STATE OF MICHIGAN

COURT OF APPEALS

STATE MUTUAL INSURANCE COMPANY, ALLSTATE INSURANCE COMPANY, and ATHLETE'S CONNECTION, INC.,

Plaintiffs-Appellants/Cross-Appellees,

and

DONNA RAPP,

Plaintiff,

v

JOHNSON SIGN COMPANY,

Defendant-Appellee/Cross-Appellant,

and

DOUGLAS E. FULK and JUDITH D. FULK, d/b/a DOUGLAS SIGN COMPANY, and K & K ELECTRIC, INC.,

Defendants.

UNPUBLISHED
November 5, 2002

No. 228682
Ingham Circuit Court
LC No. 94-077808-CZ

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Plaintiffs appeal, and defendant Johnson Sign ("defendant") cross appeals, from a judgment of no cause of action entered upon a jury verdict in defendant's favor. We affirm.

This matter arises from a fire in a commercial building located in Meridian Township. Before June 1992, the building was owned by New Dawn Comfort Zone Waterbeds, which in October 1989 contracted with defendant Johnson Sign to install neon accent lighting along the roof line of the building. The original installation involved exposed, unprotected neon tubes. After problems arose with the installation, Johnson Sign replaced the system with a protected

system that had neon tubes enclosed in an aluminum channel with a transparent polycarbonate cover. This system was installed in February 1990.

In June 1992, Comfort Zone sold the building to Richard and Michelle Brown, who moved their sporting goods business, Athlete's Connection, into the building. The Browns hired K & K Electric to remove an existing neon "Comfort Zone" sign and replace it with neon "Athlete's Connection" and "Sporting Goods" signs moved from the Brown's prior location. The fire involved in this case occurred three months later.

State Mutual Insurance insured the premises against fire loss and maintains this action as a subrogee of Athlete's Connection to recover the amounts paid for the fire loss. Allstate Insurance insured a neighboring business owned by Donna Rapp which sustained some damage in the fire and Allstate is pursuing a claim as subrogee of Rapp. Plaintiffs' theory against Johnson Sign is that it negligently installed the neon accent lighting in 1990 and that that lighting is what gave rise to the fire. Similar claims were brought against K & K Electric regarding the reinstallation of the "Athlete's Connection" and "Sporting Goods" signs. However, K & K Electric went out of business shortly after the fire and never responded to the suit, with a default judgment being entered against it.[1]

Plaintiffs' theory against Johnson Sign was that the neon accent lighting was negligently installed, causing electrical arcing to occur between two pieces of the aluminum channel along the roofline. This arcing produced carbon tracking on the wood fascia board to which the aluminum channels were mounted. The high resistance of the carbon track produced intense heat, which erupted into an open flame in the attic space. Defendant's theory is that the fire started in the area of the "Sporting Goods" and "Athlete's Connection" signs and was unrelated to the neon accent lighting it had previously installed.

Plaintiffs' first argument on appeal is that the trial court erred in denying its motion for judgment notwithstanding the verdict because the verdict was against the great weight of the evidence. We disagree. In reviewing a request for a judgment NOV, the evidence must be viewed in the light most favorable to the nonmoving party and judgment NOV should be granted only if the evidence fails to establish the nonmoving party's claim as a matter of law. See *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998). We review the trial court's decision de novo.

The central theme of plaintiffs' argument on appeal is that defendant failed to prove the cause of the fire and that the theory of plaintiff's expert, that the fire was caused by electrical arcing along the aluminum channel of the neon accent lighting, was unchallenged. The flaw in plaintiffs' argument is the presumption that defendant was obligated to prove anything, much less the cause of the fire. While defendant did offer a theory regarding the cause of the fire (that it originated in the transformer box of the "Sporting Goods" sign), the jury was not obligated to find for plaintiffs even if it rejected defendant's theory on the cause of the fire. A verdict for

---

[1] Plaintiffs had also named Douglas Sign Company, the original supplier of the "Athlete's Connection" and "Sporting Goods" signs at the previous business location, as a defendant. However, plaintiffs subsequently voluntarily dismissed Douglas Sign as a defendant. Thus, only Johnson Sign remains as a defendant in the case.

defendant was appropriate even if the jury determined that the cause of the fire was unknown, but that the fire originated in an area other than that identified by plaintiffs (thus rejecting plaintiffs' theory of the fire's cause and origin). For that matter, the jury would be justified in finding for defendant upon a conclusion that both the cause and origin of the fire were unknown because of the basic principle that the burden was on plaintiffs to establish that the injury was proximately caused by defendant's action. *Helmus v Dep't of Transportation*, 238 Mich App 250, 255; 604 NW2d 793 (1999).

Thus, the question is not whether the defendant proved its theory, for it could potentially have prevailed even without presenting any evidence if the jury were not convinced by plaintiffs' theory. The question which must be answered is whether plaintiffs' case is so compelling that the jury could not, as a matter of law, have rejected it. While plaintiffs presented a reasonable theory as to the cause and origin of the fire, it was hardly so compelling as to exclude all other possibilities. Indeed, defendant presented evidence from which the jury could have concluded that the fire's origin was in a location other than the neon accent lighting. Specifically, eyewitness testimony indicated that the fire started in the vicinity of the "Athlete's Connection" and "Sporting Goods" signs and not in the area of the neon accent lighting suggested by plaintiffs. Defendant also presented expert testimony to support the proposition that the fire started in the vicinity of the "Athlete's Connection" and "Sporting Goods" signs.

Plaintiffs argue that defendant's evidence that the origin the fire was in a different location than where plaintiffs suggest the fire started is inadequate because defendant does not also present compelling evidence on the cause of the fire.[2] Again, however, defendant was under no obligation to do so. If the jury concluded, which it rationally could have, that the fire started in the location suggested by defendant and not in the location suggested by plaintiffs, it could rationally rule in defendant's favor without reaching a conclusion regarding the causation of the fire. Because the jury could conclude that plaintiffs had failed to meet their burden on establishing both the cause and origin of the fire, the verdict is not against the great weight of the evidence.

Plaintiffs next argue that the trial court erred in excluding a demonstration by plaintiffs' expert showing how high-voltage arcing between aluminum plates could have caused the fire. We disagree.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). Plaintiffs wanted to show the jury a videotape prepared by their expert which demonstrated electrical arcing causing a fire. The trial court excluded the demonstration, primarily because it thought the jury would be unduly influenced by the "power" of the demonstration. The trial court did state that it would allow the demonstration in rebuttal if defendant presented expert testimony to the effect that electrical arcing across aluminum could not cause a fire.

---

[2] Plaintiffs devote a great deal of discussion to why the fire could not have started in the electrical box behind the "Sporting Goods" sign due to the lack of "beading" on the copper wires on the transformer.

We are not persuaded that the trial court abused its discretion in excluding the demonstration. All the demonstration would have established is that electrical arcing can start a fire. However, that point was not contested (and the trial court would have allowed the demonstration if that point became contested). Simply put, while, for the reasons expressed in plaintiffs' brief, it would not necessarily have been an abuse of the trial court's discretion to allow the demonstration, the trial court correctly concluded that it was not necessary to plaintiffs' case unless defendant challenged whether it is possible for electrical arcing to start a fire. Therefore, we are not willing to say that the trial court abused its discretion in excluding the demonstration.

Turning the tables, plaintiffs next argue that the trial court erred in permitting defendant's expert to use a model of a wall that did not accurately represent the wall of the building in question to demonstrate the expert's theory of how the fire spread. We disagree.

Again, we review this issue for an abuse of discretion. *Ellsworth, supra*. Defendant's expert conceded that the model was not to scale and that the details of the construction were not identical to those in the actual wall. In fact, the witness explained in detail the differences and why the model was constructed in the manner it was. Further, the trial court did not allow it to be introduced as an exhibit for the jury; rather, the witness was merely allowed to use it during his testimony to visually assist in explaining his testimony. Moreover, the model was not set on fire to show how the fire spread. In short, use of the model did nothing to prove the expert's theory, it only gave the jury a visual reference point when the expert referred to different parts of the wall in question (e.g., the foam board, the siding, the studs, etc.). In light of these, and the care taken to explain to the jury the differences between the model and the actual wall, we are not persuaded that the trial court abused its discretion in allowing the use of the model as a visual aid.

Plaintiffs next argue that the trial court erred in denying their motion for new trial because the verdict was against the great weight of the evidence. Plaintiffs state that a new trial should have been granted for the same reasons that the judgment NOV should have been granted. Accordingly, for the same reasons that we rejected plaintiffs' argument on the judgment NOV, we also reject plaintiffs' argument as to the motion for new trial.

Plaintiffs' final argument is the trial court erred in denying plaintiffs' request to instruct the jury that there was "no evidence of any electrical causation for a fire originating in the sporting goods sign." The trial court denied the request, indicating that the experts differed on the origins of the fire, that neither side presented direct evidence of the causation of the fire, and that the court would leave it to the jury to decide. In support of their position on appeal, plaintiffs point to several alleged factual errors by the trial court.[3] However, even if we accept

---

[3] Those alleged mistakes of fact are: 1) that the electrical arc, rather than carbon tracking, caused the fire under plaintiffs' theory, 2) that there was competing theories of origin of the fire, with plaintiffs again arguing that defendant's expert's opinion on origin requires that defendant show a cause for the fire, 3) that plaintiff did not offer direct evidence of causation of the fire, 4) that electricity was flowing at both the neon accent lighting and at the "Sporting Goods" sign locations when the fire started, and 5) that plaintiffs' own expert admitted there could have been tracking and high voltage in the "Sporting Goods" sign without leaving any telltale signs of it.

plaintiffs' allegations as to those various factual errors the trial court supposedly committed, we are not persuaded that the trial court erred in denying the requested instruction.

The Supreme Court explained the standard of review for claimed instructional errors in *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000):

> We review claims of instructional error de novo. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Johnson v Corbet*, 423 Mich 304; 377 NW2d 713 (1985).

Plaintiffs do not argue that the jury instructions as a whole do not adequately set forth the law. Indeed, plaintiffs' requested instruction has nothing to do with the law; rather, it seeks to instruct the jury on the facts. In denying plaintiffs' motion, the trial court did not leave the jury inadequately instructed on the law; it did leave in the jury's hands the determination of the facts in this case. This is hardly inconsistent with substantial justice.

In reality, plaintiffs' argument on this issue is more an argument that the trial court should have granted directed verdict (at least in part) than it is an instructional issue. And for the same reasons that the trial court did not err in denying a new trial or judgment NOV, a directed verdict, even in part, would not have been appropriate.

Turning to the issues raised on cross appeal, all are relevant only in the event of a new trial and, therefore, none need be addressed in light of our disposition of the issues raised by plaintiffs on appeal.

Affirmed. Defendant may tax costs.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly