# STATE OF MICHIGAN

# COURT OF APPEALS

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| CHARLES A. PEASE and LUCINDA L. PEASE,<br><br>Plaintiffs-Appellees, | UNPUBLISHED<br>October 28, 2010 |
| v | No. 291440<br>Presque Isle Circuit Court |
| ROGER RILEY,<br><br>Defendant-Appellant. | LC No. 07-002807-NO |

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM.

Defendant appeals by leave granted the order of the circuit court granting plaintiffs' motion for new trial based on an error in the jury verdict form. For the reasons set forth in this opinion, we affirm.

This case arises from a motorcycle accident that occurred near defendant's property when defendant's unleashed dog ran into the road and collided with plaintiffs' motorcycle. Plaintiffs alleged that defendant had violated MCL 287.262, which requires dog owners to keep their animals held properly on a leash. The jury found that defendant was negligent, but found that defendant's negligence was not "the proximate cause" of plaintiffs' injuries on the verdict form. In contravention of the wording of the jury verdict relative to the issue of proximate cause, the trial court had instructed the jury to consider whether defendant's negligence was "a proximate cause" of plaintiffs' injuries. The trial court granted plaintiffs a new trial based on the erroneous wording employed on the verdict form. Defendant's motion for reconsideration was denied and this appeal ensued.

The court instructed the jury, "If you find that the defendant violated [MCL 287.262,] before or at the time of the occurrence, you may infer that the defendant was negligent. You must then decide whether such negligence was *a* proximate cause of the occurrence." (Emphasis added.) "When I use the words 'proximate cause,'" it continued, "I mean first, that the negligent conduct must have been *a* cause of plaintiff's injury, and second, that the plaintiff's [sic] injury must have been a natural and probable result of the negligent conduct." (Emphasis added.) Although the court used the proper language in instructing the jury, the court concluded that the error in the verdict form "short-circuited what would have been the appropriate assessment of comparative negligence. Without that evaluation, we cannot know whether plaintiffs were more or less negligent than the defendant, and therein lies the substantial injustice."

MCR 2.613(A) provides as follows:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

In *Beach v Mutual Auto Ins Co*, 216 Mich App 612, 617-618; 550 NW2d 580 (1996), this Court held that despite the fact that the verdict form "did not contain a separate question asking the jury whether plaintiffs' injuries arose out of the subject accident," a new trial was unwarranted because "the trial court remedied any doubt left open by the verdict form when it correctly instructed the jury." The Court further stated that "[b]ecause the parties' theories and the applicable law were adequately and fairly presented to the jury, any error in the jury verdict form is, therefore, harmless." *Id*. at 618. Similarly, our Supreme Court has held that a criminal defendant's constitutional right to a trial by jury was not violated because of an error on the verdict form given that the trial court had properly instructed the jury and the jury presumably understood those instructions:

> The jury verdict form was not dispositive because the trial court properly instructed the jury. On the basis of the trial court's instructions, the jury would have clearly understood that it could find the defendant "not guilty" of first-degree murder and "not guilty" of the lesser offenses of second-degree murder and involuntary manslaughter by checking the "not guilty" box listed on the form . . . . In light of the jury instructions, the trial court's error in using the improper verdict form was harmless. [*People v Wade*, 485 Mich 982; 774 NW2d 919 (2009).]

In this case, the trial court's comments during the hearing on plaintiffs' motion for new trial and in its opinion and order denying defendant's motion for reconsideration suggest that the court concluded that the jury's finding that defendant's negligence was not "the proximate cause" of plaintiffs' injuries, meant that the jury did not understand that it could find that defendant's negligence was one of multiple causal factors in the accident, including any comparative negligence on plaintiffs' part. However, the jury could have concluded that while the dog could not have run into the street had it been tethered, plaintiffs' injuries were not "a natural and probable result of the" failure to tether the dog. In other words, the jury could have concluded that because other causes intervened between defendant's negligence and the injuries sustained, the consequences of defendant's conduct was not foreseeable and thus defendant's negligence was not "a proximate cause of the occurrence."

It is just as reasonable, however, to conclude that the jury was misled by the verdict form and determined that because defendant's negligence was not the sole causal element, a verdict of no cause of action as to the claims of both plaintiffs should be entered. Where two reasonable interpretations of the lower court proceedings can be set forth, one of which comports with the court's decision to grant a new trial, the court's decision to do so was not outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Defendant also argues that the appeal should be dismissed because plaintiffs expressly approved the verdict form below. It is clear from the record that plaintiffs' counsel did not object to the verdict form which was prepared by opposing counsel and adopted by the trial court. It is not clear from the record whether plaintiffs' counsel ever expressly approved the verdict form. After the jury had been verbally instructed, the court clerk asked if the court wanted the verdict form checked. In response, the court indicated that the bailiff should "hand one to each counsel." After the bailiff was sworn, the court told the bailiff to "deliver the verdict form to the jury and take them to their room." Between having the bailiff provide copies of the form to counsel and the jury retiring, there is nothing in the transcript from which it could be reasonably concluded that counsel approved the verdict form. Further, no discussion of the form is subsequently made. The absence of any objection at this point is not the same as an on the record approval as to the form to be used. See *Roberts v Mecosta Co. Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002). We note that defendant does not assert that plaintiff relied on the mistake in order to create an "appellate parachute," and similarly plaintiffs do not contend that defendant intentionally placed the word "the" in lieu of the word "a." Consequently, we are left to conclude that an unintentional typographical error with significant legal ramifications went unnoticed by the parties and the trial court.

In any event, this Court is not asked to rule on a motion for new trial filed here, but to review for an abuse of discretion the trial court's grant of a new trial. Having concluded that the trial court's decision to grant a new trial was not outside the range of principled outcomes, this issue fails. Accordingly we affirm the trial court's ruling granting plaintiffs a new trial.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Richard A. Bandstra