

STATE OF MICHIGAN  
COURT OF APPEALS

---

TARRIE L. JACKSON,

Plaintiff-Appellee,

v

GENESEE COUNTY ROAD COMMISSION,

Defendant-Appellant.

---

UNPUBLISHED

October 29, 2002

No. 232383

Genesee Circuit Court

LC No. 99-66152-NO

Before: Murphy, P.J., and Markey and R. S. Gribbs\*, JJ.

PER CURIAM.

Defendant appeals as of right the jury verdict for plaintiff, who was injured when she lost control of her automobile after allegedly hitting a pothole on a county road. We affirm.

Defendant argues on appeal that the trial court erred in denying defendant's motion for a directed verdict. Defendant contends that plaintiff did not provide evidence that defendant breached its statutory duty to "maintain and repair" the road or that defendant had notice of the alleged defect in the road, and therefore, as a matter of law, plaintiff's claims did not avoid defendant's governmental immunity under the highway exception, MCL 691.1402. We disagree. The trial court's decision on a motion for a directed verdict is reviewed de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002).

Plaintiff presented evidence that defendant knew, or should have known, about the rough condition of the road for many months before plaintiff's accident in December 1998. One witness testified that the road was "in terrible condition" for at least a year. This witness also claimed that he had telephoned several different people and agencies, including defendant, complaining about the condition of the road. Another witness testified that the road was "in terrible condition" in December 1998, with "lots of large holes, ruts, ridges, [and] extremely irregular concrete or asphalt" and that it had been in the same condition for "months and months." Defendant's maintenance supervisor testified that the road was in constant need of repair and that his crew constantly repaired the road with routine patches.

Viewing this evidence in the light most favorable to plaintiff, there was a question of fact as to whether defendant had notice, either constructive or actual, of the alleged defective

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

condition, and this question was properly presented to the jury. *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996). The question whether defendant breached its duty to maintain and repair the roadbed was also a question for the jury. *Haliw v City of Sterling Heights*, 464 Mich 297, 304-305; 627 NW2d 581 (2001); *Spikes v Banks*, 231 Mich App 341, 355; 586 NW2d 106 (1998). The trial court did not err in denying defendant's motion for directed verdict.

Defendant also argues that the trial court abused its discretion by admitting lay witness' testimony, instead of expert testimony, to show that defendant had notice of the alleged defect before plaintiff's accident occurred. We disagree. The decision whether to admit evidence is within the trial court's discretion and will be reversed only where there is an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188-189; 600 NW2d 129 (1999).

Defendant contends that lay witness' testimony about the condition of the road before plaintiff's accident is not relevant to notice of the specific defect alleged by plaintiff. There is no merit to this argument. Testimony regarding personal knowledge of the defects in that area of the road before December 20, 1998, was specifically relevant to the question of notice under MCL 691.1403, which states that knowledge of the defect is conclusively presumed when it is "readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place."

Defendant also argues that the probative value of the evidence is substantially outweighed by its prejudicial effect, and that it was confusing to the jury. MRE 403. "Unfair prejudice" does not mean merely "damaging." *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995). Here, the testimony was more than marginally relevant to statutory notice, one of the contested issues in this case, and potholes and rough pavement are readily observable to the ordinary driver. The trial court did not abuse its discretion by admitting lay witness' testimony concerning the condition of the road.

Defendant also contends that the introduction of interrogatory answers regarding plans to resurface the road was in error because the answers were irrelevant to the issues of defendant's negligence and notice of the specific alleged defect. We disagree. Information that defendant was planning to resurface the road was relevant to plaintiff's theory that defendants knew the condition of the road and had delayed repair. There is no indication that the jury gave the interrogatory answers undue weight in reaching its verdict. *Id.* We find no abuse of discretion.

Defendant argues that, during closing arguments, plaintiff's continuing theme of "waking up" defendant and telling it that the general condition of the roads was unacceptable was a deliberate course of misconduct that prevented defendant from receiving a fair trial. We disagree. Remarks asking the jury to "send a message" are improper, *Hunt v CHAD Enterprises, Inc*, 183 Mich App 59, 65; 454 NW2d 188 (1990), as are remarks that do not have a basis in the admitted evidence. *Hayes v Coleman*, 338 Mich 371, 382; 61 NW2d 634 (1953). However, any prejudice defendant may have suffered here could have been prevented by timely objection and a request for a curative instruction. *Hunt, supra*, 183 Mich App 65. Further, the court instructed the jury that the attorneys' remarks were not evidence. Defendant was not denied a fair trial by plaintiff's counsel's remarks.

Finally, defendant argues that the trial court made improper remarks in the presence of the jury that demonstrated its bias against defendant and denied defendant a fair trial. There is no merit to this claim. In light of the absence of defendant's objection at trial, we review for plain error affecting defendant's substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000).

The trial court is permitted to question witnesses, MRE 614(b), especially to clarify testimony or elicit relevant information. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). To determine whether an error requiring reversal occurred, this Court must determine whether the trial judge's conduct or comments denied defendant a fair and impartial trial by unduly influencing the jury. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 216; 457 NW2d 42 (1990). Although the court's comments in this case were not always constrained in their tone, "being courteous is the ideal, not the requirement." *In re Forfeiture of \$ 1,159,420*, 194 Mich App 134, 154; 486 NW2d 326 (1992). Moreover, any potential prejudice was cured when the trial court instructed the jury to disregard any judicial conduct or remark that might seem to indicate an opinion. *King, supra*, 184 Mich App 216. Jurors are presumed to follow the law. *People v Reed*, 449 Mich 375, 401; 535 NW2d 496 (1995). Defendant has not demonstrated a plain error affecting its substantial rights.

Affirmed.

/s/ William B. Murphy

/s/ Jane E. Markey

/s/ Roman S. Gibbs