

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD SMITH and BETH SMITH,

Plaintiffs-Appellants,

v

ARTHUR RAMOS BRISENO,

Defendant-Appellee.

UNPUBLISHED

May 12, 1998

No. 199037

Ionia Circuit Court

LC No. 94-N15652-NI

Before: Hoekstra, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action following a jury trial. We affirm.

This case arises out of an automobile accident that occurred on May 2, 1992. Plaintiff Richard Smith was injured when the automobile he was driving was struck by defendant's pickup truck in the intersection of Clarksville and Jackson Roads in the City of Lake Odessa. Defendant, a volunteer firefighter, was responding to a fire when the accident occurred. Because of defendant's status as a volunteer firefighter, plaintiffs had to prove that defendant was grossly negligent pursuant to MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). The jury specifically found that defendant was not grossly negligent. Following the jury verdict, plaintiffs moved for a judgment notwithstanding the verdict (JNOV) or for a new trial. The trial court denied the motion.

I

Plaintiffs first argue that the trial court erred when it denied their motion for JNOV or new trial, essentially contending that the evidence clearly showed that defendant's conduct was grossly negligent. The evidence and all legitimate inferences must be viewed in a light most favorable to the nonmoving party in reviewing a JNOV. *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995). Only if the evidence so viewed fails to establish a claim as a matter of law should a motion for JNOV be granted. *Id.*, p 558. A new trial may be granted when the verdict was against the great weight of the evidence. MCR 2.611(A)(1)(e). Under this standard, a new trial may be granted only when the

evidence clearly preponderates in the opposite direction. *Fletcher v Fletcher*, 447 Mich 871, 878-879; 526 NW2d 889 (1994).

The trial court did not err in denying the motion for JNOV or a new trial. The evidence presented at trial indicated that there was a question of fact regarding whether defendant's conduct was actually grossly negligent. The jury's factual finding that defendant's conduct was not grossly negligent will not be set aside because there is evidence to support the jury's verdict.

Under MCL 691.1407(2)(c); MSA 3.996(107)(2)(c), a volunteer acting on behalf of a governmental agency is immune from tort liability unless the conduct amounts to gross negligence. Gross negligence is defined in the statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Viewing the evidence in a light most favorable to defendant, the jury could have reasonably found that defendant did not act so recklessly as to demonstrate a substantial lack of concern for whether an injury resulted. Defendant testified that as he approached the intersection, he applied his brakes, but his truck began to slide on the paved apron of Jackson Road. Defendant slid past the stop sign, and then pressed the accelerator so that he could get through the intersection as quickly as possible. Defendant did not see plaintiff's car until immediately before the collision. Defendant believed that he was traveling at fifty-five miles an hour when he approached the intersection (before applying his brakes), and defendant's expert witness testified that defendant was traveling at a speed of twenty-seven miles an hour on impact. There was also conflicting evidence regarding whether defendant had activated the red siren on his truck.

There was, of course, evidence presented by plaintiffs that was contrary to defendant's evidence. However, this merely created a factual issue for the jury to resolve. The jury resolved the issue by finding that defendant was not grossly negligent. Viewed in a light most favorable to defendant, there is evidence to support the jury's finding and the evidence does not clearly preponderate in the opposite direction. Accordingly, the trial court did not err in denying plaintiffs' motion for JNOV or a new trial.

II

Plaintiffs next argue that the testimony of defendant's expert witness should have been excluded because the expert's opinions were based on assumptions, conjecture, and conclusion, and there was no foundation for the expert's opinions. A trial court's decision regarding whether an expert witness is qualified to testify is reviewed for an abuse of discretion. *Bahr v Harper-Grace Hosp*, 448 Mich 135, 141; 528 NW2d 170 (1995). A trial court's ruling regarding the admissibility of evidence is likewise reviewed for an abuse of discretion. *Koenig v South Haven*, 221 Mich App 711, 724; 562 NW2d 509 (1997).

Plaintiffs essentially argue that defendant failed to lay a proper foundation, and therefore the trial court abused its discretion in allowing defendant's expert to testify about his conclusion concerning the speed of the two vehicles at the time of the accident. Plaintiffs do not argue that defendant's expert, an accident reconstructionist with twenty-three years of experience with the Michigan State Police, was not qualified to testify in this regard. See MRE 702. MRE 703 provides that the "facts or data in the

particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.” Further, MRE 705 provides that the “expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise.” Such underlying facts or data may be disclosed on cross-examination.

A review of the expert’s testimony reveals that it was entirely in accord with the rules of evidence. Moreover, plaintiffs were permitted to cross-examine the expert to refute his findings and conclusions, and they presented their own expert witness. See, e.g., *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175; 530 NW2d 772 (1995). Accordingly, defendant’s expert’s testimony concerning the speeds of the two vehicles at the time of the impact was properly admitted.

III

Plaintiffs next argue that because defendant’s truck was not properly equipped, he was not entitled to claim an exemption under MCL 257.603; MSA 9.2303. Plaintiffs’ claim is not supported by the record because defendant did not claim at trial that this exemption applied and acknowledged at closing argument that the exemption did not apply. Rather, defendant simply argued that his conduct did not amount to gross negligence. There is no error on the record before us.

IV

Plaintiffs next argue that defense counsel made several improper comments to the jury during closing argument. None of the comments were objected to; therefore, they are reviewed only to determine if a curative instruction could not have eliminated the prejudicial effect, or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Reviewing defense counsel’s closing argument in its entirety and in its proper context, we do not find any miscarriage of justice. Moreover, the trial court instructed the jury preliminarily that statements of the lawyers were not evidence, and that it was the jury’s duty to accept the law as the court instructed the jurors. In its final instructions, the trial court again instructed the jury that arguments, statements, and remarks of the lawyers were not evidence and should be disregarded if not supported by the evidence. The trial court also correctly instructed the jury regarding the elements of gross negligence. Therefore, the trial court’s instructions cured any prejudice.

V

Plaintiffs next argue that defendant improperly introduced evidence of his good character into trial in an effort to gain sympathy from the jury. Even if the evidence should not have been admitted, no substantial right of plaintiffs’ was affected. MRE 103(a)(1). The evidence of defendant’s character was fairly minimal, and the trial court instructed the jury that sympathy should not influence its decision.

VI

Lastly, plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition to exclude plaintiff Richard Smith's excess wage loss claim. In light of the fact that we have affirmed the jury's finding that defendant was not grossly negligent, and the verdict of no cause of action, this issue is moot and need not be addressed.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Kathleen Jansen

/s/ Hilda R. Gage