STATE OF MICHIGAN

COURT OF APPEALS

DAVID L. ENO,

Plaintiff-Appellant/Cross-Appellee,

v

CALHOUN N. KATTERMAN AND JACQUIE KATTERMAN, d/b/a KATTERMAN TRUCKING, INC.,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
February 18, 2000

No. 211198
Iosco Circuit Court
LC No. 96-000071 NI

Before: Holbrook, Jr., P.J., and Smolenski and Collins, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order denying his second motion for a new trial and denying reconsideration of its order denying his first motion for a new trial or additur following a jury trial in this personal injury action. Defendants cross-appeal the trial court's order in limine prohibiting defendants from calling an accident reconstructionist at trial. We affirm.

Plaintiff's snowmobile and a snowmobile driven by Calhoun Katterman (hereinafter "defendant") collided at or near a blind curve on a groomed snowmobile trail. Plaintiff suffered a fractured wrist and ligament damage in the collision. The jury returned a verdict of $21,205 in plaintiff's favor, but found plaintiff twenty percent comparatively negligent.

Plaintiff first argues on appeal that the jury's finding of comparative negligence is against the great weight of the evidence. This Court reviews a lower court's ruling on a motion for a new trial on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *Bordeaux v Celotex Corp,* 203 Mich App 158, 170; 511 NW2d 899 (1993), citing *Arrington v Detroit Osteopathic Hosp Corp (On Remand),* 196 Mich App 544, 551; 493 NW2d 492 (1992). The trial court must determine whether the overwhelming weight of the evidence favors the losing party, while this Court determines whether the trial court abused its discretion in making that determination. *Bordeaux, supra.* In considering whether the trial court abused its discretion in denying a motion for a new trial, this Court recognizes the unique opportunity of the jury and trial judge to observe the

witnesses. *Stallworth v Hazel,* 167 Mich App 345, 354; 421 NW2d 685 (1988). This Court gives substantial deference to the conclusion of the trial court that a verdict was not against the great weight of the evidence. *Watkins v Manchester,* 220 Mich App 337, 340; 559 NW2d 81 (1996).

Under the law of comparative negligence, all persons have an obligation to exercise reasonable care for their own safety. *Hierta v General Motors Corp,* 196 Mich App 20, 23; 492 NW2d 738 (1992). The standards for determining the comparative negligence of a defendant, and the question of a plaintiff's own negligence for failure to use due care for his own safety is a jury question unless reasonable minds could not differ. *Rodriguez v Solar of Michigan, Inc,* 191 Mich App 483, 488; 478 NW2d 914 (1991). Circumstantial evidence and permissible inferences therefrom may constitute sufficient proof of negligence. *Pontiac School Dist v Miller, Canfield, Paddock & Stone,* 221 Mich App 602, 623; 563 NW2d 693 (1997), quoting *Duke v American Olean Tile Co,* 155 Mich App 555, 556; 400 NW2d 677 (1986).

Here, defendant testified that both he and plaintiff were "crowding" the invisible center line of the trail and were traveling too fast to safely pass each other on the curve. Plaintiff testified that when he perceived that a snowmobile was approaching from the opposite direction, he pulled over to the far right side of the trail and slowed almost to a stop. He further testified that as defendant's snowmobile came around the curve, it slid sideways across the center of the trail and hit plaintiff's machine, throwing plaintiff off of his snowmobile, which stopped where it was struck. However, defense witnesses testified that plaintiff's machine continued moving forward after impact and came to rest beyond the point at which plaintiff landed. Given evidence that of the two snowmobile drivers, only plaintiff was aware of the other, and testimony that plaintiff's machine traveled some distance forward after colliding with defendant's machine, a reasonable jury could conclude that plaintiff was negligent because he was traveling too fast and/or because he failed to stop, and that his negligence was a proximate cause of his injuries. Because the evidence supports a finding that plaintiff was comparatively negligent, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on the basis that the jury's finding was against the great weight of the evidence.

Plaintiff argues next that he is entitled to a new trial on the basis of defense misconduct during trial. Specifically, plaintiff contends that defense witnesses gave perjured testimony concerning the presence of a bottle of wine or an unopened bottle of brandy at the scene of the accident, the location of plaintiff and the various snowmobiles after the collision, a witness's use of expletives, a conversation at the scene of the collision, and statements made by Jacquie Katterman. Again, we review a trial court's decision to deny a motion for a new trial for an abuse of discretion. *Setterington v Pontiac General Hosp,* 223 Mich App 594, 608; 568 NW2d 93 (1997). The discovery that testimony introduced at trial was perjured may be a ground for ordering a new trial. *Stallworth, supra* at 352.

In support of his argument that defense witnesses offered perjured testimony, plaintiff points to numerous contradictions between defense witness testimony and that of plaintiff and his witnesses. However, the contradictions in testimony were obvious at trial and such contradictions, in and of themselves, do not constitute proof of perjury. Plaintiff highlighted the contradictions for the jury, cross-examined witnesses on the inconsistencies, and argued that his version of events was more credible. Credibility determinations are for the jury. *Arrington, supra* at 553.

Plaintiff offers as further evidence that defense witnesses offered perjured testimony the affidavit of David Eno, plaintiff's son. Plaintiff offered the affidavit at his second motion for a new trial and argued that it contained newly discovered evidence warranting a new trial. To justify a new trial on the basis of newly discovered evidence, the moving party must show that the evidence (1) is newly discovered; (2) is not cumulative; (3) is likely to change the result; and (4) could not with reasonable diligence have been discovered and produced at trial. *Hauser v Roma's of Michigan*, 156 Mich App 102, 106; 401 NW2d 630 (1986).

In his affidavit, David Eno stated that Hal Katterman, defendant's father, made statements to Eno before trial to the effect that plaintiff was greedy and that Katterman intended to make sure that plaintiff lost the case. Eno further averred that Katterman made a post-trial statement indicating that there was no difference between Mad Dog wine and brandy. Plaintiff contends that this statement shows that Katterman committed perjury in testifying that he found a bottle of Mad Dog wine in plaintiff's snowmobile after the accident, when plaintiff's witness testified that it was a bottle of brandy, and that it was in her snowmobile, not plaintiff's. However, Katterman's statement indicating that there is no difference between certain wine and brandy is not an admission that he lied at trial. Moreover, the trial court correctly found that the statements alleged to have been made by Katterman that he intended to make sure that plaintiff lost the case were not "newly discovered" and, therefore, were not grounds for granting a new trial. Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on the basis of defense misconduct or newly discovered evidence.

Next, plaintiff argues that the trial court abused its discretion in allowing Hal Katterman to testify about a safe snowmobile speed. We review a trial court's decision to allow lay testimony in the form of an opinion for an abuse of discretion. *Richardson v Ryder Truck Rental, Inc*, 213 Mich App 447, 454-455; 540 NW2d 696 (1995); *Wilson v General Motors Corp*, 183 Mich App 21, 35-36; 454 NW2d 405 (1990). Lay opinion testimony is permitted when it is rationally based on the witness' perception and is helpful to a clear understanding of a fact at issue. MRE 701; *Richardson, supra* at 455.

Here, Katterman testified that he had been a snowmobiler for over thirteen years, and that he had been on the trial where the accident occurred more than one hundred times. Katterman's experience with snowmobiles and his familiarity with the trail where the accident occurred qualified him to express an opinion with regard to the safe speeds for the trail. Such evidence would be helpful to the jury in determining negligence in this case. Accordingly, the trial court did not abuse its discretion in allowing the testimony.

Finally, plaintiff argues that the jury's award of damages was grossly inadequate and that the trial court abused its discretion in failing to order a new trial or additur. This Court accords due deference to the trial court's decision to deny a motion for additur and will reverse that decision only if an abuse of discretion is shown. *Setterington, supra* at 608. The proper consideration when reviewing a grant or denial of additur is whether the jury award is supported by the evidence. *Id.* Likewise, we review a trial court's decision to deny a motion for a new trial based on inadequate damages for an abuse of discretion. *Id*. Awards for personal injury rest within the sound judgment of

the trier of fact, particularly awards for pain and suffering, and there is no absolute standard for measuring such awards. *Precopio v Detroit,* 415 Mich 457, 464-465; 330 NW2d 802 (1982).

Plaintiff argues that the jury award was inadequate because it did not assign future damages for the remainder of his life expectancy as indicated on the statutory mortality table. The jury found that plaintiff was entitled to 3½ years of future damages, while the mortality table indicated that plaintiff could expect to live for fifteen more years. The trial court instructed the jury, without objection by plaintiff, under SJI2d 53.01 as follows:

> *If* you determine that plaintiff has suffered damages which will continue for the remainder of his life, you must then determine how long he probably will live. In determining plaintiff's life expectancy, you *may* take into consideration the mortality table which is part of our statute. . . . [Emphasis added.]

Thus, the jury was not instructed that the mortality table was conclusive with regard to the question of life expectancy. Moreover, evidence presented at trial supported a conclusion that plaintiff's damages may not continue for the rest of his life. While plaintiff testified to a number of tasks he no longer feels capable of doing, such as chopping and splitting wood, the jury heard testimony that plaintiff has a full range of motion in his wrist and has been placed on no restrictions by his doctor. Therefore, we conclude that the trial court did not abuse its discretion in denying plaintiff's motion for new trial based on inadequate damages or additur.

In their cross-appeal, defendants argue that the trial court abused its discretion in excluding the testimony of their accident reconstruction expert witness. We review a trial court's decision to exclude expert witness testimony for an abuse of discretion. *Franzel v Kerr Mfg Co,* 234 Mich App 600, 620; 600 NW2d 66 (1999). In order to predicate error on a ruling excluding evidence, the substance of the evidence must have been made known to the trial court. MRE 103(a)(2); *Anderson v Harry's Army Surplus, Inc,* 117 Mich App 601, 608; 324 NW2d 96 (1982). At the hearing on defendants' motion to exclude defendants' expert's testimony, the court noted that, despite adequate notice of defendants' motion, plaintiff made no offer of proof with regard to the substance of his expert's testimony, nor the basis upon which any such testimony would be given. Because defendants failed to make an offer of proof of the substance of the excluded testimony, this issue is not preserved for appeal and we therefore decline to address it. See *Wolak v Walczak,* 125 Mich App 271, 278-279; 335 NW2d 908 (1983); *Green v Richardson,* 69 Mich App 133, 141; 244 NW2d 385 (1976).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski
/s/ Jeffrey G. Collins