

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT MCCALVIN,

Plaintiff-Appellant,

v

CITY OF DETROIT,

Defendant-Appellee.

UNPUBLISHED

December 13, 2002

No. 236973

Wayne Circuit Court

LC No. 00-009633-NI

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

PER CURIAM.

Plaintiff appeals as of right a verdict of no cause of action entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was driving northbound on Shaefer Avenue in Detroit when the left rear tires on a southbound bus broke loose and traveled toward his vehicle. One of the tires hit his vehicle. He filed suit alleging that defendant negligently failed to properly inspect and repair the bus, and that as a result of the accident he suffered injuries to his neck and back. The trial court denied defendant's motion for summary disposition based on governmental immunity.

The case proceeded to a bench trial. Plaintiff testified that as a result of the accident he suffered injuries for which he was still being treated and which negatively affected his daily life. Christopher King, plaintiff's expert witness, testified that he had a mechanic's training license, but that he had never performed repair work on a bus. He opined that repairs to the bus had been performed in a negligent manner, and that the left rear tires came off the bus because the lug nuts were either too loose or too tight. He acknowledged that he was not familiar with the torque specifications for a bus.

Plaintiff's physician, Dr. Lerner, testified that the accident aggravated plaintiff's pre-existing injuries to his neck and back. Jimmy Coburn, the bus driver, testified that he had not had any trouble with the bus prior to the accident. Robert VanDervoort, defendant's superintendent of vehicle maintenance, testified that the repair records did not indicate that the bus had any previous problems with the left rear tires. He stated that an inspection of the bus revealed that a screw head protruded into a tire, worked its way into the drum, and caused the tires' lug nuts to lose their torque. Eventually, the tires came off the bus. VanDervoort testified that he found no indication the lug nuts were not properly torqued, and it was highly unlikely a mechanic would notice the screw was protruding into a tire.

In its findings of fact and conclusions of law the court found no evidence showed that at the time of the accident the bus was being driven in a reckless manner. The evidence showed that the left rear tires came loose, and that one tire struck plaintiff's vehicle. The expert witnesses agreed that the lug nuts came loose and allowed the tires to come off the bus. The trial court found VanDervoort's testimony regarding the cause of the accident to be more credible than the testimony given by King. The court concluded the evidence did not establish that defendant acted negligently, and entered a verdict of no cause of action. Plaintiff did not move for a new trial in the trial court.

A new trial may be granted on some or all of the issues if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). A verdict may be overturned as against the great weight of the evidence only if it was manifestly against the clear weight of the evidence. A verdict should not be set aside if there was competent evidence to support it. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). In a case tried without a jury, a motion for a new trial need not be made before the trial court in order to preserve the issue. MCR 7.211(C)(1)(c).

We review the factual findings of a trial court sitting without a jury under the clearly erroneous standard. MCR 2.613(C). A finding is clearly erroneous when after a review of the entire record we are left with the definite and firm conviction that a mistake was made. We review a trial court's conclusions of law de novo. *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000).

To establish a prima facie case of negligence, a plaintiff must prove: (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached the duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injuries; and (4) that the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

Plaintiff argues that the verdict was against the great weight of the evidence. We disagree and affirm the verdict of no cause of action. The trial court found that no evidence showed the accident occurred because the bus was being driven in a reckless manner. Rather, the accident occurred when the left rear tires came off the bus. These findings are not clearly erroneous. MCR 2.613(C). The parties' experts offered differing testimony as to why the tires' lug nuts loosened and allowed the tires to come off the bus. The trial court found the testimony of VanDervoort, a supervisor who oversaw work on defendant's buses and who inspected the bus in question, to be more credible than that of King, an unlicensed mechanic trainee who had never worked on a bus and who admittedly was unfamiliar with torque specifications for buses. The trial court was entitled to weigh the credibility of the witnesses and to determine what testimony it would accept. *Sparling Plastic Industries, Inc v Sparling*, 229 Mich App 704, 716; 583 NW2d 232 (1998). No error occurred.

Plaintiff's contention that the accident would not have happened absent negligence on the part of defendant is an assertion of the doctrine of *res ipsa loquitur*. Under this doctrine an inference of negligence can arise when a plaintiff's injury: (1) ordinarily would not have occurred in the absence of negligence; (2) was caused by an agency or instrumentality within the exclusive control of the defendant; and (3) was not due to any voluntary action or contribution on the part of the plaintiff. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 194; 540 NW2d 297 (1995). VanDervoort testified the protrusion of the screw into the tire was not

something that a mechanic would likely notice, and no evidence showed the lug nuts were not torqued properly. Plaintiff did not establish that the accident would not have happened absent negligence on the part of defendant. *Id.* VanDervoort's testimony supported the trial court's finding that the accident did not occur as a result of any negligence on defendant's part. The verdict was not manifestly against the clear weight of the evidence, and competent evidence existed to support it. *Ellsworth, supra.* Plaintiff is not entitled to a new trial.

Affirmed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Mark J. Cavanagh