STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM R. FROEDE and LIBERTY MUTUAL INSURANCE COMPANY,

Plaintiffs-Appellants,

v

HOLLAND LADDER AND MANUFACTURING COMPANY and NATIONAL LADDER & SCAFFOLDING COMPANY,

Defendants-Appellees.

UNPUBLISHED
February 9, 2001

Nos. 211464; 217933
Oakland Circuit Court
LC No. 89-373873-NP

Before: O'Connell, P.J., and White and Saad, JJ.

PER CURIAM.

In these consolidated cases plaintiffs William Froede and Liberty Mutual Insurance Company appeal as of right from an April 15, 1998, jury verdict in favor of defendants. Plaintiffs also appeal by leave two orders granting defendants' motion for costs and fees. These parties have been before this Court previously in *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127; 523 NW2d 849 (1994). The present appeal follows this Court's remand for retrial in that case. We affirm in part, reverse in part, and remand for further proceedings.

I. Negative Evidence

Plaintiffs argue that the trial court erred in allowing defendants to introduce and elicit "negative evidence" of similar incidents. Plaintiffs assert that such evidence is irrelevant because the jurors were to evaluate the facts of the case before them, not if similar incidents had occurred in the past. Plaintiffs further contend that even if the evidence was marginally relevant, the prejudicial effect of the evidence outweighed its probative value, and the court should have excluded it under MRE 403 because the negative evidence could have misled the jury. This Court reviews for an abuse of discretion the trial court's decision to admit or exclude evidence. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 517; 592 NW2d 786 (1999).

Plaintiffs correctly argue that negative evidence generally has no probative value, and is therefore inadmissible. See *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 810; 286 NW2d 34 (1979). However, plaintiffs in this case alleged that the ladder was negligently designed and

manufactured. Manufacturers have a duty to design their products so as to eliminate any unreasonable risk of foreseeable injury. *Gregory v Cincinnati, Inc*, 202 Mich App 474, 478; 509 NW2d 809 (1993). "In order to sustain a claim of products liability, a plaintiff may opt to show that there was a defect in a product's design or that the manufacturer failed to warn of a risk inherent in the product's design." *Id*. at 479. Therefore, whether defendants had knowledge of any defects in the ladder's locking mechanism is indeed relevant to whether the alleged defect was foreseeable and whether defendants had a duty to warn the purchaser of the alleged defect. See *Przeradski v Rexnord, Inc*, 119 Mich App 500, 506; 326 NW2d 541 (1982) ("The admissibility of the claim-free history of plaintiff's model 6S cement mixer may have had a tendency to make the existence of a design defect less probable than it would be without such evidence.").

Plaintiffs' second argument relating to the admissibility of the negative evidence is that it constituted inadmissible hearsay. This argument is without merit. Hearsay consists of a statement. MRE 801(c). A "statement" is either an oral or written assertion, or nonverbal conduct that a person intends as an assertion. MRE 801(a). The negative evidence in this case involved neither a "statement" nor an "assertion"; rather it involved the lack thereof.

II. Impeachment and Rebuttal Evidence

At trial, plaintiffs sought to introduce the testimony of Herman House, who was the union steward on the project, that his brother-in-law sustained an injury when he was on an extension ladder and the ladder locks displaced. Plaintiffs wished to present this evidence to rebut defendants' negative evidence. Defendants argued that the statement was based on hearsay and that it was highly prejudicial because it happened at another construction site and therefore House lacked personal knowledge of how the accident happened. The trial court sustained defendants' objection. Plaintiffs also attempted to introduce into evidence a survey indicating that, in 1978, 951 injuries were attributable to ladder accidents on a "hard surface (such as compacted ground)," and that 147 occurred when the ladder slipped, fell or broke, even though it was secured at the top.

The trial court did not abuse its discretion in excluding plaintiffs' evidence. As an initial matter, this Court previously concluded that the United States Bureau of Labor Statistics survey was inadmissible because it was irrelevant in that it "did not concern accidents similar to the one at hand." *Froede, supra* at 135. Plaintiffs argue that on retrial they were offering the survey evidence for different purposes than before – to rebut defendants' claim that they had no knowledge of any defect and to establish that the injuries were reasonably foreseeable. According to plaintiffs, at the first trial they merely sought to prove that a survey of ladder injuries existed.

"[E]vidence proffered at trial must bear a particularly sufficient correspondence or connection to a case before it can be properly admitted. This threshold requirement represents the application of two distinct rules: first, the matter sought to be established by the evidence must be 'in issue'; and, second, the proffered evidence must have probative value with respect to that matter." *People v McKinney*, 410 Mich 413, 418; 301 NW2d 824 (1981) (citations omitted). Plaintiffs' evidence was not relevant because it was not probative of a fact at issue. Plaintiffs'

theory of the case was that the ladder's locking device was negligently designed or manufactured. Whether plaintiffs sought to introduce the evidence for a different purpose than before is inconsequential. Evidence that in the past people had been injured when using ladders would not have been particularly helpful to the jury. The evidence was not probative of the alleged defect in the lock, and so would not, in any appreciable way, have established that defendants had any knowledge of the alleged defect.

Plaintiff further argues that the survey evidence was admissible to impeach defendants' witnesses. At trial, defendants' expert George Kyanka testified that he had been involved with the American National Standards Institute (ANSI) for over fifteen years. He worked on a committee that drafted safety standards for wooden ladders. He testified that as far as he knew, the Consumer Products Safety Commission had never raised an issue before his committee regarding the particular type of gravity lock involved in the case. Jon Ver Halen, another of defendants' witnesses who was a consulting engineer, theorized that, based on the testimony of other witnesses and experts, the cause of the accident was likely that someone moved the ladder shortly before Froede's injury, and forgot to reset the locking mechanism. He further concluded that the ladder in question met the ANSI standards, specifically the requirement that ladder locks be "positive in their action."

According to plaintiffs, both House's testimony and the survey data should have been admissible to impeach Kyanka and Ver Halen. The trial court did not abuse its discretion in denying plaintiffs the opportunity to impeach defendants' witnesses with this evidence. As noted, this evidence only established that ladder accidents had occurred in the past. The evidence did not establish that the ladders had a faulty locking mechanism, or that the ladder did not comply with ANSI standards. The disputed evidence would have had minimal impeachment value. Further, plaintiff did not establish that House had any personal knowledge regarding the circumstances of his brother-in-law's fall.

We conclude that the issue whether the trial court erred in not allowing rebuttal testimony from Robert Nissly, whom defendant had listed as an expert witness, but did not call at trial, is unpreserved. At trial, plaintiffs stated an intent to call Nissly as an adverse witness, in rebuttal, and asked that defendants produce him as "an adverse witness." Defense counsel responded that that Nissly was not a party, so he was not an "adverse witness." The trial court agreed. This colloquy appears to have been directed to plaintiffs' demand that defendant produce the witness, and not to the larger question of the admissibility of the witness' testimony on rebuttal. Later, when the court asked whether plaintiff would be presenting rebuttal testimony, plaintiff did not mention Nissly. We conclude that plaintiffs abandoned the issue below, and it is not properly considered on appeal.

Plaintiffs also argue that the trial court erred in denying them the opportunity to impeach the testimony of defendants' expert, Jon Ver Halen, with the deposition testimony of its own expert, Robert Nissly, and with the prior testimony of another defense expert, Edward Burdette, who also was not called as a witness at the second trial.

The issues before for the jury were reasonably well-defined. They included the location of the accident and whether the ladder had been moved, the propriety of tying the top of the ladder to the resteel, securing the ladder by setting its base into holes in the clay, whether the

foregoing was foreseeable, and whether defendants were reasonable in manufacturing and selling a ladder with gravity locks. Whether Ver Halen's opinion differed from those of Nissly and Burdette was not a major issue because plaintiffs presented their own witnesses whose opinions contradicted Ver Halen's theory regarding the cause of the accident. Further, the record does not indicate that Ver Halen relied on the testimony of Nissly and Burdette. Additionally, plaintiffs were actually successful in placing Burdette's conflicting testimony before the jury. Whether members of the Consumer Product Safety Commission were on the ANSI committee that drafted the safety standards was also not a major issue in the case. Both sides were able to present evidence regarding whether the ladder's gravity locks were "positive in their action." Based on the foregoing, we cannot say that "there [was] no justification or excuse for the ruling made." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999). Therefore, the trial court did not err in denying plaintiffs the opportunity to impeach Ver Halen with Nissly's deposition testimony.

