STATE OF MICHIGAN

COURT OF APPEALS

JOHN RUSSELL MORRISON and KATHY SUE MORRISON, Plaintiffs-Appellants,	UNPUBLISHED April 16, 2009
v	No. 282956 Macomb Circuit Court
JOHN CARLO, INC, Defendant-Appellee.	LC No. 2006-000091-NI

Before: Zahra, P.J., and O'Connell and K. F. Kelly, JJ.

PER CURIAM.

In this personal injury action, the jury returned a verdict of no cause of action. Plaintiffs moved for a new trial, arguing that the verdict was against the great weight of the evidence or, alternatively, for judgment notwithstanding the verdict (JNOV). The trial court denied those motions and plaintiff now appeals as of right. We affirm.

I. Basic Facts

This matter arises out of a traffic accident that occurred at around 6 p.m. on September 2004, when plaintiff John Morrison drove into an excavated portion of the roadway on defendant's road construction site in Macomb County, Michigan. Mr. Morrison[1] was driving about 30 miles per hour when a white pickup truck veered slightly into his lane, causing plaintiff to swerve. As a result, plaintiff drove off the road and into the excavated portion of the roadway, which was lower than the road, and which was allegedly not marked with any type of construction warning or barrier. The accident aggravated plaintiff's pre-existing spinal injury and, consequently, plaintiff was not able to return to work. Plaintiffs sued defendant for negligence, alleging that defendant failed to properly warn of the excavated portion of the road, and for loss of consortium.

After discovery, the matter proceeded to trial. Plaintiffs presented testimony that defendant had failed to warn of the drop-off from the road to the excavated area. Plaintiff

[1] Mr. Morrison is referred to as plaintiff throughout this opinion.

testified that although he saw some orange construction barrels on the construction site, as well as a barricade, that there were not any barrels in front of the excavated area where his vehicle went off the road. Plaintiff, however, admitted that he knew he was coming up on a hole at the point when he swerved to avoid the white truck. With respect to the white truck, plaintiff indicated that he saw the truck swerve toward him and then veer back into its lane. It was revealed that plaintiff, however, had previously testified during his deposition that he never saw the truck go back into its own lane. Plaintiff also testified that the only damage to his vehicle was a flat tire and a scratched rim.

On the day of the accident, plaintiff's acquaintance, John Peers, was following plaintiff home. At trial, Peers testified that he did not observe any traffic signs, barrels, or warnings directing traffic on the construction site. Peers saw the white truck veer into plaintiff's lane and observed plaintiff go off the edge of the roadway into the excavation hole. Peers stated that when he pulled over to help plaintiff, he did see some barrels in the excavated portion of the road. Peers indicated that he helped a police officer pick-up two barrels out of the hole, and that he recalled a barrel standing-up in the excavation area. On cross-examination, defense counsel questioned Peers regarding his deposition testimony. Contrary to his trial testimony, it was revealed that Peers had previously testified to seeing a barrier in the area of the accident.

Defendant then presented witnesses who testified that all the construction barrels were properly in place, as they were placed along the edge of the drop-off every 25 feet consistent with Michigan Department of Transportation standards. Heidi Flateau, the Macomb County Road Commission (MCRC) project engineer who prepared the construction plan and directed defendant on the site, testified that she had looked at the site on the day of the accident to determine whether all barrels, barricades, and signs were properly in place. She stated that they were and that there was no doubt in her mind that they were properly placed at the time of the accident, although she was not present when it occurred.

The MCRC senior inspector for the job, Tammy Goike, testified that she checked to make sure that all the barrels, barricades, and signs were in place just two hours before the accident and stated that they were properly placed at the time. She did not witness the accident, but upon observing the scene, she noticed that a barricade had been moved from its spot and that more than one barrel was lying in the excavated area and on the pavement. Her daily report indicated that all barricades were in place prior to the accident. Similarly, Michael Shaefer, one of defendant's employees, testified that when he arrived at the accident one of the barricades had been knocked over and its legs were bent.

The jury then deliberated and returned a verdict of no cause of action, having determined that defendant was not negligent. Plaintiffs moved for a new trial or JNOV on the basis that the verdict was against the great weight of the evidence. The trial court denied these motions and this appeal followed.

II. Standards of Review

We review for an abuse of discretion a trial court's determination on a motion for a new trial. *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008). "An abuse of discretion occurs when the result is outside the range of principled outcomes." *Id.* When the motion is based on a claim that the verdict is against the great weight of the evidence, the trial court is to

determine "whether the overwhelming weight of the evidence favors the losing party." *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). We must give "[s]ubstantial deference . . . to the trial court's conclusion that the verdict was not against the great weight of the evidence." *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). Neither this Court nor the trial court should substitute its judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Campbell*, *supra* at 193.

In addition, we review de novo a trial court's decision to grant or deny a motion for JNOV. *Morinelli*, *supra* at 260. In doing so, we must "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Prime Financial Services LLC v Vinton*, 279 Mich App 245, 255; ___ NW2d ___ (2008) (internal citations omitted). "If reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005) (citation and quotation marks omitted).

III. Analysis

Plaintiffs posit two main arguments on appeal: First, the trial court erred in denying plaintiff's motion for a new trial based on the great weight of the evidence, and, in the alternative, motion for JNOV, because the two witnesses present at the time of the accident, plaintiff and Peers, testified that there were no barrels or other markers warning of the edge of the excavated roadbed; and, second that this case should be remanded pursuant to MCR 7.211(C) for an evidentiary hearing to determine whether defendant's witnesses committed perjury.

1. Motion for a New Trial or JNOV

We first address plaintiffs' argument that the trial court erred by denying their motions for a new trial, or for JNOV, because plaintiffs' case established that defendant failed to warn of the roadway's edge and excavated area. We cannot agree with plaintiffs' argument. To establish negligence, a plaintiff must show by prima facie evidence that "(1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages." *Latham v Nat'l Car Rental Sys*, 239 Mich App 330, 340; 608 NW2d 66 (2000) (quotation marks and citation omitted.)

The only issue relevant on appeal is whether defendant breached its duty. The jury determined that defendant had not. The trial court, ruling on plaintiffs' motion for a new trial, or alternatively for JNOV, determined that this verdict was not against the great weight of the evidence. The court stated:

> What this case boils down to is who did the jury believe, the testimony of Mr. Morrison and Mr. Peers, or did it believe the testimony of the witnesses called by the defendant who were employees of [defendant] and also the road commission? I can't sit here and substitute my determination of the facts over and above what the jury found, it boils down to a credibility of the witnesses. That's a function of the jury, the jury found that [defendant] was not negligent, they must have

> believed the testimony of the defendant's witnesses over and above that of plaintiff's [sic] witnesses . . . and for that reason, the Court will not substitute its discretion for that of the jury, or its findings for that of the jury and deny your Motion for [JNOV] and your Motion for a New Trial.

After our review of the record, we cannot disagree with the trial court. The trial court was correct to conclude that the evidence presented did not preponderate so heavily against the verdict that a miscarriage of justice will result should it permit the verdict to stand. *Campbell*, *supra* at 193. Plaintiffs presented evidence that the warning devices were not properly placed and inconsistencies were revealed in the testimonies of some of plaintiffs' witnesses. Defendant produced evidence to the contrary, tending to show that the all barrels, barricades, and signs were in their proper place when the accident occurred. Apparently, the jury decided to believe defendant's witnesses. As the trial court appropriately noted, the determination of the witnesses' credibility, and the weight to be afforded their testimonies, is for the jury and not this Court. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 519; 679 NW2d 106 (2004); *Guerrero v Smith*, 280 Mich App 647, 669; ___ NW2d ___ (2008). We must defer to the jury on questions of credibility, *Guerrero*, *supra* at 669, and we can see no reason why we should depart from this principle in this case, given that the evidence does not heavily preponderate against the verdict. Similarly, because the jury could have reasonably reached different conclusions, the verdict must stand and the trial court properly denied plaintiffs' motion for JNOV. *Zantel Marketing Agency*, *supra* at 568. The trial court did not abuse its discretion.

2. MCR 7.211(C)(1)

Plaintiffs next argue that the matter should be remanded to the trial court to develop a record on the issue of whether defense witnesses committed perjury when they testified to the placement of the warning devices. We note at the outset that plaintiffs previously filed a motion to remand on this same basis, which this Court denied because plaintiffs failed to make an offer of proof and did not provide any affidavits. *Morrison v John Carlo, Inc*, unpublished order of the Court of Appeals, entered May 22, 2008 (Docket No. 282956). Under such circumstances, we would typically not consider plaintiff's argument again because it would be rendered moot by this Court's previous decision. However, on appeal, plaintiffs presented new evidence in support of their motion for remand, and it is for this reason that we now consider plaintiffs' argument. Nonetheless, we cannot agree.

Although plaintiffs failed to request such an evidentiary hearing before the trial court, this Court may grant a motion for remand for this purpose if the party can identify an issue for appeal that requires further development of the factual record for appellate consideration. MCR 7.211(C)(1)(a)(ii). Such a motion must be supported by an affidavit or other offer of proof. MCR 7.211(C)(1). This Court has the discretion to determine whether such a remand is appropriate and may consider whether the moving party has shown that the issue is meritorious. *People v Hernandez*, 443 Mich 1, 14-15; 503 NW2d 629 (1993).

Here, plaintiffs submitted an affidavit of plaintiff John Morrison. In our view, this affidavit does not demonstrate that the issue raised is meritorious. Plaintiff swears in this affidavit that his daughter was told by her brother that both he and plaintiff's ex-wife were offered large sums of money to testify against plaintiffs. This evidence is inadmissible hearsay. Even if this evidence was admitted and considered true, however, it does not establish perjury,

but only serves to impeach those witnesses' testimonies. Plaintiff also swears that there are photographs of the accident site taken by his insurance provider in the presence of defendant's safety officer, contrary to defense witnesses' testimonies that they had no knowledge of any photographs. Again, this evidence does not show that these witnesses lied under oath; rather, to the extent that a trier of fact would make the inferential step that defendant's workers had knowledge of such photographs because they may have been on the scene, again, functions only to make those witnesses less credible. Lastly, the only evidence plaintiff offers in his affidavit that would tend to show that defense witnesses may have knowingly committed perjury is his statement that he has spoken to "17 witnesses who would testify that the barriers and warning signs were not in place . . . ." However, because plaintiff does not provide any detail with respect to the identity of any of these witnesses and the circumstances of their observances on the day in question, this allegation presents us with nothing more than the speculative notion that these witnesses even exist. Thus, plaintiffs have failed to advance their position and we are not persuaded that a remand is required.

Affirmed.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly