

STATE OF MICHIGAN  
COURT OF APPEALS

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MARK MIANECKI,

Plaintiff-Appellee,

v

JMB CONSTRUCTION COMPANY,

Defendant-Appellant.

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UNPUBLISHED

June 12, 2001

No. 219158; 219733

Wayne Circuit Court

LC No. 96-612891-NO

Before: Murphy, P.J., and Hood and Cooper, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order granting plaintiff's motion in limine and motion for new trial. We affirm.

Plaintiff filed a lawsuit alleging that defendant was vicariously liable for the negligence of its backhoe operator. Plaintiff sustained injuries in a construction site accident. Before trial, the court granted plaintiff's motion to exclude evidence that previous accidents of the type that injured plaintiff had never occurred. However, during closing arguments, counsel for defendant referred to the accident as a "freak" accident that was simply not foreseeable. Plaintiff objected to this statement as a violation of the order in limine. A sidebar conference was held, and the court allowed defendant to continue the argument. The jury returned a general verdict finding that defendant was not negligent. After trial, plaintiff filed a motion for a new trial claiming that defense counsel violated the order in limine and that this violation warranted a new trial. The court agreed with plaintiff and granted a new trial.

Defendant contends that the trial court erred in excluding evidence of the absence of prior similar accidents. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Price v Long Realty, Inc.*, 199 Mich App 461, 466; 502 NW2d 337 (1993). In *Grubaugh v St Johns*, 82 Mich App 282, 286-289; 266 NW2d 791 (1978), we held that evidence of the lack of prior accidents should not be admitted to prove absence of negligence. In *Grubaugh*, the plaintiff sustained injuries in a car accident and filed a negligence action. We held that the trial court properly excluded testimony that the police department had no record of any previous accidents at the intersection where the accident and injury occurred. *Id.* Although the introduction of the evidence was designed to show that the defendant was unaware of the unsafe condition, we held that this collateral issue might confuse the jury. *Id.* Furthermore, the potential for confusion

substantially outweighed the probative value of this evidence. Accordingly, the trial court did not abuse its discretion by excluding the testimony. *Id.*

Likewise, in the case at bar, plaintiff's lawsuit alleged a claim based on negligence. Like *Grubaugh*, the danger existed that the jury might be confused and could have believed that the absence of prior accidents necessarily precluded a finding of negligence. The probative value of the evidence was slight. The absence of prior accidents may have been the result of blind luck. *Grubaugh, supra.* Accordingly, the trial court did not abuse its discretion when it granted plaintiff's motion in limine. *Price, supra.*

Defendant next argues that the trial court abused its discretion in granting plaintiff's motion for a new trial when any error resulting from defense counsel's closing argument could have been cured by a cautionary instruction. We disagree. The decision to grant a new trial rests in the trial court's discretion, and we will not reverse absent a clear abuse of that discretion. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). A decision constitutes an abuse of discretion when it is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000). Misconduct of counsel will not justify a new trial if the error was harmless. *Means v Iowa Security Services*, 176 Mich App 466, 475-476; 440 NW2d 23 (1989). However, comments which improperly and unfairly influence the jury merit a new trial. *Willoughby v Lehrbass*, 150 Mich App 319, 333-334; 388 NW2d 688 (1986).

During closing argument, defense counsel suggested that the testimony from every witness indicated that this was the first time this type of accident had ever occurred. Although defendant concedes that this statement violated the order in limine, defendant contends that such an error was harmless because it did not improperly or unfairly influence the jury. When there is no way of knowing whether a defendant's improper statement may have influenced the jury and where it is possible that the verdict might have been different had the defendant not violated an order in limine, it is appropriate to place the burden of a new trial on the defendant. *Lapasinskas v Quick*, 17 Mich App 733, 739; 170 NW2d 318 (1969). Accordingly, we cannot conclude that the trial court abused its discretion by granting plaintiff's motion for a new trial. *Setterington, supra; Lapasinskas, supra.*

Affirmed.

/s/ William B. Murphy  
/s/ Harold Hood  
/s/ Jessica R. Cooper