STATE OF MICHIGAN

COURT OF APPEALS

THOMAS L. DILLON,

Plaintiff-Appellant,

v

JOYCE M. DILLON, as Next Friend of CHRISTOPHER DILLON, a Minor,

Defendant-Appellee.

UNPUBLISHED
June 6, 2000

No. 211152
Oakland Circuit Court
LC No. 96-519868-NI

Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

In this negligence case, plaintiff, Thomas L. Dillon, appeals as of right from a judgment of no cause of action in favor of defendant, Joyce M. Dillon, as next friend of Christopher Dillon, a minor, entered by the trial court following a jury trial. Plaintiff additionally raises issues related to the order of the trial court denying his motions for directed verdict, judgment notwithstanding the verdict (JNOV), and new trial. We reverse and remand.

On January 20, 1995, plaintiff and his sixteen-year-old son, Christopher Dillon, went into their garage to replace a headlight on Christopher's 1986 Subaru. After replacing the headlight, Christopher asked plaintiff to listen to a "funny" sound coming from the car's engine. Christopher got into the car and turned the key; the car immediately "lunged" forward. Plaintiff, who was standing in front of the vehicle, was pinned against the wall of the garage by the vehicle, and both of his legs were broken. This negligence suit followed.

Plaintiff first argues that the trial court erred in sustaining objections to questions asked of Christopher by plaintiff's counsel concerning whether Christopher was "negligent" or "at fault" with respect to the accident. We disagree. The trial court's decision regarding the admissibility of evidence is reviewed for an abuse of discretion. *Grow v W A Thomas Co*, 236 Mich App 696, 711; 601 NW2d 426 (1999). An abuse of discretion "involves far more than a difference in judicial opinion," and "such abuse occurs only when the result is '"so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance

thereof, not the exercise of reason but rather of passion or bias."'" *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999) (citations omitted).

At trial, Christopher testified that he could not remember much about the accident, that he did not know what happened to cause it, that he "thought" the car was in neutral and that the emergency brake was set before he turned the key, but that the car must have been in gear and he must have let go of the clutch, causing the car to lurch forward. Plaintiff's counsel attempted, several times, to ask Christopher whether he was "negligent," at "fault," or "wrong" in the way he started the car. The trial court sustained defense counsel's objections to these questions. Plaintiff contends that the proffered testimony was admissible pursuant to MRE 701 and MRE 704, and that the trial court abused its discretion in excluding the testimony.

MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

MRE 704 further provides:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Accordingly, lay opinion testimony is permitted when it is rationally based on the witness' perception and is helpful to a clear understanding of a fact at issue. *McPeak v McPeak (On Remand)*, 233 Mich App 483, 493; 593 NW2d 180 (1999). Moreover, the fact that a witness' opinion may embrace "an ultimate issue" in the case does not make it inadmissible. See *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993).

However, "[u]nder MRE 701, a nonexpert witness' opinion testimony is limited to those opinions and inferences which are rationally based on the witness' own perceptions. Legal conclusions are not included." *Temborius v Slatkin*, 157 Mich App 587, 602; 403 NW2d 821 (1986). Additionally, "opinion regarding standard of care is not based on physical perception" and is therefore inadmissible pursuant to MCR 701. *Troyanowski v Village of Kent City*, 175 Mich App 217, 225; 437 NW2d 266 (1988). Furthermore:

> A 'witness is prohibited from opining on the issue of a party's negligence or nonnegligence . . . .' [*People v Drossart*, 99 Mich App 66, 79-80; 297 NW2d 863 (1980).] Therefore, it is error to permit a witness to give the witness' own opinion or interpretation of the facts because doing so would invade the province of the jury. *Id.* [*Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 123; 559 NW2d 54 (1996).]

We conclude that the trial court in the instant case properly ruled that plaintiff's counsel was not permitted to elicit testimony from Christopher that he was "negligent" or "at fault" in starting the car on January 20, 1995. While MRE 701 allows a nonexpert witness to give opinion testimony, the opinion testimony must be "rationally based on the perception of the witness." Accordingly, while plaintiff was certainly entitled to—and did—elicit opinion testimony from Christopher concerning the cause of the accident, it would not have been proper to allow Christopher to opine whether his actions were "negligent." Not only would this testimony have constituted a legal conclusion and invaded the jury's responsibility to make a determination whether Christopher's conduct was, indeed, "negligent," see *Carson Fischer Potts & Hyman*, *supra* at 123; *Troyanowski*, *supra* at 225; *Temborius*, *supra* at 602, it is also clear that the proffered testimony would not have been rationally based on Christopher's perception: Christopher testified repeatedly that he did not remember much about the accident and that he did not know what happened to cause it.

Moreover, any error in the exclusion of the proffered testimony was harmless. Christopher testified that the accident could have been prevented if he would have made sure the car was in neutral and that the emergency brake was up. Also, Christopher ultimately did testify that he believed that the accident was his fault. Finally, during closing argument, plaintiff's counsel reminded the jury several times that Christopher had testified that the accident was his fault. Plaintiff was not prejudiced by the exclusion of what would have been cumulative testimony.

Plaintiff next argues that the trial court erred in denying his motions for directed verdict, JNOV, and new trial. Plaintiff contends that the only evidence submitted on the issue of liability established that Christopher was negligent, that reasonable jurors could not have concluded otherwise, and that the verdict was against the great weight of the evidence. We disagree.

A trial court's denial of a motion for a directed verdict or a motion for a judgment notwithstanding the verdict is reviewed de novo. *Abke v Vandenberg*, 239 Mich App 359, 361; 608 NW2d 73 (2000). When examining either motion, this Court views the evidence, as well as any legitimate inferences, in the light most favorable to the nonmoving party, and decides whether a factual question exists about which reasonable minds might have differed. *Id*. Furthermore, this Court may not substitute its judgment for that of the jury; hence, it must defer to the trier of fact's ability to observe witnesses, determine credibility, and weigh testimony. *Nabozny v Pioneer State Mutual Ins Co*, 233 Mich App 206, 209; 591 NW2d 685 (1998).

This Court reviews a trial court's decision to deny a motion for a new trial for an abuse of discretion. *Abke*, *supra*. When a party claims that a jury's verdict was against the great weight of the evidence, this Court may overturn that verdict only when it was manifestly against the clear weight of the evidence. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. *Ellsworth*, *supra* at 194. We give substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence and to the trial court's unique ability to judge the weight and credibility of the testimony, and this Court will not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. *Id.*

The elements of an action for negligence include the existence of a duty, a breach of the standard of care, causation in fact, legal or proximate causation, and damages. *Theisen v Knake*, 236 Mich App 249, 257; 599 NW2d 777 (1999). The standard of conduct to which an actor must conform to avoid being negligent is that of a reasonable person under like circumstances. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 155; 555 NW2d 738 (1996). Here, Christopher testified that he turned the key in the Subaru and that the car "lunged forward," pinning plaintiff against the wall. Christopher further testified that he "[did not] remember too much" about the accident, that he "thought the car was in neutral" and "thought" that the emergency brake was set when he turned the key, and that he did not know whether the clutch was in or whether the car was in gear, even though he usually checked these things when getting into the car. When asked what Christopher had told her about how the accident happened, Joyce Dillon testified that Christopher told her that he did not know exactly how it happened, and that "[w]e don't know" how it happened. Although Christopher speculated that he had not started the car "the way [he was] supposed to" and that he "must have started it in gear and hit the gas, and . . . let go of the clutch," he further testified that he did not "really know what happened." Evidence was also introduced indicating that the car had not been used for a year or more before Christopher began driving it, and that repairs had recently been performed on it.

On the basis of the evidence presented, we find that reasonable jurors could have arrived at different conclusions concerning whether Christopher's conduct in starting the car was negligent. Given Christopher's uncertainty as to the precise cause of the accident, and the lack of any technical testimony concerning possible or probable reasons for the sudden movement of the car, a factual question clearly existed regarding whether Christopher's conduct constituted a breach of his duty of care to plaintiff—i.e., whether his conduct in starting the car fell below the standard of conduct of a reasonable person under the same or similar circumstances. *Howe*, *supra* at 155. Accordingly, the trial court did not err in denying plaintiff's motions for directed verdict and JNOV. *Abke*, *supra* at 362-363. Furthermore, because there is competent evidence to support the jury's conclusion that Christopher's conduct was not negligent, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial. *Ellsworth*, *supra* at 194-196.

Lastly, plaintiff argues that he was prejudiced by defense counsel's improper comments during closing argument concerning the parties' familial relationship. Plaintiff contends that defense counsel prejudiced the jury by presenting an irrelevant argument regarding the fact the plaintiff was suing his son. We agree.

> '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.' [*Badalamenti v William Beaumont Hospital-Troy*, 237 Mich App 278, 290; 602 NW2d 854 (1999), quoting *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982).]

Defense counsel made the following comments:

In spite of what [plaintiff's counsel] has to say about this . . . this is about a family relationship. Because that's what this whole trial has been about.

Actually, the underlying theory on this is perception versus reality. You've had a lot of perceptions. [Plaintiff's counsel] has wanted you to forget that it's a father suing a son. . . .

But that's what happened here. It's a father suing his son. And this is all about fathers and sons, and it's about what fathers teach their sons, and what they say they're teaching their sons, and what their actions tell them that they're teaching their sons.

[Plaintiff] says that he taught his son how to drive this car. He told him everything that he was supposed to do and he taught him right. But his actions were—as he said, I don't always use the emergency brake myself. A lot of times I just left it in gear. His actions were teaching his son something different.

Like most fathers, he taught his son to work hard, keep your nose clean, you'll make a good living. But his actions are, if you see an opportunity where you can make a quick buck, seize it, and it doesn't make any different if you're suing a member of your family.

Most fathers tell their sons, always tell the truth. But here, it's okay to change, quote, the truth. If it's for the family, that's all right.

This is about fathers and sons. This is about family, and this is about how and what messages we give to our children as they're growing up. And in this case, this father has reshaped his son into his own story—his wife too, for that matter.

Is this the example we want to give? Is this what we want to have society tell people, to tell their children that this is how you act in your life?

* * *

If your son falls out of your treehouse that you built, is it okay for him to sue you? If you walk out the door and you trip over a skateboard that your son left outside and you twist your knee, is it okay to sue him? Is it okay to sue your daughter if you step on the doll she left on the floor and you twist your ankle or you break your angle [sic]? Is that okay? Is that what we want to teach? Is that what this is all about?

* * *

> You know, tonight, this afternoon, tomorrow, next week, or whatever, you're going to be talking to your friends, your co-workers, your family, and what are you going to tell them? It's okay to sue your kids? It's okay for your kids to sue you? [Plaintiff's counsel] thinks that that's no big deal at all. I think it is.
>
> If you want to send a message, it's real simple. On the first question of this jury verdict form: Was the defendant negligent? All you have to do is just say no. Thank you.

We agree with plaintiff's contention that defense counsel's comments with respect to the parties' family relationship were improper, particularly counsel's statement urging the jury to "send a message" that it is not "okay" for family members to sue each other. " '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.' " *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 638; 601 NW2d 160 (1999), quoting *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996). In this case, defense counsel's comments do "reflect a studied purpose to inflame or prejudice" the jury. Moreover, given that the comments were irrelevant to any fact in issue, defense counsel clearly engaged in an attempt to "deflect the jury's attention from the issues involved."

We therefore find that this alleged misconduct does constitute error that was not harmless. *Badalamenti, supra*. We further conclude that defense counsel's focus on the parties' relationship played such a large part in the proceedings that it had the effect of denying plaintiff a fair trial. *Id.* Accordingly, notwithstanding plaintiff's failure to object to these comments during trial, we hold that he is entitled to a new trial.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Jeffrey G. Collins
/s/ Donald S. Owens