

STATE OF MICHIGAN
COURT OF APPEALS

TAMMIE HENRY, Personal Representative of
the Estate of Larry L. Henry, deceased,

UNPUBLISHED
April 8, 1997

Plaintiff-Appellant,

v

No. 184867
Emmet Circuit Court
LC No. 93-002155

JOEL WEBSTER,

Defendant-Appellee.

Before: Markey, P.J., and Michael J. Kelly and M.J. Talbot,* JJ.

PER CURIAM.

In this wrongful death case, plaintiff, Tammie Henry, as personal representative of the estate of her deceased husband, Larry L. Henry (hereinafter referred to as “Henry”), appeals as of right from the judgment of no cause for action in favor of defendant, Joel Webster, entered after a jury trial. We affirm.

First, plaintiff claims that the trial court erred in denying her motion for judgment notwithstanding the verdict (“JNOV”). Here, although the jury found that defendant was negligent, defendant’s negligence was not a proximate cause of Henry’s death. Plaintiff argues that because reasonable minds could not differ that defendant’s negligence was a proximate cause of Henry’s death, the trial court erred in denying her motion for JNOV. We disagree.

In *Babula v Robertson*, 212 Mich App 45, 53-54; 536 NW2d 834 (1995), this Court addressed the issue of proximate cause:

Liability for negligence does not attach unless the plaintiff establishes that the injury in question was proximately caused by the defendant’s negligence. Proximate cause means such cause as operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred. Ordinarily, the

* Circuit judge, sitting on the Court of Appeals by assignment.

determination of proximate cause is left to the trier of fact, but if reasonable minds could not differ regarding the proximate cause of the plaintiff's injury, the court should rule as a matter of law. [Citations omitted.]

In reviewing a motion for JNOV, this Court views the evidence presented in a light most favorable to the nonmoving party. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995). If reasonable jurors could honestly have reached different conclusions, the jury's verdict must not be disturbed. *Id.*

Here, the evidence presented below indicated that on the day of the incident in question Henry had been at defendant's house socializing and drinking. Sometime in the evening Henry inquired about defendant's handgun which Henry knew defendant used for deer hunting. Defendant retrieved the loaded Smith & Wesson revolver from the dresser in his bedroom. As he approached Henry, defendant was carrying the revolver in the palm of his hand. Defendant gestured to Henry to show him the gun and stated that it was his intent to remove the bullets before handing the gun to Henry. Before defendant could remove the bullets Henry reached for the gun. Defendant backed away from Henry but Henry tripped over the bottom portion of a chair, stumbled into defendant, and the gun went off. Henry was fatally wounded. The parties stipulated that both Henry and defendant were intoxicated at the time of the incident. Defendant admitted that the alcohol he had consumed on the night in question had affected him, and that bringing out a loaded gun on that particular evening was "totally foolish" and "the most stupid thing [he] had ever done in [his] life." Further, defendant admitted that he was aware that the gun did not have a safety device on it, and that it could be discharged in either the cocked or uncocked position.

Viewing this evidence in a light most favorable to defendant, we believe that reasonable jurors could honestly have reached different conclusions regarding proximate cause in this case. The evidence, taken in a light most favorable to defendant, while clearly indicating that defendant was negligent in handling the gun while intoxicated, could support a finding that defendant was not a proximate cause of Henry's death. Henry asked to see the gun. After defendant got the gun and was attempting to unload it, Henry reached for the gun. Defendant pulled the gun away from Henry, intending to unload it before allowing Henry to handle the gun. Henry, while trying to grab the gun, tripped over a chair and stumbled into defendant, and the gun discharged killing Henry. While it is possible that these facts could have supported a finding that defendant's actions were a proximate cause of Henry's death, the evidence also supported a finding that Henry's conduct alone caused the gun to discharge. As above indicated, if reasonable jurors could honestly have reached different conclusions the jury's verdict must not be disturbed. *Severn, supra*, 212 Mich App 412.

In sum, even though the evidence supported a finding that defendant was negligent, reasonable jurors could have concluded that defendant's negligence was not a proximate cause of Henry's death. Because we believe that the jurors could honestly have reached different conclusions on this issue of proximate cause, we hold that the jury's verdict of no cause for action in favor of defendant must not, therefore, be disturbed. Likewise, in light of the above evidence, we cannot say that the jury's finding

that defendant's negligence was not a proximate cause of Henry's death was against the great weight of the evidence. Clearly, there was support in the record for such a finding. The trial court did not abuse its discretion in denying plaintiff's motion for a new trial. *Severn, supra*, 212 Mich App 412.

Plaintiff also claims that certain instructional errors denied her a fair trial. We disagree.

The determination of whether an instruction is accurate and applicable to a case is within the sound discretion of the trial court. *Rice v ISI Manufacturing, Inc*, 207 Mich App 634, 637; 525 NW2d 533 (1994). On review, there is no error requiring reversal if, on balance, the theories and the applicable law were adequately and fairly represented to the jury. *Id.*

First, plaintiff claims that the trial court erred in failing to include the elements of manslaughter, as enumerated in CJI2d 16.11, Involuntary Manslaughter - Firearm Intentionally Aimed, for which defendant was convicted, when instructing the jury under SJI2d 12.01, Violation of Statute - Negligence. Plaintiff also claims that the trial court erred in failing to include the elements of reckless, wanton use or negligent discharge of a firearm contained in MCL 752.a863; MSA 28.436(24) when instructing the jury under SJI2d 12.01.¹ Any error in the trial court's failure to include the elements of involuntary manslaughter or reckless, wanton use or negligent discharge of a firearm was harmless. SJI2d 12.01 is an instruction dealing with negligence, not proximate cause. Under SJI2d 12.01, the jury is instructed that if it finds that a party violated a certain statute, it may infer that the party was negligent. In this case, the jury found defendant negligent. Therefore, even if the trial court erred in omitting the elements of the crimes when reading SJI2d 12.01, the error was harmless because the jury found defendant negligent anyway. Hence, even if the jury had been instructed on the elements of the crimes, it would have had no impact on the jury verdict.

Next, plaintiff claims that the trial court erred in failing to instruct the jury with regard to SJI2d 6.01c, failure to produce evidence or a witness.² Plaintiff requested this instruction because defendant, who was in the process of appealing his criminal conviction in connection with this matter, asserted his fifth amendment right against self-incrimination and was, therefore, unavailable as a witness in the civil case. The instructions to SJI2d 6.01 provide that this instruction should be given if no reasonable excuse for the party's failure to produce the evidence has been shown. Here, there was a reasonable excuse for defendant's failure to testify: defendant's pending criminal appeal. In any event, plaintiff was not deprived of defendant's testimony because the testimony defendant provided at his criminal trial was read into the record at the civil trial.

Lastly, plaintiff claims that the trial court improperly substituted the word "may" for the word "must" in SJI2d 3.13, the jury instruction regarding judicial notice.³ Plaintiff failed to object to the instruction as given. Failure to review the alleged instructional error will not result in

manifest injustice. *Phillips v Deihm*, 213 Mich App 389, 403; 541 NW2d 566 (1995). Hence, this issue is not preserved for appellate review.

Affirmed.

/s/ Michael J. Kelly

/s/ Michael J. Talbot

¹ SJI2d 12.01 provides as follows: “We have a state statute which provides that _____. If you find that the [defendant/plaintiff] violated this statute before or at the time of the occurrence, you may infer that the [defendant/plaintiff] was negligent. *(You must then decide whether such negligence was a proximate cause of the occurrence.)

² SJI2d 6.01c provides as follows: The [plaintiff/defendant] in this case has not offered [the testimony of _____. As this evidence was under the control of [plaintiff/defendant] and could have been produced by [him/her], you may infer that the evidence would have been adverse to the [plaintiff/defendant], if you believe that no reasonable excuse for [plaintiff’s/defendant’s] failure to produce the evidence has been shown.

³ SJI2d 3.13 provides as follows: In this case, you must accept it as a fact that _____. [Emphasis supplied.]