STATE OF MICHIGAN

COURT OF APPEALS

CHARLES M. CULL and CRISSANNA CULL, individually, and CHARLES M. CULL, Conservator for the ESTATE OF CHARLES ALAN CULL, a Minor,

Plaintiffs-Appellants/Cross-Appellees,

v

ANGELA M. NIELSEN,

Defendant-Appellee/Cross-Appellants,

and

NATIONAL CHERRY FESTIVAL,

Defendant.

UNPUBLISHED
February 22, 2000

No. 212728
Grand Traverse Circuit Court
LC No. 97-015835-NO

Before: Markey, P.J., and Murphy and R. B. Burns*, JJ.

PER CURIAM.

Plaintiffs appeal as of right challenging the trial court's denial of their motion for judgment notwithstanding the verdict. Defendant Nielsen cross-appeals as of right challenging the trial court's imposition of sanctions against defendant, and the denial of defendant's motion for directed verdict. We affirm in part and reverse in part.

This case arises out of an incident occurring July 11, 1995, in Traverse City. Plaintiffs, the Cull family, drove to Traverse City in order to attend the Cherry Festival. Plaintiffs allege that while at the Cherry Festival, defendant's dog attacked and bit plaintiff child, causing both physical injury to plaintiff child and, under a bystander theory of recovery, injury to plaintiff father and mother. Plaintiffs argue on

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

appeal that they are entitled to judgment notwithstanding the verdict because no reasonable jury could find, as the jury in the present case did, that defendant's dog did not bite plaintiff child. We disagree.

In reviewing a decision on a motion for judgment notwithstanding the verdict, we must view the testimony and all legitimate inferences in the light most favorable to the nonmoving party. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

Plaintiffs' action against defendant was based in relevant part on MCL 287.351(1); MSA 12.544(1), which states:

> If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

Plaintiffs argue on appeal that the great weight of the evidence establishes that defendant's dog did bite plaintiff child, and therefore defendant is liable for damages suffered by plaintiff child. Plaintiffs' argument is based in large part on the fact that defendant admitted, during her deposition and during a conversation with the investigating police officer, Stephen Morgan, that her dog bit plaintiff child. However, at trial defendant gave testimony that the jury could have accepted as an explanation of defendant's earlier statements that she knew the dog bit plaintiff child. Defendant first testified that she "did not see it happen, but I was told that he had bitten the dog – had bitten the child." Defendant later testified that she "knew that the dog had been on [plaintiff child]. And I assumed that it was a bite, but I did not see it." The jury could have believed defendant's trial testimony and reasonably concluded that her deposition testimony and statements to Officer Morgan were not based on personal knowledge but on what she had been told by others and on her assumptions about what had occurred. Our Supreme Court has stated that "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). The jury apparently found defendant to be a credible witness, and believed her trial testimony that she did not see her dog bite plaintiff child. Because "the jury is the final judge of credibility," we will not disturb this finding. *Id.*

Plaintiffs also argue that the following portion of Officer Morgan's trial testimony establishes that plaintiff child was bitten by defendant's dog:

> *Q*. What if anything did the father tell you in your interview with the father?
>
> *A*. He told me that his son had been bitten by a dog, and showed me the injuries on his son.
>
> *Q*. Okay. Were you able to verify those injuries visually?

A. Yes, I was.

During cross-examination, however, Officer Morgan testified that he did not know whether defendant's dog bit plaintiff child. He also testified that the injuries he saw on plaintiff child could have been scratches. Therefore, the testimony of Officer Morgan does not conclusively establish that defendant's dog bit plaintiff child.

Plaintiffs further argue that the following portion of plaintiff father's testimony establishes that defendant's dog bit plaintiff child:

Q. Do you remember how [the dog] grabbed [plaintiff child]?

A. It happened I would say by the teeth, because he, I don't know, he was just on him, you know? And he was as big as [plaintiff child], you know, at the time, and he just kind of tore him to the ground, and then was over the top of him.

The fact that plaintiff father used the phrase "I would say" to qualify his statement indicates that he was making an assumption rather than speaking from personal knowledge. Plaintiff father assumed that the dog used its teeth to bring plaintiff child to the ground because of the size of the dog and the speed of the event. As noted above, it is up to the jury to assess the credibility of witnesses. *Id*. The jury could have found plaintiff father not to be a credible witness, and it was under no obligation to accept his opinion that defendant's dog pulled plaintiff child to the ground with its teeth.

Plaintiffs next argue that the jury unreasonably ignored plaintiff mother's eyewitness testimony that the dog bit plaintiff child's arm. Plaintiff mother testified at trial that she was sure that the dog had its mouth around plaintiff child's arm. However, plaintiff mother's trial testimony contradicted her deposition testimony. At her deposition, when plaintiff mother was asked whether she saw the dog's mouth around plaintiff child's arm, she responded "I don't know." This statement was introduced at trial by defendant. Again, the determination of witness credibility is the function of the jury and not of the reviewing court. *Id*. The jury could reasonably have concluded that plaintiff mother was not a credible witnesses because of her conflicting deposition and trial testimony.

Plaintiffs argue that the Urgent Care clinic record establishes that defendant's dog bit plaintiff child. The treating physician at the clinic diagnosed plaintiff child's physical injuries as abrasions and contusions secondary to a dog bite. However, plaintiff mother testified at trial that she told the treating physician that plaintiff child's injuries were caused by a dog bite. The jury may have reasonably concluded that the doctor's diagnosis was based on plaintiff mother's explanation of the injuries and did not represent an expression of a professional opinion. Therefore, the clinic record does not conclusively establish that plaintiff child's injuries were caused by a dog bite.

Plaintiffs finally argue that the testimony of Thomas Kern, the director of the Cherry Festival, established that defendant's dog bit plaintiff child. Kern did not witness the incident, however, and at trial he merely speculated that plaintiff child's injuries could have been caused by a dog bite. Photographs of plaintiff child's injuries, which were taken soon after the incident, were presented to the

jury. Thus, the jury was in as good a position to speculate on the cause of the injuries as was Kern. The jury was no more obligated to accept Kern's opinion than it was to accept any of the previously referenced testimony.

When the evidence presented at trial is viewed in a light most favorable to defendant, it is clear that reasonable jurors could have developed differing opinions about whether defendant's dog bit plaintiff child. Consequently, we will not disturb the jury's verdict. *Central Cartage Co, supra* at 524.

Defendant argues on cross appeal that the trial court abused its discretion by sanctioning defendant. We agree. The applicable court rule gives the trial court discretionary power to impose monetary sanctions for failure of a party's attorney to attend a scheduled conference. MCR 2.401(G). Thus, we review this imposition of sanctions for an abuse of discretion.

MCR 2.401(E) states:

> The attorneys attending the conference shall be thoroughly familiar with the case and have the authority necessary to fully participate in the conference. The court may direct that the attorneys who intend to try the case attend the conference.

The trial court in the present case imposed sanctions because the defense attorney who attended the conference in question did not try the case. Attorney Read was present for defendant at the conference on February 27, 1998, and attorney Swogger was defendant's attorney during the March 1998 trial. Plaintiffs' counsel told the court that he "did not have a particular problem with Mr. Swogger being trial counsel and trying this case." In response, the court stated, "It's not your problem, it's mine. I'm running a docket, and I want trial counsel at the settlement conference." The trial court subsequently imposed a $700 sanction against defendant for having different attorneys at the settlement conference and trial in violation of MCR 2.401(E).

The trial court appears to have sanctioned defendant pursuant to MCR 2.401(G), which gives the trial court power to mandate payment of "reasonable expenses as provided in MCR 2.313(B)(2)" if a party's attorney fails to attend a scheduled conference as directed by the court. Under MCR 2.313(B)(2), attorney fees are considered reasonable expenses. The trial court in the present case arrived at the $700 sanction through consideration of the cost to plaintiffs of attending the conference. While the trial court may have used proper procedure to calculate the amount of the sanction, we find that the court abused its discretion by imposing the sanction because there was no violation of MCR 2.401(E).

Attorney Swogger explained to the court that the reason he was not at the conference on February 27, 1998, was because he was attending the deposition of a witness for the case, Dr. Hill. The deposition was to be videotaped and played back for the jury. Attorney Swogger told the court that the deposition was scheduled for February 27 before the notice of the conference, and "[i]t was not possible to reschedule that deposition according to [the witness'] schedule at any time before trial." Attorney Read was instead present at the conference on February 27. Attorney Read had also been present at a previous settlement conference.

Attorney Swogger explained to the court that the decision to have Swogger try the case was a tactical decision, made after the February 27, 1998, conference, that was based on the fact that "it would look better in front of the jury we believed to have the same lawyer asking the questions in Dr. Hill's [deposition], as have the lawyer in this case at the trial." Thus, attorney Read was the intended trial counsel at the time of the February 27 conference, the decision to have attorney Swogger try the case not made until after that final settlement conference. There is no indication that Attorney Read was unfamiliar with the case, that he attended the settlement conference without authority to settle the case within the parameters of authority given by the client, or that he was unable or unwilling to contact the client for additional settlement authority if need be. On this record, we conclude that the trial court erred in finding a violation of MCR 2.401(E), and that the court abused its discretion by imposing sanctions for the purported violation.

Given our decision to affirm the trial court's denial of plaintiffs' motion for judgment notwithstanding the verdict, we need not review defendant's additional claim on cross appeal that the trial court erred in denying defendant's motion for directed verdict.

Affirmed in part and reversed in part. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Robert B. Burns