STATE OF MICHIGAN

COURT OF APPEALS

NORMAN REZMER and DONALD REZMER,

Plaintiffs-Appellants,

v

SCOTT ALTMAN,

Defendant-Appellee,

and

JON ALTMAN AND BROOK ALTMAN,

Defendants.

UNPUBLISHED
November 18, 1997

No. 181355
Midland Circuit Court
LC No. 91-008904-NO

Before: O'Connell, P.J., and Smolenski and T.G. Power*, JJ.

PER CURIAM.

Plaintiffs appeal by leave granted from a judgment of no cause of action entered in favor of defendant Scott Altman following a jury verdict that defendants Scott Altman, Jon Altman and Brook Altman had not engaged in concert of action.[1] We affirm.

Plaintiffs left a hunting area and began returning to their vehicle just after dark. Their flashlights were turned off. Defendants were venturing into the hunting area at the same time with their flashlights turned on. Defendant Jon Altman was carrying a double-barreled, twenty-gauge shotgun loaded with buckshot. Upon hearing a noise ahead of him, defendant Jon Altman became startled and lost his balance. The gun discharged, seriously injuring plaintiff Norman Rezmer.

Plaintiffs filed suit, alleging a concert of action theory of liability.[2] Before trial, defendant Scott Altman requested, in relevant part, the following supplemental jury instruction with respect to plaintiffs' concert of action theory:

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* Circuit judge, sitting on the Court of Appeals by assignment.

a. That all Defendants acted tortiously pursuant to a common design. By common design I mean that each of the Defendants had an equal right to direct and govern the movements and conduct of each other, which arises only out of a contract or agreement between the parties which may be expressed or implied.

b. That an agreement or tacit understanding existed between all of the Defendants.

As evidenced by his trial brief, defendant Scott Altman relied on *Troutman v Ollis*, 164 Mich App 727; 417 NW2d 589 (1987), for that portion of the requested supplemental instruction that defined "common design" as meaning that each of the defendants must have "had an equal right to direct and govern the movements and conduct of each other . . . ." Over plaintiffs' objection to this aspect of the supplement instruction, the trial court instructed the jury substantially in conformance with defendant Scott Altman's requested instruction:

That Defendant all Defendants acted tortiously pursuant to a common design. By common design, I mean that each of the Defendants had a right to direct and govern the movements and conduct of each other.

That an agreement or tacit understanding existed between all of the Defendants. The agreement may be expressed or implied.

The jury specifically found that defendants had not been engaged in concert of action.

Plaintiffs first argue that by instructing the jury that "common design" meant that the defendants must have "had a right to direct and govern the movements and conduct of each other," the trial court erroneously instructed the jury with an element of the theory of joint enterprise. Defendant Scott Altman, the only defendant who is participating in this appeal, argues that the jury was properly instructed because there is no legal distinction between the theories of concert of action and joint enterprise.

When a party requests an instruction that is not covered by the standard jury instructions, the trial court may, in its discretion, give additional, concise, understandable, conversational, and nonargumentative instructions, provided they are applicable and accurately state the law. MCR 2.516(D)(4); *Chmielewski v Xermac, Inc*, 216 Mich App 707, 713-714; 550 NW2d 797 (1996). On appeal, jury instructions are reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Mull v Equitable Life Assurance Society of the United States*, 196 Mich App 411, 423; 493 NW2d 497 (1992), aff'd in part on another ground 444 Mich 508 (1994). There is no error requiring reversal, if on balance, the theories of the parties and the applicable law were fairly and adequately presented to the jury. *Id*. The trial court's decision regarding supplemental instructions will not be reversed unless failure to vacate the verdict would be inconsistent with substantial justice. *Id*.

In *Cousineau v Ford Motor Co*, 140 Mich App 19, 32; 363 NW2d 721 (1985), this Court discussed the concert of action theory:

> A plaintiff may proceed on the theory of concert of action if he or she can prove "that all defendants acted tortiously pursuant to a common design." . . . "Express agreement is not necessary, and all that is required is that there be a tacit understanding." . . . "A concert of action case does not require that the plaintiff be unable to identify the specific defendant who caused his injury." . . . Rather, each defendant "is jointly and severally liable for the entire amount of damages, although he may be entitled to contribution from his fellow tortfeasors." . . . "Even if defendant caused no harm himself, he is liable for the harm caused by his fellows because all acted jointly." . . . "[T]o state a cause of action, a plaintiff need only allege that the defendants were jointly engaged in tortious activity as a result of which the plaintiff was harmed."
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> Each defendant who acted jointly and tortiously is liable, even though his conduct was not the direct cause of the injury. [*Id*. at 32 (citations omitted).]

See also *Holliday v McKeiver*, 156 Mich App 214, 217-218; 401 NW2d 278 (1986).

A plaintiff is entitled to recover from the defendants under a concert of action theory if the plaintiff can prove that each defendant acted tortiously pursuant to a common design and that such action proximately caused the injury. *Cousineau, supra* at 33. Negligence is essentially the tortious activity underlying a plaintiff's concert of action claim. *Id*. at 35. As explained in *Abel v Eli Lilly & Co*, 418 Mich 311; 343 NW2d 164 (1984):

> The concept is perhaps most clearly illustrated in the racing context. If three drivers join in a drag race, as a result of which one pedestrian is injured, all three may be held liable. Thus, a legal fiction is created: all three drivers are found to be the cause in fact, although only one driver may have actually struck the pedestrian. [*Id*. at 338.]

The rule of joint enterprise in negligence cases is founded on the law of principal and agent. *Helsel v Morcom*, 219 Mich App 14, 21; 555 NW2d 852 (1996); *Troutman, supra* at 734. Under this theory, the negligence of one person is imputed to another to charge the latter with liability to a third person injured by reason of the negligence of the former. *McLean v Wolvernine Moving & Storage Co*, 187 Mich App 393, 399; 468 NW2d 230 (1991); *Troutman, supra* at 733. The theory rests on the assumption that the person sought to be held responsible was engaged in a joint venture with the one who was actually negligent. *McLean, supra*. Thus, every person sought to be held liable under this theory must have management and control of the enterprise, a right to be heard, and an equal right of control and joint responsibility for decision making and expenses. *Helsel, supra* at 22; *Troutman, supra*.

Contrary to defendant Scott Altman's contention, there is a legal distinction in Michigan between the theories of concert of action and joint enterprise. Concert of action requires that each defendant act tortiously (negligently) pursuant to a common design or tacit understanding. *Cousineau, supra*. Conversely, under the theory of joint enterprise, the negligence of one of the members of the joint enterprise may be imputed to a non-negligent member. *McLean, supra; Troutman, supra*. Generally, where there is an attempt to hold a person civilly liable for the negligence of another, it must be made to appear that the person sought to be held responsible was engaged in a joint enterprise with the person who was negligent. *Troutman, supra*. This, we believe, is why the theory of joint enterprise requires the element of control or direction.

Thus, we agree with plaintiff that the trial court's supplemental instruction defining common design as meaning that each defendant must have "had a right to direct and govern the movements and conduct of each other" referred to an element required for the theory of joint enterprise and, therefore, did not accurately and fairly present the theory of concert of action to the jury. However, in the present case we would note that the theory of concert of action requires tortious action by each of the defendants. *Holiday, supra* at 219. Going into the woods with two others to secure and retrieve a deer is not acting tortiously pursuant to a common design nor does it evidence tortious action by each of the participants.

In *Holliday v MacKeiver*, 156 Mich App 214; 401 NW2d 278 (1986), this Court was faced with a case similar to that presently before the Court. The plaintiff was hunting, and was injured when a member of another hunting party negligently[3] shot him. The plaintiff sought to hold the entire hunting party liable under a theory of concert of action. One of the "hunters" named as a defendant was unarmed, and another had not fired his gun when the plaintiff was injured. We ruled that because the common scheme was not itself tortious, but only involved one of the members of the party acting tortiously, the party was not engaged in *concerted* activity with respect to the negligent act. We emphasized that under a theory of concert of action, the "plaintiff must show *tortious action* by each defendant against whom the liability is sought." *Id*., p 219 (emphasis in original). Because neither the defendant who was unarmed nor the defendant who had not fired had either acted tortiously or agreed that one of the group would act tortiously, the plaintiff's concert-of-action allegation failed.

In the present case, not only was defendant Scott Altman unarmed, but he had actively advised defendant Jon Altman not to bring a gun into the woods. These facts are sufficient to negate any suggestion that Scott and Jon Altman were acting in concert when the gun allegedly accidentally discharged. There is little difference between the present case and one in which two friends agree to go to a crystal shop, one insists on wearing a large sombrero into the store, and the other advises against it. May both be found liable after the sombrero-wearing friend breaks some crystal?

In short, we find no evidence supporting plaintiffs' contention that defendants were engaged in a concert of action when plaintiff Norman Rezmer was shot. Because it is error to instruct a jury on a matter not sustained by the evidence or the pleadings, *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). It would be error *to* instruct the jury concerning plaintiffs' concert of action theory.

Therefore, while the trial court may have erred in its recitation of the elements of this theory, it was harmless in light of the fact that the instruction should not have been given at all.

In light of our holding with respect to plaintiffs' first issue, we decline to address the balance of the issues.

Affirmed.

/s/ Peter D. O'Connell
/s/ Thomas G. Power

[1] Defendants Jon Altman and Brook Altman did not defend at trial. Thus, defendant Scott Altman was the only defendant represented by counsel at trial. Following the jury's October 13, 1994, verdict, defendant Scott Altman, through his counsel, moved for the entry of a judgment of no cause of action in his favor. On November 23, 1994, the trial court granted the motion and entered a judgment of no cause of action in favor of defendant Scott Altman. On December 14, 1994, plaintiffs filed a claim of appeal from the November judgment in favor of Scott Altman. On December 29, 1994, plaintiffs were informed by this Court's clerk that their submission was defective because it was not accompanied by orders disposing of plaintiffs' claims against defendants Jon Altman and Brook Altman, and that plaintiffs' appeal would be dismissed unless such orders were filed within fourteen days. On January 23, 1995, the trial court entered a judgment of no cause of action in favor of defendants Jon Altman and Brook Altman. On March 20, 1995, this Court dismissed plaintiffs' appeal for lack of jurisdiction. Plaintiffs moved for rehearing, explaining that they had intended to appeal with respect to all three defendants, and that the fact that a judgment had not been originally entered with respect to the unrepresented defendants was an inadvertent mistake. Plaintiffs further explained that in order to correct the error a judgment in favor of defendants Jon Altman and Brook Altman had subsequently been entered, but that this fact was inadvertently not conveyed to this Court. On June 2, 1995, this Court granted plaintiffs' motion for rehearing and set aside its previous order of dismissal. This Court further ordered that "[t]he premature claim of appeal is considered an application for leave to appeal which is GRANTED."

Only defendant Scott Altman has filed an appearance in this appeal. However, the record indicates that plaintiffs have served defendants Jon Altman and Brook Altman with various documents related to plaintiffs' appeal during the course of these appeal proceedings. See, generally, MCR 7.204 and MCR 7.205.

[2] Since defendant John Altman was uninsured and uncollectable and defendant Scott Altman was insured and collectable, plaintiff, rather than bring a negligence action, filed suit alleging a concert of action claim against all defendants.

[3] We use the term "negligently" to facilitate discussion. While the plaintiff alleged negligence, at the time *Holliday* reached this Court there had, apparently, not yet been a determination of negligence.