STATE OF MICHIGAN

COURT OF APPEALS

HANAN JAGHAB, individually and as Personal Representative of the ESTATE OF BUTROS B. JAGHAB,

Plaintiff-Appellant,

v

RICHARD EUGENE MERZ, LESTER BROTHERS EXCAVATING, INC., and FIVE WAY LEASING, LLC,

Defendants-Appellees.

UNPUBLISHED
December 3, 2009

No. 285280
Jackson Circuit Court
LC No. 05-006492-NI

Before: Saad, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

I. Nature of the Case

In this automobile negligence, personal injury case, plaintiff asks this Court to overturn a jury verdict of no cause of action in favor of defendant because, in plaintiff's view, the trial court incorrectly instructed the jury and the verdict was against the overwhelming weight of evidence.

As more fully explained below, we affirm because the trial court properly instructed the jury and, because the jury could have found for either party based on conflicting expert and eyewitness testimony, the trial court correctly rejected plaintiff's request to overturn the jury's verdict.

II. Facts

This case arises out of a motor vehicle accident that occurred on a two-lane highway, US-223, near Shepherd Road in Lenawee County. Individually and as representative of Butros Jaghab's estate, Hanan Jaghab sued Richard Merz, Lester Brothers Excavating, Inc., and Five Way Leasing, LLC, and alleged that Merz negligently failed to stop or keep his truck under control and that this resulted in an accident that caused her injuries and the wrongful death of Butros. Plaintiff's theory at trial was that Butros was making a legal left turn in his minivan from a lane of US-223 and that Merz attempted to pass the minivan on the left. Plaintiff further maintained that Merz entered the opposite lane of traffic in order to pass the minivan and failed to notice the minivan's left turn signal before the impact. Defendants took the position at trial

that the minivan was on the right shoulder of US-223 when it suddenly turned left and drove right into the path of Merz's truck.

III. Analysis

A. Jury Instruction

Defendants asked the trial court to give an instruction on the sudden emergency doctrine and the trial court instructed the jury as follows:

> You've heard reference to this "sudden emergency." In this case you would -- In this case if you would find that the Defendant was confronted with the "sudden emergency" not of his own making, and if you find that he used ordinary care and was still unable to avoid the occurrence because of some emergency, then you will render a verdict in favor of the Defendant and against the Plaintiff. One who suddenly finds himself in a place of danger and is required to act without time to consider the best means that may be adopted to avoid the impending danger is not guilty of negligence if he fails to adopt what subsequently and upon reflection may have appeared to have been a better method unless the emergency in which he finds himself is brought about by his own negligence.

Plaintiff did not object to the trial court giving the instruction, but asked the trial court to also advise the jury that, "[u]nder the 'sudden emergency' doctrine, it is essential that the potential peril had not been in clear view for any significant length of time and was totally unexpected." The trial court declined to add plaintiff's requested language and instructed the jury as set forth above. Plaintiff complains that the trial court's failure to give the additional language denied him a fair trial. As our Supreme Court explained in *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000):

> In [reviewing jury instructions], we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Johnson v Corbet*, 423 Mich 304; 377 NW2d 713 (1985).

The operative inquiry is: Did the trial court abuse its discretion in failing to give plaintiff's requested instruction? We hold that the trial court did not abuse its discretion. "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007).

"The sudden-emergency doctrine applies 'when a collision is shown to have occurred as the result of a sudden emergency not of the defendants' own making.' " *White v Taylor Distributing Co, Inc*, 482 Mich 136, 139-140; 753 NW2d 591 (2008), quoting *Vander Laan v Miedema*, 385 Mich 226, 231; 188 NW2d 564 (1971). In *Vander Laan*, the Court set forth the circumstances in which the doctrine applies. The Court opined that the circumstances surrounding the accident must be "unusual" or "unexpected," meaning out of the ordinary and not in clear view for a significant length of time. In *White*, our Supreme Court agreed with language from *Vander Laan* that a sudden emergency must be "totally unexpected." *White, supra* at 140.

Again, plaintiff does not argue that the trial court should have declined to give the sudden emergency instruction, but instead asserts that the court should have added language from the cases. However, Michigan case law does not suggest that additional language is required for the jury instruction, but only that a sudden emergency instruction should be given if the facts support a finding that the emergency was actually unexpected. Indeed, none of our cases imply, much less mandate, that the trial court is required to insert additional, specific language to emphasize the underlying purpose of the doctrine. Moreover, the instruction, as given by the trial court, sufficiently informed the jury of the doctrine, including the rather straightforward proposition that a "sudden emergency" means the situation arises urgently, unexpectedly, and is unavoidable. Therefore, the trial court properly instructed the jury in a manner that the jury could make a well-informed decision.

Plaintiff takes the position that there could have been no "sudden emergency" because, based on her view of the evidence, Merz saw that the van was driving erratically and should have taken action to avoid the collision. However, rather than challenge the applicability of the doctrine in the trial court, plaintiff instead made the strategic decision to challenge the language of the definition. And, it is dispositive of plaintiff's claim that the trial court accurately defined the doctrine to the jury, including the point, important here, that for the doctrine to apply, the driver should not have known about the danger for a significant length of time and the danger must have arisen unexpectedly.

And, rather than asking the jury to consider whether Merz saw the problem ahead of time or whether the emergency was "totally unexpected," plaintiff instead argued to the jury that the situation was of Merz's own making. Consistent with the trial court's instruction, plaintiff could have argued to the jury that a sudden emergency must be "totally unexpected" and not in view for a significant length of time and that the facts showed that this was not a sudden emergency. Such an argument might have lent some credibility to plaintiff's position on appeal that the trial court's definition did not adequately convey the full meaning of the doctrine. Yet plaintiff chose not to advance this theory and, instead, advanced the argument that Merz created the emergency himself. Accordingly, for this additional reason, we reject plaintiff's contention that the trial court failed to adequately instruct the jury.

B. Motion for New Trial

Plaintiff claims that the verdict was against the great weight of the evidence and that the trial court should have granted her motion for a new trial. As this Court recently explained in *Guerrero v Smith*, 280 Mich App 647, 666; 761 NW2d 723 (2008):

> "[W]ith respect to a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party." *Phinney v Perlmutter*, 222 Mich App 513, 525; 564 NW2d 532 (1997). "This Court's function is to determine whether the trial court abused its discretion in making such a finding." *Id*. We give substantial deference to the trial court's conclusion that a verdict was not against the great weight of the evidence. *Id*.

As stated above, "[a]n abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett, supra* at 158.

Plaintiff argues that Merz's theory of how the accident occurred defies logic and is contrary to the physical evidence. Specifically, plaintiff contends that the impact between the truck and minivan could not have been at a perpendicular angle and, therefore, the minivan could not have driven in front of Merz from the right shoulder of US-223. Merz testified that the van unexpectedly pulled out from the right shoulder of the road and made a left turn in front of his truck. According to eyewitness Kim Baker, the truck hit the van at what appeared to be a perpendicular angle. Merz's expert, Donald Rudny, also testified that the impact occurred at an almost perpendicular angle, 88 degrees. Rudny explained that, according to his computer simulation, the impact had to be at such an angle to cause the gouges in the road, and to cause the van to arc toward its final resting position.

Plaintiff asserts that there would have been significantly more damage to the driver's side front of the truck if it was a T-bone collision as defendants suggest. Rudny pointed out that various photos show more damage to the truck's front bumper than plaintiff had noticed, including dents and paint transfer marks. He also testified that there was an impact between the van's front tire and the truck's tow hook. He rejected plaintiff's suggestion that the impact could have occurred at a 40-degree angle because such a glancing blow would be insufficient to cause the rotation of the van down the road based on the undisputed location of the tire marks. He also believed that more of a sideswipe impact would not cause the van to propel into a second impact with the truck, which we know happened in this case. In contrast, plaintiff offered testimony from her expert, Lawrence Richardson, who maintained that the impact occurred at a 40-degree angle. Richardson testified that the damage to the truck is not consistent with a perpendicular collision. Brian McHenry agreed that there would be damage all the way across the front of the truck if it were a T-bone crash. McHenry also testified that the computer simulation of the perpendicular hit showed more damage to the truck than actually occurred in this case.

While the parties clearly offered conflicting evidence with regard to the angle of impact, the jury could have simply chosen to believe defendants' witnesses. Moreover, the jury could have agreed with plaintiff that the angle of impact was not 90 degrees, but nonetheless found in favor of Merz. While plaintiff's expert, Richardson, testified that the damage is *consistent* with a scenario in which the van turned from the through lane of US-223, he conceded that the same impact could have occurred if the van pulled out from the shoulder of US-223. In other words, the shallow angle of impact advocated by Richardson did not definitively undermine Merz's testimony that the van suddenly pulled out from the right-hand shoulder and in front of Merz's oncoming vehicle. Rudny echoed this during his own testimony, explaining that even a 40-degree angle of impact could have occurred if the van pulled out from the shoulder.

Plaintiff contends that it was illogical for the jury to believe Merz's testimony that, when he got to the top of the hill, he saw the van make a U-turn from the southeast lane toward the northwest lane and then turn again from the shoulder into the roadway. The experts agreed that, at the speeds and distances estimated by Merz, he would not have time to see all of these maneuvers from the top of the hill. However, consistent with Merz's testimony, plaintiff testified that Butros made a U-turn to get back to the egg farm and that he then turned left toward the farm driveway. So the evidence supports the maneuvers that Merz claimed to have seen; the only issue is whether Merz saw them all after he crested the hill or whether he saw the van make the first U-turn at some other spot. In either case, the jury could have simply concluded that, regardless when the initial U-turn happened, the van pulled onto the shoulder and then unexpectedly turned out in front of Merz.

Plaintiff complains that Merz's explanation of the accident is untenable because evidence established that the van's left turn signal was flashing at the time of the impact. Merz testified that he believed the van was going to turn right onto Shepherd Road because the van was on the right shoulder, headed toward the crossroad, and its right turn signal was activated. None of the witnesses who tested the van's turn signal bulbs could determine when Butros activated the left turn signal, how long it was activated before the crash, or whether the right turn signal was activated shortly before the crash. Accordingly, the jury could have concluded that Butros activated the right turn signal while on the shoulder and switched the signal as he turned across the lanes of US-223. His use of the left turn signal under those circumstances would not have given Merz enough time to avoid the collision or put him on notice that Butros intended to turn left.

Plaintiff also takes issue with the lack of evidence of tire markings along the right-hand shoulder of US-223. Merz testified that, after the accident, he saw that the minivan had carried some gravel from the shoulder over the road and that he told Deputy Heather Sikkenga to look for markings to show the minivan turned from the shoulder. However, ample testimony established that various emergency vehicles drove over the shoulder immediately after the accident. Kim and Hailey Baker also testified that they pulled over to the shoulder and drove up to Shepherd Road right after they witnessed the collision. First responder Deputy Sikkenga did not inspect or photograph the shoulder and Deputy Kraig Kourt conceded that, by the time he looked for tire marks, the emergency vehicles could have easily destroyed the evidence. For these reasons, the lack of tire mark evidence does not weigh in favor of plaintiff's theory that Merz drove negligently at the scene of the accident.

For the above reasons, the trial court did not abuse its discretion when it denied plaintiff's motion for a new trial. The evidence did not weigh heavily against the verdict. While plaintiff also presented a viable case, the jury could have simply found defendants' evidence more persuasive or believed that Merz's explanation more logically explained this accident.

Because there is clearly sufficient evidence to support the jury's verdict, the trial court correctly declined to disturb the jury's verdict and, thus, we affirm the trial court and reject plaintiff's effort to overturn the jury's verdict.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra