungee cords. At trial, Dodson's son and daughter testified that Dodson rechecked it before they left that evening by tugging, shaking, and rattling the bicycle to make sure it would not fall.

However, later that evening, while Dodson drove northbound on I-15, the bicycle fell, landing in the left side of the left lane. Dodson pulled over to retrieve the bicycle about one-quarter mile up the road. Tammy testified that he turned his flashers on and left the car running with its headlights and taillights on. She testified that they both got out, without flashlights, to retrieve the bicycle. Dodson walked in the middle of the center median toward the bicycle and she followed behind him.

As Dodson was walking, Nevada Highway Patrol Trooper Daniel Bennett, who was driving northbound on I-15, struck the bicycle and drove into the median, hitting and killing Dodson.

Dodson's family testified that Trooper Bennett never swerved to miss the bicycle, but hit it straight on. The Dodsons further testified that Trooper Bennett did not slow down, but kept driving for about one-quarter mile until turning off the roadway and hitting Dodson. Tammy testified that, as she was trying to straighten out Dodson's mangled body, Trooper Bennett shook her and told her not to disturb the evidence. Tammy told him that Dodson was just trying to get their son's bicycle out of the roadway. She testified that Trooper Bennett replied, "What bicycle?"

At trial, Trooper Bennett testified that he had swerved and left the road to avoid the bicycle. Other trial witnesses testified that Trooper Bennett swerved to avoid the bicycle and to avoid hitting Dodson.

The Dodsons presented evidence from law enforcement officers that Trooper Bennett intentionally left the roadway, entering the dirt median. The DMV presented conflicting evidence that Trooper Bennett left the roadway to avoid the bicycle. The DMV presented further evidence that the lack of swerve marks did not mean that Trooper Bennett

did not swerve because a lot of steering input must be put in to cause a vehicle to leave skid marks.

At the time of his death, Dodson's: (1) blood contained 867 nanograms per milliliter (ng/mL) of methamphetamine; and (2) urine contained 40,926 ng/mL of methamphetamine and its metabolite, amphetamine, as well as 617 ng/mL of marijuana's metabolite, TCH. Dodson's blood had the presence of some detectable amount of marijuana, although the amount was unknown because a quantitative blood test was not performed per normal coroner's policy.

At the conclusion of the trial, the district court found that Trooper Bennett was solely negligent and entered a finding of fact that "there were indications [Dodson] had controlled substance metabolites in his blood; however, controlled substances were not a factor in this accident."

On appeal, the DMV contends that, given the significant amount of controlled substances in Dodson's blood and urine at the time of his death, he was comparatively negligent: (1) in his inability to properly secure the bicycle to his vehicle, which created a road hazard to oncoming traffic when it fell; and (2) in attempting to retrieve the bicycle. The DMV asserts that Dodson, who was chemically impaired, was responsible for his misjudgments and poor decisions, including walking one-half to three-quarter miles toward the bicycle, not taking any precautions to make himself more visible to oncoming traffic at night, and positioning himself near the road. As a result, the DMV seeks a new trial, at least, to the limited issue of apportionment of fault.

The Dodsons contend that substantial evidence supports the district court's findings and that Dodson acted as any prudent person would have in similar circumstances.

"A district court's findings will not be disturbed on appeal unless they are clearly erroneous and are not based on substantial evidence."¹ "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion."²

We conclude that the district court did not clearly err in finding Trooper Bennett solely negligent. At trial, the DMV failed to present expert evidence linking the alcohol and controlled substances to Dodson's ability to secure the bicycle to his vehicle. At trial, the DMV did not present any evidence of Dodson's negligence in securing the bicycle to his vehicle. Without such evidence, the DMV's contention that drugs impaired Dodson's ability to properly secure the bicycle to his vehicle was based solely on the mere presence of the substances. The district court apparently gave little weight to this evidence in light of the testimony presented regarding the steps Dodson took to secure the bicycle.³ Likewise, the DMV did not present any expert testimony that the drugs

¹Gibellini v. Klindt, 110 Nev. 1201, 1204, 885 P.2d 540, 542 (1994); see also NRCP 52(a); Hermann Trust v. Varco-Pruden Buildings, 106 Nev. 564, 566, 796 P.2d 590, 591-92 (1990).

²Bopp v. Lino, 110 Nev. 1246, 1249, 885 P.2d 559, 561 (1994); see also Radaker v. Scott, 109 Nev. 653, 657, 855 P.2d 1037, 1040 (1993); Bally's Employees' Credit Union v. Wallen, 105 Nev. 553, 556 n.1, 779 P.2d 956, 957 n.1 (1989).

³Quintero v. McDonald, 116 Nev. 1181, 1184, 14 P.3d 522, 524 (2000) (the credibility of witnesses and the weight to be given their testimony is within the sole province of the trier of fact).

found in Dodson's system affected Dodson's decision or ability to negotiate the median. A reasonable mind could have concluded that there was adequate evidence that Dodson was walking in the center of the median and this was a reasonable course of action under the circumstances, and that there was insufficient evidence to support a finding that alcohol or drugs impaired Dodson's ability to properly secure the bicycle. Thus, we conclude that the district court did not err in finding Trooper Bennett solely negligent from the evidence presented. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

cc: Hon. Lee A. Gates, District Judge
Attorney General Brian Sandoval/Las Vegas
Stein & Rojas
Clark County Clerk