III. Adverse Inference Instruction

Finally, plaintiffs contend that the trial court erroneously instructed the jury that defendants were entitled to an adverse inference against plaintiffs for their failure to produce the actual ladder that Froede used at the time of the accident. We review for an abuse of discretion a party's claim of instructional error. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 193; 600 NW2d 129 (1999). "An instructional error does not require reversal where it did not result in a jury verdict inconsistent with substantial justice." *Wilson v General Motors Corp*, 183 Mich App 21, 31; 454 NW2d 405 (1990).

The trial court's instruction was based on SJI2d 6.01(d). The instruction permits an adverse inference, but the jury is free to decide for itself. *Lagalo*, *supra* at 521. We do not conclude that the court's instruction was in error. The court instructed the jurors that they could make an adverse inference *if* they believed that the ladder was within his control. "A plaintiff bringing a products liability action, under either a negligence or a warranty theory, must show that the defendant supplied a product that was defective and that the defect caused the injury." *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 399; 586 NW2d 549 (1998). Plaintiffs therefore had the burden of production in this case. Although the evidence below established that Froede did not own the ladder, the jury could have reasonably found that he was able to keep track of it, given that it was in the hands of a non-party, his employer. Moreover, any adverse inference would have had minimal effect. The jury specifically found that Holland Ladder and Manufacturing manufactured the ladder, and that National Ladder & Scaffolding sold it.

IV. Taxation of Costs

We next turn to plaintiffs' argument relating to the trial court's order allowing defendants to tax costs. We review a lower court's determination to tax costs for an abuse of discretion. *Portelli v I R Construction Products Co*, 218 Mich App 591, 604; 554 NW2d 591 (1996). The order of judgment in this case permitted defendants to tax all allowable costs. Thereafter, defendants filed a bill of taxable costs. In an order dated October 12, 1998, the trial court ordered the following:

1. IT IS HEREBY ORDERED that the Defendants, Holland Ladder and Manufacturing Company and National Ladder and Scaffold Company may tax costs in the above-captioned matter against William Froede and Liberty Mutual Insurance Company, jointly and severally, as follows:

a. All fees assessed by the Oakland County Circuit Court in the above-captioned matter in the amount of $1,211.48

b. General witness and service of subpoena fees in the amount of $518.74

c. Deposition and public document fees pursuant to MCL 600.2549[; MSA 27A.2549] in the amount of $2,151.82

d. Expert witness fees paid pursuant to MCL 600.2164[; MSA 27A.2164] to N. Hepner, R. Keil, D. Vankirk, E. Burdette, in the amount of $11,292.68

e. Expert witness fees and costs payable pursuant to MCL 600.2164[; MSA 27A.2164] for work incurred by expert, Jon Ver Halen, in the amount of $9,000

f. Expert witness fees and costs payable pursuant to MCL 600.2164[; MSA 27A.2164] for work incurred by expert George Kyanka, Ph.D., in the amount of $13,735.

2. IT IS HEREBY ORDERED that as to the remaining expert witness fees of Jon Ver Halen, Plaintiffs are entitled to conduct an evidentiary hearing by deposition which must take place within 60 days from the date of this order or by mutual agreement of the undersigned counsel as to establishing the amount of time and the amount of fees claimed by the Defendant's expert Jon Ver Halen and if not completed within 60 days of the date of this order or as otherwise stipulated to by the undersigned any objections to the remaining amounts claimed are waived and it is further ordered that they be paid in full.

3. IT IS HEREBY ORDERED that any inquiry will be limited solely to time and expenses charged for expert witness fees by Jon Ver Halen and deposition taken pursuant to the foregoing paragraph 2, will occur in the city of the respective expert's residence at the respective parties expenses, except for the expert's time in deposition which will be paid within 30 days of submission of the invoice to the party taking the deposition pursuant to MCR 2.302(B)(4)(c)(i)[.]

In a subsequent order, the court required plaintiffs to pay "[e]xpert witness fees and costs payable pursuant to MCL 600.2164[; MSA 27A.2164] for work incurred by expert, Jon Ver Halen, in the additional amount of $17,200.94."

Plaintiffs argued before the trial court, and now on appeal, that the motion fees and costs that defendants incurred during the first trial were not recoverable because defendants were not the "prevailing party" in the first trial. The trial court rejected plaintiffs' argument. Plaintiffs

assert that because they were the prevailing party at the first trial, and that this Court reversed the verdict in their favor through no fault of their own, they should not have to pay defendants' motion fees and costs.

MCR 2.625(A)(1) provides:

> Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action.

The answer to the issue that plaintiffs raise is contained in the clause allowing costs to the "prevailing party in an *action*." MCR 2.625(1) (emphasis added). Although this case involved two trials, they were part of one action – plaintiffs claims against defendants for negligence, breach of warranty, and loss of consortium. Therefore, defendants, who prevailed in the second trial, were the prevailing parties in the "action." See *Forest City Enterprises v Leemon Oil Co*, 228 Mich App 57, 81; 577 NW2d 150 (1998) (focusing "on the entire record"); *Severn v Sperry Corp*, 212 Mich App 406, 417; 538 NW2d 50 (1995) (rejecting a similar argument within the context of the mediation court rule, focusing instead on "the ultimate result of the case").[1] Plaintiffs also contend that each party prevailed in part, given that each side won one of the trials, and therefore neither party could tax costs. See *Barnett v International Tennis Corp*, 80 Mich App 396, 414-415; 263 NW2d 908 (1978) (affirming the trial court's denial of motions to tax costs where neither party prevailed in full). We decline to accept plaintiffs' argument. While plaintiffs did prevail in the first trial, this Court, in *Froede*, *supra*, determined that errors in the first trial required reversal of the jury's verdict in plaintiffs' favor. In light of this Court's reversal in *Froede*, we cannot conclude that plaintiffs prevailed in part in this case.

Plaintiffs next contend that the trial court abused its discretion when it awarded defendants $11,292.68 in expert witness fees for Hepner, Keil, Van Kirk, and Burdette. MCL 600.2164; MSA 27A.2164 provides for the taxation of costs associated with the testimony of expert witnesses. Plaintiffs argue on appeal that the statute does not allow a party to tax costs in a situation where, as here, the defendants did not prevail in the first trial. For the reasons stated above, we reject this argument. MCL 600.2164; MSA 27A.2164 provides for the taxation of costs in a "case." Although plaintiffs prevailed in the first trial, defendants won the case.

Plaintiffs further challenge the trial court's decision to require plaintiffs to pay $1,161.48, which represented defendants' one-third share of a court-ordered facilitator's fee. This fee was included as part of the $1,211.48 that the court awarded for "fees assessed by the Oakland County Circuit Court." In allowing the costs, the court relied on MCL 600.2529(1)(f); MSA 27A.2529(1)(f), which provides:

> For services under the direction of the court that are not specifically provided for in this section relative to the receipt, safekeeping, or expending of

[1] Similarly, with respect to the analogous federal rule regarding costs and fees, FRCP 54(d)(1), "the prevailing party at a second trial usually is awarded the costs of both trials." 10 Wright & Miller Federal Practice and Procedure, § 2667, pp 206-207.

> money, or the purchasing, taking, or transferring of a security, or the collecting of interest on a security, the clerk shall receive the allowance and compensation from the parties as the court may consider just and shall direct by court order, after notice to the parties to be charged.

Plaintiffs argue that this section did not authorize the recovery of a facilitator's fee. Plaintiffs rely on *JC Building Corp v Parkhurst Homes, Inc*, 217 Mich App 421, 429; 552 NW2d 466 (1996), where this Court held that no statutory authority existed for the trial court to allow the prevailing party to tax its portion of a mediation fee. Plaintiffs argue that a facilitator's fee is analogous to a mediator's fee, and that under the *JC Building* case, the facilitator's fee was not recoverable. We agree. The plain language of the rule indicates that it governs costs associated with "the receipt, safekeeping, or expending of money, or the purchasing, taking, or transferring of a security, or the collecting of interest on a security . . . ." We do not deal with such costs here. As this Court noted in *JC Building*, "[c]osts are not recoverable where there is no statutory authority." *Id*. at 429. Our review of the applicable law reveals no statutory authority providing that a prevailing party may tax this type of cost. The trial court therefore erred in allowing defendants to tax its portion of the facilitator's fee.

Plaintiffs also say that the trial court made several errors in allowing defendants to tax their witness and service of subpoena fees. First, they claim that at least $307 of the costs were attributable to the first trial. Second, they assert that some of the witnesses never testified. Third, according to plaintiffs, some of the witnesses received more than the statutory limit of $15 per day. Finally, they assert that subpeona fees are not taxable.

We reject plaintiffs' first argument (that defendants were unable to tax costs associated with the first trial) for the reasons we discussed above. With regard to plaintiffs' argument that defendants were not entitled to tax costs for witnesses who never testified, MCL 600.2552(1); MSA 27A.2552(1), effective at the time of the proceedings below, provided:

> A witness who attends any action or proceeding pending in a court of record shall be paid a witness fee of $12.00 for each day and $6.00 for each half day, or may be paid for his or her loss of working time but not more than $15.00 for each day shall be taxable as costs as his or her witness fee. A witness shall be reimbursed for his or her traveling expenses at the rate of 10 cents per mile in coming to the place of attendance and returning from the place of attendance, to be estimated from the residence of the witness, if his or her residence is within this state, or from the boundary line of this state that the witness passed in coming into this state, if his or her residence is out of the state.

Further, MCL 600.2559(1); MSA. 27A.2559(1) states:

> Except as provided in subsection (2), the following schedule applies as fees for process served out of the circuit court, the probate court, the district court, or any municipal court by any person authorized pursuant to this act or supreme court rule to serve process:

(n) For a subpoena directed to a witness, including a judgment debtor, $13.00 plus mileage.

Nothing in either of these two sections requires that the witness testify at trial in order for a party to tax their expert witness and subpoena fees. Further, plaintiffs have not identified which witnesses, if any, failed to attend the trial.

Plaintiffs' third argument is that the witnesses received more than the statutory limit of $15 per day. Plaintiffs neither cite the record nor provide any factual data to support their argument. A party may not state a position and then leave this Court with the task of discovering the basis of its claim. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). Nevertheless, our review of the record indicates that none of the witnesses of which plaintiffs complain received more than the statutory amount. Finally, although MCL 600.2559(1); MSA 27A.2559(1) does not expressly state that subpoena fees are taxable, MCR 2.625(A)(1) allows costs to the prevailing party in an action.

Plaintiffs contend that the trial court erred in awarding $13,735 and $9,000 in expert fees to George Kyanka and Jon Ver Halen respectively. They argue that much of Ver Halen's time was spent in strategy sessions, which were not taxable, and that Ver Halen incurred travel expenses that were unnecessary.

While plaintiffs' statement of the issue asserts that the trial court abused its discretion with respect to its order taxing costs for Kyanka's expert witness fees, plaintiffs advance only a general argument in their discussion. We therefore treat the issue of Kyanka's expert witness fees as abandoned. See *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992). We also do not conclude that the trial court abused its discretion in allowing defendants to tax Ver Halen's expert witness fees. Plaintiffs first contend, in conclusory fashion, that Ver Halen spent more time at trial than was necessary. Ver Halen testified on March 30 and 31, 1998, and was one of many witnesses who gave lengthy testimony, which could have made difficult the task of predicting the precise times that he would be needed. Whether Ver Halen's expenses were reasonable and necessary was an issue that the trial court was in the best position to decide. See *Barnett*, *supra* at 415. Plaintiffs have not convinced us of the need to disturb that decision.

Also, plaintiffs assert that expert fees do not include time spent preparing to give testimony. We disagree. See *Miller Brothers v Dep't of Natural Resources*, 203 Mich App 674, 691; 513 NW2d 217 (1994) ("we find no abuse of discretion in the trial court's award of plaintiffs' expert witness fees incurred in preparing for trial, even though those experts did not testify"); *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989) (trial court was empowered to "authorize expert witness fees which included preparation fees"); *Barnett, supra* at 414 ("It is proper to tax as cost fees paid to the expert in connection with his or her preparation for trial."). As our Supreme Court noted in *Highway Comm'r v Rowe*, 372 Mich 341, 343; 126 NW2d 702 (1964):

> It is not amiss to observe generally that few expert witnesses could testify properly or effectively without careful preparation and, on occasion, without necessary disbursement in the course of such preparation. For instance any medical or legal expert, testifying without preparation and confronted by a cross-

examiner of competence, would find little comfort in the witness box. More important, his testimony would provide but little light for the trier or triers of fact. Therefore, the trial does not appear to have abused its discretion in allowing those fees.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Henry William Saad