STATE OF MICHIGAN

COURT OF APPEALS

SALLIE SMITH, Plaintiff-Appellee,	UNPUBLISHED September 22, 2009
v	No. 284911 Kent Circuit Court
MICHAEL ROBERT LUNDEEN, Defendant-Appellant.	LC No. 06-012052-NI

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

In this personal injury action, defendant appeals as of right the trial court's order granting plaintiff a new trial. We reverse and remand for entry of judgment in defendant's favor.

I. Basic Facts and Procedural History

The underlying facts of this litigation concern a traffic accident that occurred on January 6, 2004. On that date, defendant allegedly failed to yield to oncoming traffic when making a left turn, thereby causing a collision with plaintiff's car. At the time of the incident, heavy snow was on the roadway, blizzard-like conditions were present, visibility was about 25 feet, and traffic was moving slowly. Plaintiff suffered injuries as a result of the collision.

In November 2006, plaintiff filed this lawsuit, alleging that defendant acted negligently. During discovery, it was determined that plaintiff, prior to the accident, had made numerous claims for social security, worker's compensation, and other insurance benefits related to health problems plaintiff was suffering from. Plaintiff moved to exclude the evidence regarding these disability claims. Initially, the court ruled that whatever plaintiff said could be received no matter who she said it to. However, the trial court reserved the issue of whether those statements would be put into context as part of a claim for disability benefits. On the first day of trial, the court heard additional arguments on the issue. Defense counsel argued "What I'm asking is for her statements . . . [that she] was telling her doctors she was disabled. She was telling her doctors she couldn't work [back in 2003 before the accident.]" The trial court ruled that such statements were admissible, but that they should not be put in context of a claim for benefits. The court stated:

> So what we're going to do right now is, you may present the statements. To the extent they were made to one of these doctors, and identified, Did she tell Dr. So-and-So, or Dr. So-and-so's nurse, or whatever else.
>
> To the extent the statement was made . . . to someone from the Social Security Administration, or insurance company, . . . we'll just say, Didn't you state to such-and-such. We won't say who the statement was made to. If we mix them up a little bit, some to doctors, and some we don't identify, I think the jury will kind of not catch on that we've not identified some, and it will just be a statement, and it will be used as a statement should be.

The matter then proceeded to a nine-day jury trial, where the parties' testimonies conflicted on some key relevant issues. Defendant testified that on the day of the accident he was driving north on East Paris Avenue and anticipated turning left onto Sparks Drive in order to go to the credit union. He described the weather conditions as "blustery, snowy, [and] windy" and indicated that traffic was slower than usual and visibility was low. When defendant reached the traffic light at East Paris Avenue and Sparks Drive, he pulled into the left turn lane. Defense counsel asked defendant what happened next, and he stated:

> *A.* I moved into the left turn lane there, and, umm, because of the – how slippery it was, and the visibility, and the conditions, I decided to wait to try to make my turn, because I felt it wasn't safe. So –
>
> Q. Wait for what, Mike?
>
> *A.* I waited for the traffic light to turn red.
>
> *Q.* All right. What happened next?
>
> *A.* Well, I made sure that all the traffic had come to a stop before I started to complete my left-hand turn. And, when I was confident that the vehicles that I could see were stopped, I proceeded to make my left hand turn.

According to defendant, he completed about a third of the turn, traveling at less than five miles per hour, when he was struck by plaintiff's vehicle. In other words, defendant pulled into the turn lane and stopped when the light was still green and then proceeded to complete the left turn once the light had turned red. Defendant allegedly told the officer who responded to the scene, officer Fannon, that plaintiff went through the red light and was traveling too fast. However, Fannon testified that defendant did not tell him that plaintiff had run a red light or that plaintiff had been driving too fast. Defendant's girlfriend, who was in defendant's car when the accident occurred, testified that she did not recall what happened on the day of the crash and defendant never told her what happened on that day.

Plaintiff testified that on the day of the accident, she was traveling south on East Paris Avenue. According to plaintiff, as she approached the intersection at Sparks Drive the light was green as she proceeded to drive through it. Although plaintiff indicated that defendant's car turned in front of her and they collided, plaintiff stated, "I don't remember the collision, itself." Plaintiff testified that although she did not know exactly what speed she was traveling, she

guessed that she was traveling between 40 and 45 miles per hour. Evidence presented at trial indicated that plaintiff did not actually remember the collision and that prior to the accident plaintiff had been suffering from serious memory problems due to some pre-existing conditions.

A total of eight video deposition testimonies were also played for the jury during trial. Portions of these depositions referring to plaintiff's previous claims for disability benefits were redacted, consistent with the trial court's ruling. During the deposition of Dr. Stephen Bloom, however, a reference was made to plaintiff's denied claim for social security benefits. This statement was made in response to defense counsel's question regarding plaintiff's employment history. Dr. Bloom answered:

> She told me that she last worked regularly for nine years as a underwriter at Grand Valley State University, but she left that job in 2002. She told me she applied for, but had been denied, social security, starting in November of 2002. Prior to working at Grand Valley, she talked about working at Clear Channel Radio for about 10 years.

Plaintiff's counsel objected and the trial court indicated that it would decide what to do later.

At the close of the parties' proofs, plaintiff moved for a directed verdict on defendant's defense that plaintiff was traveling at an excessive speed. Initially the trial court denied the motion, but reserved an opportunity to revisit the issue. The next day before closing arguments, plaintiff renewed his motion for a directed verdict and this time the trial court granted the motion, stating "The issue of speed is off the table." During his closing argument, however, defendant's counsel stated, "I submit to you, given the visibility that day, given the—given how fast she was traveling, that she never saw that . . . . " Counsel also made several references to the weather conditions, to which plaintiff objected. In response, the court indicated, "The weather is not an excuse. I'll tell the jury that. We didn't deal with that as a matter of argument . . . and I'll deal with that." On this last day of trial, the court also ruled that the admission of Dr. Bloom's statement regarding plaintiff's application for disability benefits was an inadvertent mistake by defense counsel.

After closing arguments, the eight-member jury returned a unanimous verdict of no cause of action. Before a judgment could be entered, plaintiff moved for a new trial, alleging that the verdict was against the great weight of the evidence and that counsel's conduct deprived plaintiff of a fair trial. The trial court granted plaintiff's motion for a new trial, reasoning that defendant's testimony had been so seriously impeached that the verdict had been called into question. The court stated:

> Defendant probably was not negligent if he testified truthfully that, before making the left-hand turn at issue in this case, he "waited for the traffic light to change to red," "made sure that all traffic had come to a stop," and proceeded only when "confident that the vehicles that I could see were stopped." In other words, defendant was not negligent if he testified truthfully that plaintiff had run the red light and that poor visibility, because of heavy snow, prevented him from seeing her approach the intersection. If, after the light had turned red, he could not see any vehicles approaching the intersection, defendant was entitled to turn on the assumption that any approaching vehicles would stop for the light. A driver who

> sees a vehicle approaching an intersection in a way which discloses that it is not likely to stop in time cannot pull in front of that vehicle, even though the other vehicle has lost the right away, but a driver who cannot, through no fault of his or her own, see oncoming vehicles can assume the red light will be honored.
>
> Unfortunately for him, the truthfulness of defendant's testimony was significantly impeached at trial. The police officer who came to the scene testified that defendant said nothing to him about plaintiff having run the red light, and, most significantly, nothing in that officer's accident report reflected such a claim by defendant. Hence, for defendant's insistence that he did tell that to the officer to be true, the jury has to find that the officer was lying or forgetful and, more significantly, that he did not fill out the accident report in routine fashion. In addition, defendant's girlfriend, who was in the car at the time of the accident, testified that defendant never told her, then or thereafter, about the circumstances of the accident, so that, specifically, he never said anything about plaintiff running a red light.
>
> Finally, in his deposition, given well after the excitement of the moment, defendant did not describe the accident as he described it at the trial. It is possible, of course, that defendant's trial description of events was truthful, despite being belated, but the belatedness of that version says that it is more likely that it was not truthful.

And, although the trial court did not grant plaintiff's motion on the basis of defense counsel's conduct, the trial court stated:

> At least with regard to the issues of speed and weather, defense counsel's conduct does, however, provide an explanation why a reasonable jury might have accepted defendant's seriously impeached testimony.
>
> This appeal followed.

II. Motion for a New Trial

Defendant argues that the trial court erred by granting plaintiff a new trial. We agree. We review for an abuse of discretion a trial court's decision to grant a new trial. *Guerrero v Smith*, 280 Mich App 647, 666; 761 NW2d 723 (2008).

A. Great Weight of the Evidence

In the present matter, the trial court granted plaintiff's motion on the basis that the jury's verdict was against the great weight of the evidence. In deciding such a motion, a trial court must consider whether the overwhelming weight of the evidence favored the losing party. *Id*. When undertaking this inquiry, the trial court should not substitute its judgment for that of the jury "unless the record reveals that the evidence preponderated so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Campbell v Sullins*, 257 Mich App 179; 667 NW2d 887 (2003); *People v Lemmon*, 456 Mich 625, 644-645; 576 NW2d 129 (1998). Under this test, conflicting testimony alone, even if impeached, is not a sufficient

ground for granting a new trial. *People v McCray*, 245 Mich App 631, 638; 630 NW2d 633 (2001). A narrow exception to this rule applies where "the testimony contradicts indisputable physical facts or laws, where testimony is patently incredible or defies physical realities, where a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror, or where the witnesses testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Lemmon*, *supra* at 643-644 (citations and quotation marks omitted). In effect, these rules adhere to the well-settled principle that a trial judge does not sit as a thirteenth juror when ruling on motions for a new trial. *Id*. at 627. Rather, issues of witness credibility and questions of fact are questions best resolved by the jury and should not be usurped by the trial court. *Id.* at 637; *Guerrero*, *supra* at 669.

After our review of the record, we are not of the opinion that this is one of those exceptional cases where a new trial should have been granted on the basis that the verdict was against the great weight of the evidence. Defendant's and plaintiff's testimonies revealed conflicting versions of the event at issue. Plaintiff contended she was proceeding through a green light when defendant's car pulled in front of her causing the collision. Defendant contended he yielded to oncoming traffic and only proceeded to turn left once the light had turned red, meaning plaintiff had allegedly proceeded through a red light, not a green light. Both parties' testimonies were impeached to a certain extent. It was revealed that plaintiff had serious memory problems dating from before the accident and, indeed, plaintiff testified that she did not really remember the collision. Defendant's testimony that he told officer Fannon that plaintiff was driving too fast and had gone through a red light did not coincide with the officer's testimony indicating that defendant had told him neither of those alleged facts. Neither party's testimony, however, was impeached to the extent that it was deprived of all probative value. And, neither party's testimony contradicted indisputable facts or laws, defied physical reality or was patently incredible, nor was it so inherently implausible that a reasonable juror could not believe it. See *Lemmon*, *supra* at 643-644. "[W[hen testimony is in direct conflict, [as it is here,] and testimony supporting the verdict has been impeached, if it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it, the credibility of witnesses is for the jury." *Id.* at 643 (quotation marks omitted). This is such a case.

Here, the jury chose to believe defendant's testimony over plaintiff's testimony, despite the fact that defendant's testimony was impeached to a limited extent during trial. A review of the trial court's opinion shows that the trial judge simply displaced the jury's assessment of the witnesses' credibility with his own view that defendant was incredible and not to be believed. But nothing about defendant's testimony was so "significantly impeached," as the trial court described it, as to warrant a new trial. The fact that officer Fannon's testimony did not corroborate defendant's testimony and that defendant's girlfriend testified that defendant never spoke to her about the accident, in no way renders defendant's testimony inherently incredible such that it could not be believed by a reasonable juror. Nor does our review of defendant's deposition testimony, which the trial court also relied on, support the trial court's conclusion—rather, defendant's deposition testimony is substantially consistent with his trial testimony.

In short, nothing in the lower court record indicates that defendant's testimony was deprived of all probative value, or that one of the narrow exceptions should apply that would have permitted a new trial. Thus, we conclude that the trial court abused its discretion by acting

as a thirteenth juror and by usurping the jury's role by displacing the jury's judgment with its own. Such a determination bypasses well-established law and completely fails to recognize that jury verdicts in our legal system are nearly sacrosanct and are to be overturned only in the rarest of situations. For this reason we reverse the trial court's order granting plaintiff a new trial.

B. Attorney Misconduct

Lastly, we note that the trial judge in the instant matter indicated that defense counsel's supposed misconduct provided an explanation of why a juror may have believed defendant's impeached testimony. In other words, the trial court suggested that defense counsel's alleged misconduct constitutes an additional basis for granting a new trial. We disagree.

We briefly note the following guidance:

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. *It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial.* If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [*Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982) (emphasis added).]

Even assuming in the instant matter that the conduct complained of was not harmless, we are of the opinion, after our review of the record, that defense counsel's conduct was not so egregious as to deny plaintiff a fair trial. Here, a single statement regarding plaintiff's disability claims was admitted contrary to the court's order when it was played to the jury during a video deposition. This single statement was made during a deponent's lengthy answer to a question about plaintiff's employment history, in one of the eight video depositions the jury listened to over the course of a nine-day trial. The trial court determined that defense counsel's failure to redact the statement was inadvertent and plaintiff specifically requested no curative instruction as to not draw the jury's attention to the comment. Later, during closing arguments, defense counsel made a single comment regarding the speed at which plaintiff was traveling when the accident occurred, again against the court's previous order. However, the court later instructed the jury that the lawyers' arguments were not to be considered as evidence. Plaintiff also points out defendant's allegedly inappropriate references to weather conditions during closing argument. However, the trial court stated over plaintiff's objection that it had made no ruling as to the weather "as a matter of argument." And, later a curative instruction was provided to the jury, advising the jurors that the "weather isn't an excuse."

It is our view that these instances, cited by both the trial court in its opinion and by plaintiff in her brief on appeal, are isolated, benign, and relatively brief occurrences when viewed in comparison to those cases where counsel's misconduct has been reprehensible

throughout the proceedings, such that a new trial has been granted. *Id.* at 104-107; *Badalamenti v William Beaumont Hosp*, 237 Mich App 278, 290-291; 602 NW2d 854 (1999); *Wayne Co Bd of Rd Comm'rs v GLS LeasCo*, 394 Mich 126; 229 NW2d 797 (1975). Rather, it is plain on the record that defense counsel's conduct, while not perfect, falls far short of the type of conduct aimed to inflame the jury's passions or divert the jurors from the case's merits, such that the trial is unfair. In any event, the trial court's instructions are generally sufficient to cure any prejudice that counsel's remarks may have caused. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). Accordingly, we cannot agree with the trial court's suggestion that defense counsel's conduct would provide an alternative basis for granting a plaintiff a new trial.[1]

Reversed and remanded for entry of order consistent with the jury's verdict. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Douglas B. Shapiro

[1] There is also no merit to plaintiff's additional argument that a new trial is appropriate because there is no record of what was actually played for the jury during the video depositions. Plaintiff has not shown how she has been prejudiced such that a new trial is warranted, especially in light of the fact that the record contains transcribed depositions of those that were played for the jury. See *Bransford v Brown*, 806 F2d 83, 86 (CA 6, 1986).