

STATE OF MICHIGAN
COURT OF APPEALS

MARSHALL POPE, Personal Representative of
the Estate of CHRIS'SHA PATRICIA JOHNSON,
Deceased,

UNPUBLISHED
May 25, 2001

Plaintiff-Appellant,

v

BABETTE HAYES, ANTHONY HAYES, a
Minor, ILOMA RADNEY and LEE SMITH,

No. 220299
Wayne Circuit Court
LC No. 97-707270-NO

Defendants-Appellees.

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment entered by the trial court after a jury verdict of no cause of action entered in favor of defendants. We affirm in part, reverse in part, and remand for further proceedings.

In May 1995, plaintiff's children, including Johnson, were taken into the custody of the Family Independence Agency (FIA). Defendant Smith, a foster care worker with the FIA, was assigned to be the caseworker for Johnson and he was supervised by defendant Radney, also an employee of the FIA. On June 4, 1996, Johnson was placed in defendant Babette Hayes' foster home. At that time, defendant Babette Hayes was a fully licensed foster care parent, caring for five adopted children and one other foster child. Defendant Anthony Hayes was one of the adopted children living in Hayes' home. After four months of living in the Hayes foster home, Johnson died on October 12, 1996, of multiple blunt force injuries to the brain and liver inflicted by defendant Anthony Hayes while defendant Babette Hayes was out of the house. As the personal representative of the estate of Johnson, plaintiff filed a complaint for wrongful death, wilful and wanton misconduct, and gross negligence against defendants Smith, Radney, Babette, and Anthony. The jury returned a verdict of no cause of action against all four defendants and this appeal followed.

Plaintiff argues on appeal that the trial court erred when it did not allow plaintiff to voir dire juror number seven, Kenneth Miller, as to possible bias against witness, Detective Kevin Smith. We disagree. Generally, a party's claim that the jury selection process was defective is

not preserved for appellate review if the party fails to use all available peremptory challenges or expresses satisfaction with the jury empaneled. *Leslie v Allen-Bradley Co, Inc*, 203 Mich App 490, 492; 513 NW2d 179 (1994). Because plaintiff stated that she was satisfied with the jury empaneled after using only one peremptory challenge, leaving five peremptory challenges remaining, this issue is not preserved for appellate review and we decline to review it.

Plaintiff's also claims that the trial court erred in refusing to give plaintiff's requested jury instructions on the definitions of gross negligence and wilful and wanton misconduct to the jury as to defendants Smith and Radney. We disagree. To preserve an instructional issue for appeal in a civil case, "a party must make a request for a jury instruction before the instructions are given and must object to the alleged error after the jury has been instructed." *Leavitt v Monaco Coach Corp*, 241 Mich App 288, 300; 616 NW2d 175 (2000) (citations omitted). If the party fails to timely object and specifically state the ground for the objection, appellate review is precluded absent manifest injustice. *Meyer v City of Centerline*, 242 Mich App 560, 566; 619 NW2d 182 (2000); *Hammack v Lutheran Social Services*, 211 Mich App 1, 10; 535 NW2d 215 (1995).

Here, the trial court read defendants' requested modified instruction for gross negligence applicable to government employees instead of plaintiff's requested standard jury instruction for the definition of gross negligence. However, after the trial court instructed the jury, plaintiff not only failed to object to the instructions as given, but stated that she was satisfied with the instructions. Therefore, this issue is not preserved for appellate review and we decline to review it.

Plaintiff also says that the trial court erred in denying her motion for a new trial when the verdict was against the great weight of the evidence. We agree with respect to the verdict of no cause of action entered in favor of defendant Anthony Hayes. "A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion." *Meyer, supra*, 242 Mich App 564. The trial court's function in deciding a motion for a new trial is to determine whether the overwhelming weight of the evidence favors the losing party and its conclusion that the verdict was not against the great weight of the evidence is given substantial deference by this Court. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). Furthermore, when a party claims that a jury's verdict was against the great weight of the evidence, this Court may overturn that verdict only when it was manifestly against the clear weight of the evidence, but the jury's verdict should not be set aside if there is competent evidence to support it. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999) (citations omitted).

Here, plaintiff had the burden of proving that defendant Babette was negligent. Negligence requires proof that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) causation, and (4) damages. *Id.* Defendant Babette, who had undertaken to be a foster parent to Johnson, had assumed control over the child's safety and obviously had a duty to use reasonable care in ensuring that the child's well-being was not endangered. Plaintiff argues that defendant Babette breached this duty when she left Johnson in the care of defendant Anthony. There was evidence presented by plaintiff that defendant Babette left Johnson in the care of defendant Anthony, her minor son. However, there was also competent evidence

presented that defendant Babette did not leave the children alone, but left them in the care of her mother. Thus, there was conflicting evidence presented on the issue, which created a question of fact for the jury. The jury was in a superior position to judge the credibility of the witnesses and questions of credibility should be left to the factfinder. *Snell v UACC Midwest, Inc*, 194 Mich App 511, 517; 487 NW2d 772 (1992).

As for plaintiff's claim that defendant Babette engaged in wilful or wanton misconduct in the death of Johnson, plaintiff presented no evidence that defendant Babette intended to harm Johnson or that she acted with indifference as to whether harm would result. See *Burnett v City of Adrian*, 414 Mich 448, 455; 326 NW2d 810 (1982). Accordingly, the trial court did not abuse its discretion in finding that the verdict against defendant Babette was not against the clear weight of the evidence.

Plaintiff had the burden of proving that Smith and Radney were grossly negligent. However, the jury found that their conduct was not grossly negligent. Plaintiff had to prove that the conduct of defendants Smith and Radney was so reckless as to demonstrate a substantial lack of concern for whether an injury results. MCL 691.1407(2)(c); MSA 3.996(107)(2)(c). However, plaintiff argues that although defendants Smith and Radney both denied knowledge of the problems in the Hayes home, other testimony makes this contention unbelievable. Again, the jury decides questions of credibility. *Snell, supra*, 194 Mich App 517. There was competent evidence on the record to support the jury's verdict and the trial court did not abuse its discretion in finding that the verdict for defendants Smith and Radney was not against the great weight of the evidence.

Plaintiff argues that the verdict of no cause of action for Anthony was against the great weight of the evidence. The trial court gave wilful and wanton misconduct instructions as to "defendant Hayes." The jury was to decide, based on the evidence presented, whether defendant Anthony engaged in wilful and wanton misconduct in the death of Johnson. The evidence was uncontradicted that defendant Anthony struck Johnson several times in the stomach in order to get her to stop crying and that these blows caused her death. We find that this evidence showed that defendant Anthony engaged in wilful or wanton misconduct in that he intended to harm Johnson or at least acted with indifference as to whether harm would result. See *Burnett, supra*, 414 Mich 455. Accordingly, the verdict of no cause of action against defendant Anthony was manifestly against the clear weight of the evidence and the trial court abused its discretion in denying plaintiff's motion for a new trial as to defendant Anthony.

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

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder