STATE OF MICHIGAN

COURT OF APPEALS

CHARLES GRENADIER, Attorney-In-Fact for GAYL GRENADIER, MICHAEL J. ODETTE, Conservator for the Estates of JOSHUA ODETTE and DANIELLE ODETTE, CHARLES GRENADIER, and NENA GRENADIER,

Plaintiffs-Appellees,

v

CITY OF BLOOMFIELD HILLS,

Defendant-Appellant.

UNPUBLISHED
June 7, 2002

No. 224224
Oakland Circuit Court
LC No. 95-498183-NO

CHARLES GRENADIER, Attorney-In-Fact for GAYL GRENADIER, MICHAEL J. ODETTE, Conservator for the Estates of JOSHUA ODETTE and DANIELLE ODETTE, CHARLES GRENADIER, and NENA GRENADIER,

Plaintiffs-Appellants,

v

CITY OF BLOOMFIELD HILLS,

Defendant-Appellee.

No. 224246
Oakland Circuit Court
LC No. 95-498183-NO

Before: Cavanagh, P.J., and Gage and Murray, JJ.

PER CURIAM.

Defendant appeals as of right an order denying its motion for judgment notwithstanding the verdict (JNOV) or new trial and plaintiffs' cross-appeal as of right the same order denying their motion for relief from judgment, a new trial and/or additur entered following a jury trial in this negligence action. We affirm.

Defendant first argues that it was entitled to JNOV because plaintiffs failed to establish that the cracks in the roadway were a cause in fact of the accident. This Court reviews de novo the evidence presented at trial to determine if the trial court clearly erred in denying defendant's motion for JNOV. *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 284; 602 NW2d 854 (1999).

To establish a prima facie case of negligence, a plaintiff must prove that the defendant's breach of duty was a cause of the plaintiff's injuries. See *Reeves v Kmart Corp*, 229 Mich App 466, 479; 582 NW2d 841 (1998). The issue of causation is ordinarily for the jury and requires proof of both cause in fact and legal, or proximate, cause. *Haliw v Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001); *Reeves*, *supra* at 480. The cause in fact element is satisfied if the plaintiff presents substantial evidence from which a jury could conclude that, more likely than not, but for the defendant's negligent conduct she would not have been injured. See *Haliw*, *supra*; *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

Here, defendant contends that plaintiffs failed to prove that the pitch-over occurred at the location of the cracks or because of the cracks. We disagree. The eyewitness to the pitch-over, Waeschle, repeatedly testified that he could identify where the accident occurred using the turrets that he clearly saw, which ran alongside Cranbrook Road, as a reference point. Waeschle further testified that he observed the condition of the road in the area that Gayl lost control of the bicycle, albeit on a later date, and saw the cracks in the road at the location of the accident. Further, Golec, Gayl's riding companion, testified that he returned to the scene three days after the accident and went to the area where Gayl had landed and saw a large gouge in the grass near where the bicycle had been laying. He also walked the road and saw the cracks and voids in the roadway. Considering the evidence and all reasonable inferences in a light most favorable to plaintiffs, plaintiffs supported their claim that Gayl lost control of the bicycle at or in the immediate vicinity of the x-cracks. See *Barrett v Kirtland Community College*, 245 Mich App 306, 311-312; 628 NW2d 63 (2001).

The evidence also supported a finding that the pitch-over occurred because of the x-cracks and included that (1) Gayl had been a bicycle rider for years and had experience riding over hilly terrain; (2) although Gayl had only ridden the Puch bicycle one time before, she rode a bicycle for years that was nearly identical to the Puch bike, particularly with regard to the handlebar configuration, brakes, tires, and handling characteristics; (3) Gayl was near the bottom of the hill and, according to Waeschle, was in control of her bike up to the time that the rear tire suddenly projected up in the air; (4) Gayl was pitched over the handlebars of the bicycle at or in the immediate vicinity of the x-cracks; (5) plaintiffs' expert, Dr. Broker, testified that Gayl would have been traveling between eighteen and twenty-two miles an hour at the time she would have seen the defects and would not have had time to effectively avoid them, although a reasonably prudent rider would have attempted to do so; and (6) Golec testified that an unidentified bicycle rider told him that he saw that Gayl had an expression of panic on her face and that she hit the brakes just prior to being pitched over the handlebars. In sum, the trial court

properly denied defendant's motion for JNOV because, viewing the evidence and all legitimate inferences in a light most favorable to plaintiffs, plaintiffs presented substantial evidence from which a jury could reasonably infer that, more likely than not, but for defendant's failure to repair the cracks on Cranbrook Road Gayl would not have been injured.

Next, defendant argues that it was entitled to a new trial because the trial court improperly denied its motion to admit plaintiffs' complaint and improperly admitted photographs of Cranbrook Road. We disagree. The decision whether to admit evidence is within the trial court's discretion and will not be disturbed on appeal absent an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Generally, all relevant evidence is admissible. MRE 402; *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188-189; 600 NW2d 129 (1999). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998). However, even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403; *Tobin v Providence Hosp*, 244 Mich App 626, 637-638; 624 NW2d 548 (2001).

Defendant first argues that the trial court's denial of its motion to admit certain paragraphs of plaintiffs' complaint into evidence deprived it of the opportunity to "show the speculative nature of Plaintiffs' theory of causation." However, the averments in plaintiffs' complaint relating to the bicycle manufacturer are neither material nor probative on the issue whether defendant's failure to repair Cranbrook Road was a proximate cause of Gayl's injuries. Further, the trial court properly concluded that, even if relevant, the probative value was substantially outweighed by the danger of prejudice because plaintiffs were entitled to plead alternative or inconsistent claims. See MCR 2.111(A)(2); MRE 403; *Tobin*, *supra*; *Slocum v Ford Motor Co*, 111 Mich App 127, 134; 314 NW2d 546 (1981).

Finally, defendant argues that the trial court erroneously permitted plaintiffs to admit into evidence photographs of Cranbrook Road that were taken months after the accident. We disagree. Both Waeschle and Golec repeatedly testified that the photographs admitted at trial fairly and accurately depicted the condition of the road. Golec testified that he returned to the scene three days after the accident and saw the cracks and voids depicted in the photographs at issue. Charles Grenadier testified that he went to the scene about five days after the accident and the condition of the road was the same as depicted in the photographs admitted at trial. Further, plaintiffs' expert, Cupal, testified that the photographs accurately depicted the condition of the road on the date of the accident. Consequently, the trial court did not abuse its discretion when it admitted the photographs of Cranbrook Road.

On cross-appeal, plaintiffs argue that the trial court abused its discretion in denying their motion for costs under MCR 2.625(A)(1) because they were the prevailing parties. We disagree. This Court reviews the trial court's decision on a motion for costs under MCR 2.625 for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996).

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.

Consequently, the taxation of costs under MCR 2.625(A) is within the trial court's discretion, even when the party prevailed in the action. See *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997).

Here, plaintiffs were the prevailing parties because they prevailed on the entire record and improved their position by the litigation as evidenced by the amount of the jury verdict and judgment entered in their favor. See *Ullery v Sobie*, 196 Mich App 76, 82; 492 NW2d 739 (1992); *McMillan v Auto Club Ins Ass'n*, 195 Mich App 463, 466; 491 NW2d 593 (1992). However, the trial court denied plaintiffs' motion for costs primarily because the jury found Gayl eighty percent responsible for her injuries. We defer to the trial court's discretionary ruling because the result is not "'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), quoting *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959).

Next, plaintiffs argue that they were entitled to additur or a new trial because the jury failed to award Gayl past and future noneconomic damages and failed to award Gayl's children past noneconomic damages. We disagree. This Court reviews a trial court's decisions on motions for additur or a new trial for an abuse of discretion. See *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34; 609 NW2d 567 (2000); *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997); *Arnold v Darczy*, 208 Mich App 638, 639-640; 528 NW2d 199 (1995).

MCR 2.611(A)(1)(d) and (e) provide that a new trial may be granted if a verdict is clearly or grossly inadequate or is against the great weight of the evidence. MCR 2.611(E)(1) permits additur if the trial court determines that the verdict was inadequate in light of the evidence. See *Palenkas v William Beaumont Hosp*, 432 Mich 527, 532-533; 443 NW2d 354 (1989). Here, plaintiffs argue that they were entitled to a new trial or additur because the jury allegedly ignored substantial and uncontroverted evidence in support of their noneconomic damages. However, the focus of MCR 2.611 is on the verdict, not the amount allocated to each particular category of damages. See, also, *Kelly v Builders Square, Inc*, 465 Mich 29, 38-39; 632 NW2d 912 (2001). Plaintiffs have failed to show that the verdict of almost six million dollars was clearly or grossly inadequate or against the great weight of the evidence; accordingly, the trial court properly denied plaintiffs' motion for a new trial or additur on this ground.

Finally, plaintiffs argue that they were entitled to relief from judgment under MCR 2.612 because the jury verdict form failed to include two years with regard to Gayl's future economic damages. We disagree. This Court reviews a trial court's decision on a motion for relief from judgment for an abuse of discretion. *Detroit Free Press, Inc v Dep't of State Police*, 233 Mich App 554, 556; 593 NW2d 200 (1999). Here, the trial court did not abuse its discretion because plaintiffs drafted the jury verdict form, submitted it to the trial court, and expressly approved its use by the jury; therefore, neither MCR 2.612(A)(1) nor MCR 2.612(C)(1)(a) mandate relief. See *Central Cartage Co v Fewless*, 232 Mich App 517, 536; 591 NW2d 422 (1998); *Limbach v Oakland Co Bd of Co Rd Comm'rs*, 226 Mich App 389, 393; 573 NW2d 336 (1997).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Christopher M. Murray