

STATE OF MICHIGAN
COURT OF APPEALS

TRANSCONTINENTAL INSURANCE
COMPANY and M & S AUTO REPAIR,

UNPUBLISHED
November 27, 2001

Plaintiffs-Appellants,

and

No. 219924
Wayne Circuit Court
LC No. 97-715810-NZ

G. FISHER CONSTRUCTION,

Plaintiff,

v

HASTINGS AUTO PARTS, INC.

Defendant-Appellee,

and

DESIGN BUILD TECHNOLOGIES, WALKER
CONSTRUCTION, INC. DEBDE
CORPORATION, LARRY ALFORD, and
STEWART HOME CORPORATION,

Defendants.

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

Plaintiff Transcontinental Insurance Company, subrogee of plaintiff M&S Auto Repair, appeals as of right the trial court's order denying their motions for JNOV and new trial following a jury verdict of no cause of action against defendant Hastings Auto Parts, Inc. We affirm.

Plaintiffs assert that the trial court erred in denying their motion for JNOV because (1) the evidence was insufficient to support the jury verdict on their negligence claim, and (2) the jury verdict ignored the great weight of the evidence with respect to causation and damages. We disagree. This Court reviews de novo a trial court's ruling on a motion for JNOV. *Morinelli v Provident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000), and views the evidence, and

all legitimate inferences that may be drawn therefrom, in a light most favorable to the nonmoving party. *Id.* If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Id.* at 261, citing *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

A trial court is required to concisely articulate its reasoning on a motion for JNOV after reviewing the sufficiency of the evidence either in a signed order, opinion filed in the action, or on the record. *Badalamenti v Beaumont Hospital*, 237 Mich App 278, 283; 602 NW2d 854 (1999). Here, it is apparent that the trial court only gave prefatory treatment to plaintiffs' motion for JNOV and failed to review the sufficiency of the evidence on the record. Therefore, the court erred by (1) not examining the evidence in a light most favorable to plaintiffs, (2) not applying the law to the facts, and (3) failing to articulate whether the evidence was legally sufficient to support plaintiffs' negligence claim. *Id.* Nevertheless, this Court's de novo review is not impeded by the trial court's error. *Id.* at 284.

To establish a negligence claim, a plaintiff must demonstrate that (1) the defendant owed the plaintiff a duty, (2) the defendant breached that duty, (3) the defendant's breach of its duty was the proximate cause of the plaintiff's injury, and (4) the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). A duty may arise by statute, contract, or the basic common-law rule that imposes an obligation to use due care or to act so as to not unreasonably endanger the person or property of another. *Hampton v Waste Management of Michigan, Inc*, 236 Mich App 598, 602; 601 NW2d 172 (1999).

The jury determined that defendant was not negligent and never reached the issue of causation or damages. Therefore, plaintiffs' argument that the jury ignored the great weight of the evidence with regard to causation and damages is without merit and we focus on whether defendant owed a duty to plaintiff at the time the wall collapsed on plaintiff's property. After reviewing the evidence in the light most favorable to defendant, we believe that it was reasonable for the jury to conclude that defendant did not owe plaintiffs a duty because defendant was not in actual possession and control of the premises when the collapse occurred and because defendant did not intend to control the premises once work on the building began. Moreover, defendant showed no signs of controlling the premises after hiring Design Build Technologies (DBT) as construction manager in November 1995. *Hampton, supra* at 603. Premises liability is conditioned on the presence of both possession of and control over the premises. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 660; 575 NW2d 745 (1998). Title to the property is not necessary, and liability depends on *actual* possession and *actual* control. *Id.* at 661-662. Although the trial court erred by failing to review the sufficiency of the evidence, it did not err by denying plaintiffs' motion for JNOV because the jury verdict was supported by the evidence.

Plaintiffs next assert that the trial court erred when it denied their motion for new trial because (1) the jury verdict was against the great weight of the evidence because plaintiffs proved liability and damages, and (2) it denied plaintiffs a fair trial due to the irregularities in the court proceeding. We disagree. A trial court's denial on a motion for new trial is reviewed for an abuse of discretion, *Morinelli, supra* at 261, and may be reversed only where the denial was so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias. *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000).

A new trial may be granted when a party's substantial rights have been materially affected due to irregularities in the proceedings of the court that denied the moving party a fair trial or when the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(a)(e); *Snell v UACC Midwest, Inc*, 194 Mich App 511, 516; 487 NW2d 772 (1992); *Poirier v Grand Blanc Twp (After Remand)*, 192 Mich App 539, 547; 481 NW2d 762 (1992).

Plaintiffs' argument that damages were proven is irrelevant because the jury determined that defendant was not negligent and never reached the question of damages. Further, our review of the records shows that there was enough evidence to allow the jury to determine that Hastings did not owe plaintiff a duty at the time the wall collapsed because Hastings had given up actual possession and control of the premises to DBT – the construction manager. Plaintiffs' argument that they were denied a fair trial because of alleged irregularities in the court proceeding is without merit and has been waived for appeal because plaintiffs' counsel acquiesced to the trial schedule and failed to raise the argument at oral argument on their JNOV/new trial motion. *Hilgendorf v St John Hospital & Medical Center Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001); *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471-472; 628 NW2d 577 (2001). Further, even if preserved, plaintiffs failed to show how its substantial rights were materially affected because the jury verdict was supported by the evidence. MCR 2.611(A)(1).

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Jessica R. Cooper