STATE OF MICHIGAN

COURT OF APPEALS

LORETTA KARPANAI,

Plaintiff-Appellant,

v

ROSALINDA VICTORY and GLOBAL TECHNOLOGY ASSOCIATES, LTD., a Michigan corporation,

Defendants-Appellees.

UNPUBLISHED
October 29, 2002

No. 232267
Wayne Circuit Court
LC No. 99-906458-NI

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Following a jury trial, the trial court entered a judgment of no cause of action. Plaintiff had sought to recover for her personal injuries after she was struck by an automobile. Plaintiff appeals as of right. We affirm.

This accident occurred in plaintiff's driveway after plaintiff asked defendant Victory to re-park the automobile.[1] The automobile had been modified with a left accelerator pedal (LFA) to accommodate plaintiff's semi-paralysis on her right side—the result of a stroke several years earlier. The modification allowed plaintiff to drive the automobile, but only after several hours of specialized training. Presumably, while parking the automobile, defendant Victory pushed down on the accelerator, rather than the brake, causing the automobile to speed up and strike plaintiff. Plaintiff suffered serious injuries.

Plaintiff sued defendant Victory under a general theory of negligence. Plaintiff also sued the companies that installed and manufactured the LFA, contending that they both negligently failed to provide proper instruction and warnings. In an amended complaint, plaintiff alleged that she would not have allowed defendant Victory to drive the automobile if there had been adequate instructions and warnings. Plaintiff also added allegations that the installer and manufacturer were grossly negligent. In a final amended complaint, plaintiff joined defendant Global as the owner of the automobile, MCL 257.401.

[1] Although plaintiff regularly used the automobile in question, defendant Global owned it.

Before trial, plaintiff settled her claims against the manufacturer and the installer; thus, those companies were dismissed from the lawsuit. Plaintiff proceeded to trial against defendant Victory and Global (defendants). The jury attributed the following percentages of fault: (i) defendant Victory, ten percent; (ii) the LFA installer, zero percent; (iii) non-party David Zempel, thirty-five percent; and (iv) plaintiff, fifty-five percent. Because MCL 500.3135(2)(b) provides that "damages shall not be assessed in favor of a party who is more than 50% at fault," the jury's finding that plaintiff was fifty-five percent at fault mandated a judgment of no cause of action.

On appeal, plaintiff contends that the trial court made several evidentiary errors that deprived her of her right to a fair trial. Generally, we review a trial court's decision to admit evidence for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). "An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion." *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Specifically, plaintiff contends that the trial court abused its discretion when it allowed defendants to present evidence concerning the absence of warning labels[2] inside the automobile. Indeed, defendants contended that Zempel and plaintiff were at least partially at fault for the accident for not affixing the warning labels to the interior of the automobile. In support of this contention, defendants introduced evidence suggesting that the modified automobile should have come with warning labels stating the danger in using the automobile without special training.

MCL 600.6304(1)(b) provides in pertinent part that a jury must make findings of fact regarding "[t]he percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff . . . regardless of whether the person was or could have been named as a party to the action." Here, the challenged evidence concerned defendants' theory that plaintiff and Zempel were at fault for the accident. In light of the statutory mandate that the jury determine the fault of "all persons," we believe that defendants were plainly entitled to present evidence supporting their theory. Accordingly, the trial court did not abuse its discretion in admitting the evidence.[3] *Chmielewski, supra* at 614

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[2] These warnings included an adhesive warning sticker and a string tag warning. For example, the string tag distributed by the LFA installer read as follows: "Death or serious injury can occur. This vehicle has been specially modified. Do not drive this vehicle without proper training. Do not operate equipment, wheelchair lift, ramp, electronic controls or other mobility accessories without proper training."

[3] Plaintiff also contends that the evidence was inadmissible because the LFA is a "simple tool" that did not require a warning. Similarly, plaintiff contends that a warning was not required because defendant Victory testified that she was "aware" that the LFA device had been installed and knew that an automobile could be a dangerous instrument. Even though there was evidence suggesting that LFA was not a complicated instrument, the evidence also indicated that special training was required to operate an automobile equipped with an LFA. Moreover, although defendant Victory testified that she was "aware" that the LFA had been installed, her testimony did not necessarily mean that she was "aware" that driving an LFA-equipped automobile was

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Next, plaintiff challenges the trial court's decision to qualify James Bishop, Jr. as an expert witness. We review a trial court's decision to qualify a witness as an expert for an abuse of discretion. *Tate v Detroit Receiving Hosp*, 249 Mich App 212, 215; 642 NW2d 346 (2002). Guiding the trial court's decision is MRE 702, which provides as follows:

> If the court determines that recognized scientific, technological, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In addition, "Michigan endorses a broad application of these requirements in qualifying an expert." *Bouverette v Westinghouse Elec Corp*, 245 Mich App 391, 400; 628 NW2d 86 (2001).

Bishop was the president and part owner of one of the few Michigan companies that modified vehicles for handicapped drivers. He noted that he regularly attended meetings of the National Mobility Equipment Dealers Association and that he had discussed the inherent dangers of the modifications with other manufacturers. He also had contacts with rehabilitation specialists who informed him about the risks associated with use of the LFA. Based on these contacts, he designed the warning labels to be installed in all the vehicles his company modified with an LFA or any other adaptive device. He noted that the warning labels were designed and implemented to both reduce liability and improve safety. To be sure, plaintiff correctly notes that Bishop lacked the formal education and scientific expertise that experts commonly possess. However, MRE 702 also recognizes that personal experience may qualify a person as an expert. Here, the uniqueness of the LFA, as well as the competing theories surrounding its simplicity, justified allowing Bishop to testify as an expert witness to aid the jury's understanding of these theories. Therefore, we do not believe that the trial court abused its discretion by allowing Bishop to be qualified as an expert witness.[4] *Tate, supra* at 215.

Plaintiff also contends that Bishop's testimony should not have been allowed because defendants listed him as a lay witness, rather than as an expert witness, on the joint final pretrial order. However, the court properly noted that plaintiff had deposed Bishop before trial. Thus, plaintiff was fully apprised of what Bishop's testimony would be. Accordingly, we do not find an abuse of discretion. *Tate, supra* at 215.

Next, plaintiff contends that the trial court erred in allowing defendants to read certain answers to interrogatories into evidence. Plaintiff contends that these answers were inadmissible because they related to what plaintiff's expert would have testified to regarding plaintiff's inconsistent claims against the other defendants. Plaintiff notes that because inconsistent claims are not admissible as substantive evidence against a plaintiff, answers to interrogatories

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more dangerous than operating a normal automobile. At the very least, plaintiff's arguments merely indicate that there were factual questions for the jury to resolve in determining fault.

[4] For the same reasons, we do not believe that the trial court abused its discretion in allowing Bishop's testimony. *Tate, supra* at 215.

supporting the inconsistent claims are also inadmissible as substantive evidence. See *Hall v Detroit Marine Terminals, Inc*, 409 Mich 888 (1980) (holding that inconsistent claims elaborated in answers to interrogatories are inadmissible as admissions).

However, the trial court specifically ruled that defendants could not introduce the answers as "admissions." Further, the trial court ruled that defendants could not introduce either the inconsistent allegations in the complaint or any answers to the interrogatories that referenced those inconsistent allegations. Accordingly, the *Hall* decision does not support plaintiff's claim of error.[5] Therefore, because the trial court limited defendants' ability to use the answers, we do not believe that the trial court abused its discretion in admitting the answers.

Plaintiff also argues that the answers' prejudicial effect substantially outweighed their probative value. Plaintiff specifically contends that the answers confused the issues. Although several of the answers supported defendant's theory of fault, other answers supported plaintiff's theory of fault. Accordingly, to whatever extent the instant matter was confusing, it was because of the competing theories of fault, not the answers. Regardless, the answers were directly relevant to the jury's determination of the fault attributable to all persons because they reflected plaintiff's expert's opinion on the factors that contributed to the accident. Accordingly, we do not believe that the trial court abused its discretion by allowing the admission of plaintiff's answers to interrogatories.[6]

Plaintiff's final allegation of error is that plaintiff was deprived of her fundamental right to a fair trial because the trial court allowed the jury to assess fault against Zempel, a nonparty. Plaintiff claims that defendants did not file a notice of nonparty fault regarding Zempel and did not mention the defense of comparative nonparty fault in their final pretrial summary.

However, defendant Global's answer to plaintiff's final complaint included an affirmative defense stating that plaintiff's injuries "were caused in whole or in part by actions of third-parties over whom this Defendant had no control." Defendant Victory's answer included a similar defense, as well as an averment that she was "entitled to all reliefs and set-offs permitted by the Tort Reform Act . . . ." Accordingly, plaintiff was generally on notice that defendants would raise the issue of nonparty fault.

More importantly, the manufacturer of the LFA filed a notice of nonparty fault against Zempel. MCR 2.112(K)(3)(a) states that a notice of nonparty fault "filed by one party identifying a particular nonparty serves as notice by all parties as to that nonparty." Thus, the

[5] In addition, the *Hall* Court noted that answers to interrogatories are admissible at trial as both substantive evidence and impeachment evidence, provided that they are otherwise admissible. *Hall, supra* at 888.

[6] Plaintiff further claims that the answers were lacking in probative value because: (i) they were only plaintiff's expert's *anticipated* testimony, (ii) the answers were taken almost a year before trial, and (iii) plaintiff's attorney signed them. However, the answers should have been prepared following consultation with plaintiff's expert. Moreover, we agree with the trial court's ruling that an attorney's signature increases the reliability of the answers. Accordingly, we find these arguments unpersuasive.

manufacturer's notice of nonparty fault against Zempel served as notice by all defendants to plaintiff. Therefore, plaintiff was specifically notified that defendants would raise the issue of Zempel's fault.

Moreover, plaintiff's counsel stated that defense counsel informed him shortly before the trial started that Zempel's fault would be an issue. However, plaintiff's counsel did not raise the notice issue until after the proofs closed. Thus, we agree with the trial court's conclusion that plaintiff's counsel's delay in raising the notice issue prevented it from curing the error. It is well established that "error requiring reversal cannot be an error that the aggrieved party contributed to by plan or negligence." *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 684; 591 NW2d 438 (1998). Having waited until after defendants submitted evidence of non-party fault before raising the notice issue, we believe that plaintiff contributed to the error. Consequently, appellate review of this issue is waived. *Id.*

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens