STATE OF MICHIGAN

COURT OF APPEALS

BEVERLY HEIKKILA, Personal Representative for the Estate of SHERI L. WILLIAMS,

Plaintiff-Appellant/Cross-Appellee,

v

NORTH STAR STEEL CO. and INTERNATIONAL MILL SERVICE, INC.,

Defendants,

and

MARC ROLLAND SEVIGNY and J.R. PHILLIPS TRUCKING, LTD.,

Defendants-Appellees/Cross-Appellants.

UNPUBLISHED
November 5, 2009

No. 285917
Washtenaw Circuit Court
LC No. 08-000111-NI

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

In this negligence action, plaintiff Beverly Heikkila, as the personal representative for the estate of Sheri L. Williams, appeals as of right the jury trial's verdict in favor of defendants Marc Rolland Sevigny and J.R. Phillips Trucking, Ltd. (JRP). We affirm.

I. Factual Background and Procedural History

This case involves a fatal accident in which Williams was struck in the head by a large object as she was driving eastbound on Front Street in Monroe, Michigan. At the time of the accident, Sevigny, a JRP employee, was driving westbound on Front Street in a truck owned by JRP. The truck was hauling slag[1] from a nearby steel mill owned by defendant North Star Steel

[1] "Slag" is defined as "the more or less completely fused and vitrified matter separated during the reduction of a metal from its ore." *Random House Webster's College Dictionary* (2005), p 1150.

Co. (North Star). Defendant International Mill Service, Inc. (IMS) had contracted with North Star to process and dispose of slag and had leased a portion of North Star's property. Plaintiff theorized that a piece of slag became lodged in the tires of Sevigny's truck while it was on the steel mill property and, after the truck left the property and accelerated on Front Street, dislodged from the tires and crashed through Williams' windshield, striking her in the head. Plaintiff initiated this negligence action against all four original defendants, alleging in part that Sevigny was negligent for failing to timely and properly inspect his truck for slag lodged in or between the tires and that JRP was vicariously liable for Sevigny's actions.

Following several motions for summary disposition, the trial court granted defendants summary disposition under MCR 2.116(C)(10), finding that plaintiff could not establish that defendants proximately caused Williams' death and that Sevigny and JRP owed no duty to Williams to detect and remove slag from the truck tires, "due to the unforeseeable nature of" the accident. Plaintiff appealed to this Court, which reversed the trial court in a split opinion. *Heikkila v North Star Trucking, Inc*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2004 (Docket No. 246761). The majority held that plaintiff "presented sufficient evidence to indicate a 'reasonable likelihood of probability' that defendants' actions served as the proximate cause of Williams' death," and that "the trial court erred in concluding that Sevigny and [JRP] owed no duty to Williams," although the majority declined to determine the parameters of the duty owed. The majority determined that "[b]ecause there is a question as to the conditions of the road, and whether Sevigny satisfied any duty by inspecting his tires, we conclude that the issue of Sevigny's duty, and therefore [JRP's] duty, is properly an issue for the jury to resolve." In her partial dissent, Judge Kirsten Kelly agreed with the trial court that "plaintiff failed to create a genuine issue of factual causation," that "as a matter of law Sevigny and [JRP] owed no duty to [Williams]," and that "even assuming an on-going duty . . . the evidence does not establish that Sevigny breached the alleged duty to inspect tires before leaving North Star premises."

Defendants filed applications for leave to appeal in the Supreme Court. The Supreme Court reversed this Court in part, reinstating summary disposition in favor of North Star and IMS for the reasons stated in Judge Kelly's partial dissent. *Heikkila v North Star Trucking, Inc*, 474 Mich 1080 (2006). It denied Sevigny and JRP's application for leave to appeal. *Id*. On remand to the trial court, Sevigny and JRP filed a renewed motion for summary disposition, alleging in part that there was insufficient evidence to prove that the object that struck Williams was slag and, therefore, that plaintiff could not establish proximate causation. The trial court denied the motion, based on the law of the case and genuine issues of material fact.

The case proceeded to trial. The jury returned a verdict of no cause of action in favor of defendants[2] and a judgment was entered to that effect. Plaintiff subsequently moved for judgment notwithstanding the verdict or a new trial under MCR 2.610 and 2.611, arguing that the jury's verdict was against the great weight of the evidence and that there were irregularities in the proceedings. Specifically, plaintiff argued that "the jury ignored the overwhelming evidence

[2] Hereinafter, Sevigny and JRP will be referred to collectively as "defendants."

of negligence on the part of . . . Sevigny," and that "the drastic change in the testimony of the Defendants' expert (James Hrycay) [between the time of his deposition and the time of trial] . . . completely blind-sided the Plaintiff as Defendants failed to provide notification to the Plaintiff of the aforesaid change and/or an opportunity to redepose their expert." The trial court denied plaintiff's motion, stating, "Well, I listened to all of the evidence in this case. I don't hesitate to say that I think . . . this jury clearly got it wrong, but what I think is not what's important. . . . I have what I think is a constitutionally required reverence for the judgment of the jury even when I disagree with them. . . . [M]otion . . . denied." Plaintiff now appeals as of right.

II. Analysis

Plaintiff argues on appeal that the jury's verdict was against the great weight of the evidence and, therefore, that the trial court erred in denying her motion for a new trial. Plaintiff additionally argues that she was denied a fair trial due to Hrycay's surprise trial testimony. We disagree.

We review the trial court's denial of plaintiff's motion for a new trial for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). An abuse of discretion occurs when the result is outside the range of principled outcomes. *Barnett v Hildago*, 478 Mich 151, 158; 732 NW2d 472 (2007).

A motion for 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). Such a motion should only be granted when the evidence preponderates so heavily against the verdict that a serious miscarriage of justice would otherwise result. *Campbell*, *supra*. The jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). A trial court's determination that a verdict is not against the great weight of the evidence is given substantial deference. *Campbell*, *supra*.

The evidence presented at trial established that immediately before the accident, Williams was driving eastbound on Front Street. Sevigny was driving westbound, hauling a load of slag from the nearby North Star steel mill. As the vehicles passed one another on the road, a large object crashed through Williams' windshield and struck her in the head. As indicated, plaintiff's theory of the case was that a piece of slag became lodged in the tires of Sevigny's truck while it was on the steel mill property and, after the truck left the property and accelerated on Front Street, dislodged from the tires and crashed through Williams' windshield. Plaintiff alleged that Sevigny was negligent for failing to timely and properly inspect his truck for slag lodged in or between the tires.

To establish a prima facie case of negligence, the plaintiff must prove that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of the duty was a proximate cause of the plaintiff's damages, and (4) the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). There are a number of factors pertinent to determining whether to impose a duty under common law. See *Cummins v Robinson Twp*, 283 Mich App 677, 692-693; 770 NW2d 421 (2009). Ordinarily, whether a duty exists is a question of law for the court. *Brown v Brown*, 478 Mich 545, 552; 739 NW2d 313 (2007). If, however, factual questions exist regarding what factors giving rise to a

duty are present, the existence of those facts must be determined by a jury. *Howe v Detroit Free Press, Inc*, 219 Mich App 150, 156; 555 NW2d 738 (1996), aff'd 457 Mich 871 (1998). "In such cases, summary disposition would not be proper, and the matter must be submitted to the jury for resolution, accompanied by an appropriate instruction regarding a defendant's duty conditioned upon the jury's resolution of the factual dispute." *Id*. at 157. In this case, the Court of Appeals determined that a material question of fact existed regarding the conditions of the roads on North Star's premises, i.e., the existence of factors giving rise to a duty, and, therefore, that Sevigny and JRP were not entitled to summary disposition on the question of duty. At trial, however, the factual dispute identified by the Court of Appeals regarding the conditions of North Star's roads was not specifically presented to the jury. The jury was not specifically asked to resolve that factual dispute, nor was it given an instruction regarding the parameters of Sevigny's duty conditioned on the resolution of the dispute. Instead, the trial court gave the standard jury instructions on negligence, M Civ JI 10.02, and the duty to use ordinary care, M Civ JI 10.05. As such, plaintiff received the benefit of having the jury instructed that defendants owed a duty in connection with the occurrence to use ordinary care for the safety of Williams.

Assuming that Sevigny owed Williams a duty to use ordinary care under the circumstances presented, a reasonable jury could have concluded, based on all of the evidence presented, that Sevigny did not breach that duty. Plaintiff alleged at trial that Sevigny owed Williams a duty to inspect the tires of his truck for lodged pieces of slag before exiting the steel mill premises. But, as plaintiff concedes on appeal, the evidence demonstrated that Sevigny did, in fact, perform an inspection. Sevigny testified that on the morning of the accident, he and his coworker Dean Rioux met at the steel mill and loaded their trucks with slag. After loading, Sevigny weighed his truck and it was over the permitted weight limit, which required removing some of the slag. After offloading, Sevigny noticed something stuck in the lift axle; he took it out. Sevigny reweighed the truck and then performed a "circle check" to insure that nothing on the truck needed to be repaired and that nothing was lodged between the tires. He walked around the truck, crouching down and putting his head underneath the truck to see all visible portions of the tires. He also looked between each set of tires:

Q: Did you look between each set of tires to see if there was anything?

A: Yes.

Q: How did you look between each set of tires to see if there was anything?

A: You look. Stick your head and look.

Q: Stick your head on top of each tire and look down?

A: As far as you can see, you get in there and you look.

Q: You did that for each set of tires?

A: Yes.

Q: Did you stop at the back of the truck and look forward between the tires?

A: Yes.

Q: Did you do that on top and bottom of the tire?

A: Yes.

Other employees observed Sevigny performing the inspection. Sevigny then drove the truck to the steel mill exit and entered Front Street.

Plaintiff further alleged at trial that Sevigny breached his duty of care to Williams by failing to inspect the truck's tires more thoroughly and to conduct a second inspection of the tires immediately before exiting the steel mill premises. Sevigny admitted that mud flaps concealed portions of the truck's tires and that he did not lie down on the ground for a better view of the tires. He also admitted that he did not check the tires a second time before leaving the steel mill premises, despite the fact that there was slag and scrap "laying all over" between the weigh scales and the exit. Officer Paul Chapp testified that a sufficient inspection by Sevigny could have prevented the accident. That said, however, Sevigny testified that he was only required to conduct a "circle check" of the truck, that he never saw other truck drivers conducting inspections immediately before leaving the premises, and that he was unaware of any custom in the industry of doing so. Rioux confirmed that he conducts "circle checks" of his own truck after weighing in and does not conduct any additional inspections before leaving the premises. He testified that he had only once found an object lodged in his truck tires. On cross-examination, Officer Chapp conceded that it was possible Sevigny was responsible in his inspection but merely missed seeing a piece of slag in his tires. Based on this evidence, the jury could have concluded that Sevigny did not breach the duty of ordinary care.

Moreover, even if the jury found that Sevigny breached the duty owed Williams, it reasonably could have concluded that Sevigny's actions did not cause Williams' death. Proof of causation requires both cause in fact and proximate cause. *Haliw v Sterling Hts*, 464 Mich 297, 310; 627 NW2d 581 (2001). Cause in fact requires that the harmful result would not have come about but for the negligent conduct. *Id*. Cause in fact may be established by circumstantial evidence, but such proof must be subject to reasonable inferences and not mere speculation. *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994). An explanation that is consistent with known facts but not deducible from them is impermissible conjecture. *Id*. at 164. A proximate cause is a cause that, in a natural and continuous sequence, unbroken by new and independent causes, produces the injury. *McMillan v Vliet*, 422 Mich 570, 576; 374 NW2d 679 (1985). Like duty, proximate cause depends in part on foreseeability. *Haliw*, *supra*.

It is undisputed that Williams died as a result of a large object crashing through her windshield and striking her in the head. But, the object was never conclusively identified as slag. None of the eyewitnesses to the accident saw the object before it crashed through Williams' windshield. Eyewitness Spencer Maniaci testified that the object landed on the curb. After the accident, however, investigators searched the area and could not locate the object. Sergeant Lawrence Richardson and Officer Brett Ansel are both accident reconstructionists who investigated the accident at issue. Sergeant Richardson testified that the object was approximately 6 x 7 inches. Officer Ansel testified that it was roughly 8 x 6 inches. Both officers believed that the object was slag, although no slag was found at the scene and the police conducted no testing on some of the pertinent evidence at the scene, including evidence from

Williams' vehicle and items collected from the roadway such as large pieces of concrete. Sergeant Richardson testified that he did not begin his investigation until seven days after the accident and that Officer Ansel, the lead officer in the case and one of the first officers called to the scene, did not take the sergeant's suggestion to have Williams' vehicle "checked for any evidence of residue that would have been left by the object that struck the car." Sergeant Richardson further testified that some of the residue in the vehicle was wiped away during the investigation. Scott Stoeffler, a research microscopist hired by plaintiff's counsel, testified that more than a year after the accident, he took particle samples from Williams' vehicle and determined, based on the available evidence, that the object that crashed through her windshield "was at least partially composed of some type of corroded steel."

Moreover, there was conflicting evidence presented at trial as to whether the object that struck Williams had been lodged in Sevigny's truck tires. Sevigny found no objects in the truck tires when he conducted his inspection at the steel mill and Officer Ansel admitted that there was no evidence on the truck itself, such as a deflection mark caused by an object being dislodged from the tires.[3] None of the eyewitnesses to the accident heard the sound of an object caught in Sevigny's tires as the truck traveled down the road. Investigators testified that there were gouge marks in the pavement on the westbound lane of Front Street leading to the location of the accident, which could have been caused by Sevigny dragging an object in his truck tires. But, it was unclear from the evidence presented whether the gouge marks actually started at the entrance to the steel mill, as alleged by plaintiff. Further, Sevigny's testimony regarding the position of his axles permitted an inference that his truck may not have caused the gouges. Sergeant Richardson opined and testified that the object that struck Williams was a "projected object" that had been lodged in Sevigny's truck tires. Officer Ansel agreed with this conclusion. Hrycay, on the other hand, opined and testified that the object could not have been lodged in Sevigny's truck tires. Hrycay, an engineer and expert in accident reconstruction who testified on behalf of defendants, based his opinion on all of the evidence presented, including among other things, Maniaci's testimony about where the object had landed, the fact that eyewitnesses did not hear the sound of an object lodged in Sevigny's truck tires, the speed of both the truck and Williams' vehicle, and the location of the gouge marks in the pavement and the glass particles from Williams' vehicle. Hrycay testified that the most probable explanation for the accident was that Sevigny's truck hit an object lying in the road, shooting the object into the air and through Williams' windshield. If the jury accepted Hrycay's testimony, it reasonably could have concluded that the accident was caused by something other than an object lodged in Sevigny's truck tires.

Plaintiff argues on appeal that the jury could have found Sevigny negligent for hitting an object in the road, thereby causing the object to shoot into the air and through Williams' windshield. In so arguing, plaintiff points to Hrycay's testimony that the most probable

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[3] Sevigny was ultimately allowed to leave the scene of the accident with his truck, which was later returned for further investigation, at which time it was discovered that defendants had changed tires on the truck. Defendants did not produce the tires at trial and the trial court provided an adverse inference instruction to the jury, M Civ JI 6.01. Plaintiff was also able to extensively argue the implications of defendants' failure to produce this evidence to the jury.

explanation for the accident was one of Sevigny's truck tires hitting an object in the road and that a reasonable driver would attempt to avoid hitting a large object in the middle of their lane. But, even if the jury concluded that Sevigny hit an object in the road, there was no evidence that he should have seen the object or that he was otherwise negligent in hitting it. Neither Sevigny nor any of the eyewitnesses to the accident saw an object lying in the road in the truck's path; nor was there any evidence that Sevigny had negligently averted his eyes or attention from road and missed seeing the object.

Although there was ample evidence presented at trial supporting plaintiff's theory of the case, there was also evidence presented that supported the jury's determination that defendants were not negligent. The evidence did not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow the jury's verdict to stand. Therefore, the verdict must be upheld. See *Campbell, supra*.

Additionally, plaintiff argues that she was denied a fair trial when Hrycay offered different testimony at trial than he had at his deposition. She argues that because defendants failed to seasonably supplement their answers to interrogatories with the substance of Hrycay's proposed trial testimony, as required by MCR 2.302(E), she was unfairly surprised by Hrycay's changed testimony and was denied the opportunity to re-depose him. According to plaintiff, she was "blind-sided" and "this case exemplifies a 'trial by ambush.'"

A new trial may be granted due to "[i]rregularity in the proceedings of the court, jury, or prevailing party," MCR 2.611(A)(1)(a), or "[m]isconduct of the jury or of the prevailing party," MCR 2.611(A)(1)(b). A new trial is only warranted, however, if a party's substantial rights are materially affected by the irregularity or misconduct. MCR 2.611(A)(1). Misconduct of counsel will not justify a new trial if the error was harmless. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 682; 630 NW2d 356 (2001).

At his deposition, approximately five months before trial, Hrycay testified that he had considered three possible explanations for the object crashing through Williams' windshield. Hrycay considered the possibility that the object was lodged in Sevigny's truck tires and then dislodged when the truck accelerated on Front Street, as plaintiff theorized. He also considered the possibility that Sevigny's truck hit an object in the road, shooting the object into the air, or that the object came from a vehicle traveling eastbound on Front Street in front of Williams. Hrycay testified that after examining the available scientific evidence, he concluded that it was improbable that the object was lodged in Sevigny's truck tires. In fact, he believed there was a zero percent chance that had occurred. Hrycay further testified that the other two scenarios were equally probable. At trial, Hrycay maintained his conclusion that the object could not have been lodged in Sevigny's truck tires, but that the truck could have hit an object in the road and shot it into the air. He testified that this second scenario was the most probable explanation for the accident.

As plaintiff asserts, Hrycay did, in fact, change his testimony after his deposition. He initially testified that there were two equally probable explanations for the object crashing through Williams' windshield, but later testified at trial that the most probable explanation was the truck hitting an object in the road. Plaintiff is also correct that defendants failed to inform her of this change before Hrycay testified at trial. But, during his cross-examination, Hrycay explained defendants' failure to inform plaintiff of his changed testimony. According to Hrycay,

he had met with defense counsel the Friday before trial commenced and informed them that the evidence presented at trial could alter his opinions. He told defense counsel "that if the evidence of so and so is this then this is how it affects my opinion. If it turns out it's not that then my opinions stand." Hrycay further explained that he had altered his opinions only after being advised of the trial testimony of Dr. Werner Spitz and eyewitness Ronald Cutter. Hrycay testified that he had to accept their testimonies as true and take them into account when rendering his opinions.

Given Hrycay's testimony that he did not change his opinions about the cause of the accident until after hearing the other evidence presented at trial, it would have been impossible for defendants to supplement their answers to plaintiff's requests for discovery before trial. See MCR 2.302(E). Moreover, even if error occurred, there is no evidence that plaintiff's substantial rights were materially affected by Hrycay's changed testimony or her lack of opportunity to re-depose him. See MCR 2.611(A)(1); *Hilgendorf, supra*. Hrycay's testimony never supported plaintiff's theory of the case. He testified at both his deposition and trial that the object that struck Williams could not have been lodged in Sevigny's truck tires. Because plaintiff cannot establish that her substantial rights were materially affected by the changed testimony, a new trial is not warranted.

The trial court properly denied plaintiff's motion for a new trial. In light of our conclusion on this issue, we need not address defendants' issues on cross-appeal.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering