STATE OF MICHIGAN

COURT OF APPEALS

MICHELE LAVIGNE,

Plaintiff-Appellant,

v

BRENDA GLORE,

Defendant,

and

TOWNSHIP OF EGELSTON,

Defendant-Appellee.

UNPUBLISHED
September 23, 2010

No. 290858
Muskegon Circuit Court
LC No. 08-045820-NI

Before: MURPHY, C.J., and SAWYER and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right a judgment of no cause of action entered in favor of defendant, Township of Egelston, following a jury trial in this automobile negligence case. We affirm.

Plaintiff first argues that defendant Brenda Glore, who is a Township firefighter, clearly violated both the statutory law, MCL 257.627; MCL 257.401(1), and the common law by negligently operating the fire truck she was driving while making a turn, which resulted in the fire truck hitting the bus that plaintiff was driving. Plaintiff argues that because a violation of the Michigan vehicle code creates a rebuttable presumption of negligence, the trial court erred when it denied plaintiff a directed verdict on the issue of negligence because reasonable minds could not differ on whether Glore was negligent. We disagree.

We review de novo a trial court's decision on a motion for a directed verdict. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). We review all the evidence presented up to the time of the motion to determine whether a question of fact existed upon which reasonable minds could differ. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008). In reviewing a trial court's ruling on a motion for a directed verdict, we examine the evidence presented in a light most favorable to the nonmoving party and grant that party every reasonable inference and resolve any conflict in the evidence in the nonmoving party's favor. *Locke v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). Statutory

interpretation is a question of law that is also reviewed de novo. *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 99; 643 NW2d 553 (2002).

According to the Michigan vehicle code, "[t]he owner of a motor vehicle is liable for an injury caused by the negligent operation of the motor vehicle whether the negligence consists of a violation of a statute of this state or the ordinary care standard required by common law." MCL 257.401(1). MCL 257.627(1) provides the general provision that "[a] person driving a vehicle on a highway shall drive at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing." However, MCL 257.632 more specifically provides that a fire truck responding to a fire does not have to abide by the code's speed limitations when the vehicle is being operated with due regard to safety. MCL 257.632 also provides that the "exemption shall not however protect the driver of the vehicle from the consequences of a reckless disregard of the safety of others." Hence, the applicable inquiry in this case with regard to a statutory violation is whether Glore was operating her fire truck with due regard to safety and not recklessly disregarding the safety of others.

The common law provides that the "general standard of care" applicable in negligence cases relates to whether a defendant breached its duty to exercise reasonable care. *Case v Consumers Power Co*, 463 Mich 1, 6-7; 615 NW2d 17 (2000). In other words, "[n]egligence . . . consists in a want of that reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury." *Id*. at 7, quoting *Detroit & Milwaukee R Co v Van Steinburg*, 17 Mich 99, 118-119 (1868).

A directed verdict would not have been proper in this case because a factual question existed upon which reasonable minds could differ, i.e., whether Glore was negligent under the common or statutory law. *Silberstein*, 278 Mich App at 455. Specifically, on the one hand Glore admitted that she knew that the roads were wet that day and that the rear wheels of the fire truck "got away from [her]." Glore also essentially admitted that she overcorrected when her rear wheels started to slide. Moreover, she testified that, at one point, when the rear wheels were sliding to the right, she turned the steering wheel to the left, as opposed to the right, to correct the rear wheels from sliding more to the right. Further, plaintiff testified that Glore's bus "was coming too fast" and that Glore cut the turn too close. In addition, Glore and Gary McDonald, who was an accident reconstruction expert, testified that Glore was at fault for the accident. Also, both Linda Major and Sharon Dutcher, witnesses to the accident who worked near the intersection where the accident occurred, testified that they saw the bus tip or rock when the fire truck hit it, thus suggesting that the impact may have been substantial. This evidence would have supported a finding that Glore was negligent.

On the other hand, Glore testified that she made an extra wide turn with her fire truck because she knew from experience that even though fire trucks have the right of way at an intersection, some drivers may allow their vehicles to creep out into the intersection, which could result in a head on collision with those vehicles. Thus, the testimony indicates that Glore was using anticipatory measures in order to try to prevent a head on collision with the bus. Glore also indicated that the rear wheels of her fire truck getting away from her, like they did on this day, had never happened before. Moreover, Glore testified that she honestly believed that she did the best that she could that day and that if she had another more feasible option available to her, she would have taken it. In addition, the testimony of Glore, McDonald, and Roberta Smith, who was driving a bus behind plaintiff's bus, supported the proposition that the fire truck was not traveling at an excessive speed. In addition, Smith did not criticize Glore's turn with her fire truck. Rather, Smith

commented that although Glore made a wide turn, "we do [that] with big vehicles." Further, although Glore and McDonald testified that Glore was at fault for the accident, Glore causing the accident does not, in and of itself, result in a finding that Glore was negligent. *Bonin v Gralewicz*, 378 Mich 521, 536; 146 NW2d 647 (1966) (KELLY, J., dissenting), citing *In re Estate of Miller*, 300 Mich 703, 710-711; 2 NW2d 888 (1942). Moreover, the damage to the fire truck totaled only $36 and only the bumper of the bus was damaged. McDonald also testified that it was a "very minor" accident and plaintiff, Smith, Dennis DeCheney (who arrived on the scene after the accident and spoke with plaintiff), and Frank Zimonich (who was plaintiff's brother and also spoke with her that day), all testified that plaintiff did not even know that her bus was hit after the collision.

Because there was conflicting evidence, and when there is conflicting evidence on a material issue, every reasonable inference should be made to resolve the conflict in the nonmoving party's favor. *Locke*, 446 Mich at 223. At a minimum, there was a material factual issue as to whether Glore was driving at an excessive speed or whether Glore made an appropriate turn and appropriately attempted to correct the situation when the fire truck's wheels began to slide to the right.

Contrary to plaintiff's argument on appeal, there was a genuine issue of material fact as to whether Glore operated her fire truck using the reasonable care that a reasonably careful person would have used under the circumstances, *Case*, 463 Mich at 6-7, or operated her fire truck with due regard to safety and not recklessly disregarding the safety of others, MCL 257.632. Consequently, we need not reach the issue of whether a violation of the Michigan vehicle code created a rebuttable presumption of negligence. In other words, only if there were a violation of the Michigan vehicle code, would there be a presumption of negligence. Here, plaintiff did not prove that there was a violation of the Michigan vehicle code. Instead, there was a genuine issue of material fact, thus the matter was properly left to the jury, which ultimately found that Glore was not negligent.

Plaintiff also argues that because the overwhelming evidence demonstrated that Glore was negligent, the jury's verdict was against the great weight of the evidence. Because plaintiff did not move for a new trial or judgment notwithstanding the verdict in the trial court, we review this issue for plain error. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990), aff'd 438 Mich 347 (1991). "[T]he jury's verdict should not be set aside if there is competent evidence to support it." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999).

We first note that the trial court only instructed the jurors pursuant to the standard of negligence as provided in the common law, not the statutory law. Thus, the verdict was based on whether Glore was negligent pursuant to the common law. We therefore consider the common law in deciding whether the verdict was against the great weight of the evidence.

Based on the evidence produced at trial, we find that the jury's verdict was not against the great weight of the evidence. *Domako*, 184 Mich App at 144. There was ample competent evidence to support the jury's conclusion, based upon a preponderance of the evidence, that Glore was not negligent by exercising reasonable care under the circumstances. *Ellsworth*, 236 Mich App at 194. Further, any conflicting evidence should be left to the fact-finder, and we do not substitute our judgment for that of the fact-finder. *Id*. See also *Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943). There was no plain error. *Kern*, 240 Mich App at 336.

Plaintiff also argues that defense counsel erred by making specific reference to benefits available under the no-fault act by stating that those benefits would continue to run regardless of the outcome of this case. She contends that, while the trial court attempted to cure the error, its actions did not remove the tainted impression that plaintiff was trying to double dip into the system and somehow gain more than what she was suppose to receive. Therefore, a new trial is warranted.

This Court observed in *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996):

> When reviewing asserted improper comments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal. An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. [Citations omitted.]

"Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Persichini v William Beaumont Hosp*, 238 Mich App 626, 635; 607 NW2d 100 (1999).

We believe that our analysis in *Guerrero v Smith*, 280 Mich App 647, 658-659; 761 NW2d 723 (2008), is dispositive on this issue. "[I]t is not relevant whether or not a plaintiff seeking recovery for personal injury has other remedies available and, therefore, the topic should not be raised before the jury." *Id.* at 658. Thus, it was error for defense counsel to indicate to the jury that medical expenses and rehabilitation benefits are separately provided under the no-fault act and that work-loss benefits commence three years after the accident. However, similar to our conclusion in *Guerrero*, we conclude here that any error and resulting prejudice was cured by the trial court's curative instruction along with the trial court's instructions to the jury that it should only consider the evidence presented at trial and that arguments, statements, and remarks of the attorneys are not evidence and should be disregarded. *Id*. at 658-659. In addition, because the jury found that Glore was not negligent, the jury never reached the point of needing to address the amount of damages that plaintiff should be awarded. *Id*. Further, defense counsel's statements do not appear to be indicative of "a deliberate course of conduct aimed at preventing a fair and impartial trial," nor do the comments "reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved." *Hunt*, 217 Mich App at 95. Reversal is not warranted because the trial court did not abuse its discretion by denying plaintiff's request for a mistrial. *Persichini*, 238 Mich App at 635; *Hunt*, 217 Mich App at 95.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray