STATE OF MICHIGAN

COURT OF APPEALS

BRIAN BALICKI and RUTH AZAR BALICKI,

Plaintiffs-Appellants,

v

CUSHMAN, INC.,

Defendant-Appellee.

UNPUBLISHED
May 22, 2001

No. 222961
Macomb Circuit Court
LC No. 96-007765-NO

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff Brian Balicki was injured when he fell off a "Minute Miser" manufactured by defendant Cushman, Inc., and struck his head on a concrete floor. Plaintiffs appeal as of right, challenging the jury verdict that defendant was not negligent and the trial court's subsequent denial of plaintiffs' motion for a new trial in this products liability action. We affirm.

On appeal, plaintiffs first challenge the trial court's admission of evidence of safety standards regarding the use of seat belts on other types of vehicles, and a statement made by plaintiff Brian Balicki when he was being treated in the emergency room. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *Meyer v Center Line*, 242 Mich App 560, 568; 619 NW2d 182 (2000). We find no abuse of discretion with respect to the safety standards. Plaintiffs' expert testified that one is always safer with a seat belt, even if the vehicle is not equipped with a rollover protection system, or falls down a mountain or an elevator shaft, and even if the vehicle is a "hi-lo." He testified that any contrary opinion had "zero" validity. The trial court did not abuse its discretion in admitting a safety standard regarding seat belt use in other vehicles in response to the plaintiffs' expert's opinion. Nor was there reversible error with regard to the medical record evidence. In light of previous testimony that Balicki made similar statements to other people and counsel's argument at trial that it was irrelevant whether or not Balicki fainted, any error in the admission of the statement did not affect plaintiffs' substantial rights. *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998); MRE 103.

Next, plaintiffs argue that they were severely prejudiced when the trial judge left the bench during a portion of defendant's closing argument. It is clear from the record that the judge was not gone long and the absence did not occur during presentation of plaintiffs' case. Plaintiffs

did not ask the trial court to create a record regarding the judge's absence for our review or otherwise raise the issue below. Under the circumstances presented, we find no prejudicial error entitling plaintiff to a new trial. See *People v Morehouse*, 328 Mich 689, 692; 44 NW2d 830 (1950); *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

Plaintiffs also claim prejudice because the jurors allegedly overheard some of counsels' sidebar discussions. Plaintiffs did not object at trial, request a curative instruction, or request to create a record below; therefore, this issue was not properly preserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Further, the record does not provide the facts necessary to properly review this issue. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98-99; 494 NW2d 791 (1992).

Finally, plaintiffs argue that the trial court abused its discretion by denying their motion for a new trial because the jury verdict was against the great weight of the evidence. However, this Court may overturn a verdict "only when it was manifestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999), quoting *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996). In this case, plaintiffs' presented evidence that the Minute Miser should have had a seat belt and defendant rebutted with evidence that the addition of a seat belt would have been dangerous. Disputed issues of fact and assessment of the credibility of witnesses are properly within the province of the jury to determine. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998); *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 689; 607 NW2d 123 (1999). After review of the record evidence, we conclude that the trial court did not abuse its discretion in denying plaintiffs' motion.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot