STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH ADAMCZYK, Plaintiff-Appellant/Cross Appellee,	UNPUBLISHED October 25, 2011
v	No. 296838 Bay Circuit Court
K-MART CORPORATION, Defendant-Appellee/Cross Appellant.	LC No. 08-003431-NO

Before: WILDER, P.J., and CAVANAGH and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment entered in defendant's favor following a jury trial in this negligence case. We affirm. Defendant cross-appealed, but in light of our resolution of plaintiff's issues on appeal, the cross-appeal is moot.

Plaintiff, an employee of Footstar Corporation, was working in its shoe department located in defendant's store when she fell from a ladder while changing the configuration of display shelving. Prior to falling, plaintiff was in the process of removing a bottom base up and over the top of an 84-inch counter while standing on the ladder. She explained that, to lift the base clear from the counter, "you do have to lift it, you know, quite a ways up over your head to get all of it off." The ladder plaintiff was using was owned by defendant, had wheels, handrails, and six steps, including a platform at the top. When the ladder was stepped on, it would stabilize on its legs; however, three of the legs were missing rubber feet. Because of her head injuries, plaintiff was unable to remember what caused her to fall. One eyewitness testified that she saw movement by the ladder and then plaintiff fall. However, she did not know what caused plaintiff to fall and did not know whether plaintiff was already in the process of losing her balance when she saw the ladder movement.

Plaintiff sued defendant on a negligence theory, alleging that the ladder was in a dangerous condition, defendant knew it, and the ladder should not have been available for plaintiff's use. Defendant filed a notice of non-party fault, MCR 2.112(K), naming plaintiff's

employer, Footstar, as a possible contributor to plaintiff's damages for failing to provide adequate training and equipment to plaintiff. Plaintiff's two motions to strike the notice were denied. Defendant also filed a motion for summary disposition, arguing that it owed no duty to plaintiff and that the condition of the ladder did not proximately cause plaintiff's injuries. The motion was denied. Thereafter, a four-day jury trial was conducted and concluded with the jury finding that defendant was not negligent. That is, the first question on a special verdict form which asked whether defendant was negligent was answered in the negative; thus, the other questions whether Footstar or plaintiff were negligent were not answered. A judgment was entered accordingly and this appeal by plaintiff, challenging four of the court's rulings, followed. Defendant filed a cross-appeal, challenging the trial court's denial of its motions for summary disposition and directed verdict.

First, plaintiff argues that her motion to strike defendant's notice of non-party fault should have been granted because plaintiff's employer was not a properly named "non-party." However, as defendant argues, this issue is moot. Comparative fault, including the fault of non-parties, is relevant to the issue of damages. See MCL 600.2957; MCL 600.6304; *Colbert v Primary Care Med, PC*, 226 Mich App 99, 104; 574 NW2d 36 (1997). In this case, the jury concluded that the sole defendant was not negligent; thus, the issues of apportionment of fault and damages were never reached or decided. See *Jackson v Thompson-McCully Co, LLC*, 239 Mich App 482, 493; 608 NW2d 531 (2000). "As a general rule, an appellate court will not review a moot issue." *Id.*

Plaintiff argues in her response brief, however, that the issue is not moot because the trial was "permeated with Defendant's efforts to identify Footstar as the real at-fault party" and if defendant had been "precluded from doing so, there is more than a reasonable probability that the jury would have reached a different result with respect to [defendant's] negligence." Plaintiff claims that, in its opening and closing statements and "through numerous witnesses," defendant argued that it was not negligent and that the fault lay with plaintiff's employer, Footstar.

First, defense counsel's opening statement and closing argument were not evidence and the jury was properly instructed that counsel's comments were not evidence. See *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001). Second, plaintiff has not directed our attention either to defendant's "numerous witnesses" nor any witness testimony that purportedly identified plaintiff's employer as the "real at-fault party." And third, even if defendant's notice of non-party fault was stricken, defendant would still be entitled to defend against plaintiff's negligence claim by arguing that Footstar was the proximate cause of plaintiff's damages, i.e., a mandatory element of the plaintiff's claim was not established. "It is entirely proper for a defendant in a negligence case to present evidence and argue that liability for an accident lies elsewhere, even on a nonparty." *Veltman v Detroit Edison Co*, 261 Mich App 685, 694; 683 NW2d 707 (2004), quoting *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 627; 415 NW2d 224 (1987). In any case, we reject plaintiff's argument and conclude that the issue whether defendant's notice of non-party fault should have been stricken was rendered moot by the jury's finding that defendant was not negligent.

Next, plaintiff argues that the trial court erred when it permitted defendant to introduce evidence of the absence of accidents involving the ladder to prove the absence of negligence, i.e., negative evidence. We disagree. We review for an abuse of discretion a trial court's decision to admit evidence. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). An abuse of discretion occurs when the court's decision results in an outcome falling outside the range of principled outcomes. *Id*. at 158.

Plaintiff argued in the trial court and argues here on appeal that defendant should not have been permitted to present testimony concerning the lack of complaints or previous accidents involving the subject ladder. She claims that such testimony was impermissible "negative evidence" and should have been precluded because it was not probative on the issue of defendant's negligence. "Negative evidence" has been defined as "evidence to the effect that a circumstance or fact was not perceived or that it was, or is, unknown." *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 810; 286 NW2d 34 (1979); see, also, *Serinto v Borman Food Stores*, 380 Mich 637, 642; 158 NW2d 485 (1968).

Generally, all relevant evidence is admissible. MRE 402. Evidence is relevant if it has any tendency to make the existence of a material fact more or less probable than it would be without the evidence. MRE 401. However, even 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. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Waknin v Chamberlain*, 467 Mich 329, 334 n 3; 653 NW2d 176 (2002) (citation omitted).

Plaintiff is correct that the issue of admissibility of negative evidence generally turns on its probative value. In *Larned v Vanderlinde*, 165 Mich 464; 131 NW 165 (1911), our Supreme Court held that a plaintiff could not present evidence of previous accidents involving an allegedly defective stairway "for the only purpose of proving the condition, or dangerous nature of the defect complained of" because such evidence would raise collateral issues, i.e., its probative value was outweighed by the dangers of jury confusion. *Id*. at 468. For the same reason, the *Larned* Court held, a defendant could not present evidence of a lack of accidents to establish that it was not negligent with regard to the plaintiff's case. *Id*.; see, also, *La Due v Lebanon Twp*, 222 Mich 301, 306-307; 192 NW 636 (1923).

In *Dalton v Grand Trunk Western R Co*, 350 Mich 479; 87 NW2d 145 (1957), our Supreme Court later explained that negative evidence may have significant probative value if, for example, the evidence pertains to the conditions existing at the time of the incident at issue and it has a proper foundation. *Id*. at 484-486. Accordingly, in *McAuliff v Gabriel*, 34 Mich App 344; 191 NW2d 128 (1971), this Court held that witness testimony regarding a lack of difficulty in traversing an area shortly before the plaintiff slipped and fell related to the conditions at the time of the accident and was properly admitted evidence. *Id*. at 349-350. But in *Grubaugh v City of St Johns*, 82 Mich App 282; 266 NW2d 791 (1978), this Court held that evidence that there had been no prior accidents in an intersection that the plaintiff alleged was unsafe was inadmissible to prove the absence of negligence. *Id*. at 287-288. Such evidence lacked probative value, this Court held, because the "negative evidence" could merely mean that accidents were not reported or that accidents were avoided through blind luck. *Id*. at 289.

In this case, plaintiff's theories of liability were that the ladder was dangerous, defendant knew the ladder was dangerous, and thus the ladder should not have been available for plaintiff's use. In support of her claims, plaintiff presented the testimony of Elwood Wilcox, a former loss prevention manager and employee of defendant. Wilcox testified that the ladder at issue was in a dangerous condition when he worked at the store about one or two years before this incident and that he reported his concerns about the ladder to the store manager, Thomas Carlson, as well as the loss control district manager, Dennis Jones. According to Wilcox, the ladder was unsafe because it was missing some of its rubber feet. Plaintiff also presented testimony from an expert who opined that he inspected the ladder about two years after this incident and it was in a dangerous condition, in part because it was missing rubber feet on three of its four legs.

Although plaintiff did not specifically detail the testimony she is challenging as improper negative evidence, we have reviewed the record to consider her claim. First, Audrey Boucher, defendant's employee, testified that she used the ladder just before plaintiff without any difficulty. This evidence was properly admitted because it related to the condition of the ladder just before plaintiff's fall. See *Dalton*, 350 Mich at 484-486; *McAuliff*, 34 Mich App at 349-350. Second, Thomas Carlson, the store manager Wilcox allegedly told about the dangerous condition of the ladder, testified on cross-examination that Wilcox did not tell him the ladder was dangerous and that he had received no complaints about the ladder. This cross-examination testimony was relevant and had significant probative value with regard to the issue whether defendant, through its employee, knew that the ladder was dangerous, as plaintiff asserted, and thus should not have been available for plaintiff's use. And the probative value was not outweighed by any danger that the jury would be confused or misled by its admission. Plaintiff asserted, through the testimony of Wilcox, that defendant knew about the ladder; thus, defendant had the right to respond to that specific claim.

Third, Dennis Jones, the loss control district manager who Wilcox allegedly told about the dangerous condition of the ladder, testified in defendant's case-in-chief that Wilcox never told him the ladder was dangerous or should be taken out of service. Again, this testimony was relevant and significantly probative on the issue whether defendant had notice of the allegedly dangerous condition of the ladder as plaintiff claimed. Fourth, Karen Jamrog, defendant's employee who was involved in investigating this incident immediately after it occurred, testified that during her investigation she stepped on the ladder and it did not move. This testimony was properly admitted because it related to the condition of the ladder immediately after plaintiff's fall. See *Dalton*, 350 Mich at 484-486; *McAuliff*, 34 Mich App 349-350. And, fifth, Daryl Blackhurst, the store manager at the time of this incident who was present in the store when it occurred, testified that he never received any complaint from Wilcox about the ladder and was unaware of any employee having a problem with the ladder. Blackhurst also testified that he had used the ladder without a problem and did not believe the ladder was dangerous. Again, this testimony was relevant and significantly probative on the issue whether defendant had notice, through its store manager, of the allegedly dangerous condition of the ladder as plaintiff claimed. Accordingly, plaintiff's argument that negative evidence was improperly admitted is without merit. The trial court did not abuse its discretion when it admitted this evidence. See *Barnett*, 478 Mich at 158-159.

Next, plaintiff argues that the trial court erred when it refused to give SJI2d 6.01 because defendant failed to produce the monthly safety reports that Wilcox testified he authored which reported the dangers of the subject ladder. We disagree.

A standard jury instruction, when requested by a party, must be given if it is applicable and accurately states the law. MCR 2.516(D)(2). The determination whether an instruction is applicable based on the characteristics of the case and the evidence is in the sound discretion of the trial court and entitled to deference. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002); *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997). A trial court's determination whether a standard jury instruction was applicable and accurate is reviewed for an abuse of discretion. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008) (citation omitted).

Here, plaintiff requested SJI2d 6.01(c), which is to be given "where a question of fact arises regarding whether a party has a reasonable excuse for its failure to produce the evidence, the court finds that the evidence was under the party's control and could have been produced by the party, and the evidence would have been material, not cumulative, and not equally available to the other party. See Note on Use of SJI2d 6.01." *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 147; 640 NW2d 892 (2002). When this instruction is given, a jury may infer that the evidence would have been adverse to that party. *Id*. at 146-147. The trial court denied plaintiff's request for the instruction, holding that there was no showing of an unreasonable excuse for the failure to produce the reports so the instruction was not proper. This decision did not constitute an abuse of discretion.

Wilcox testified that he authored safety reports reporting the dangers of the subject ladder but the previous store manager, the store manager at the time of this incident, and the loss control district manager testified that they did not recall Wilcox complaining about the subject ladder either verbally or in writing. Wilcox did not testify as to when he allegedly wrote the reports, but he had not worked in the store since either 2005 or 2006 and this incident occurred in February of 2007. There was evidence that monthly safety reports were routine procedure, but they were subject to a document retention policy. That is, they were kept for a certain period of time in the loss prevention office and then destroyed by the loss prevention manager. There was no evidence as to how long such reports were to be kept. Defendant stipulated that it was unable to produce the reports and the jury was made aware of the stipulation, as well as the fact that the reports were not produced. Thus, although the safety reports were under the control of defendant, if they existed, there was no evidence that defendant could have produced the reports, i.e., that they should still have existed per the document retention policy. And a reasonable excuse was proffered—they could not be found and were likely destroyed pursuant to the document retention policy. In light of the characteristics of the case and the evidence, we cannot conclude that the trial court's decision falls outside the range of reasonable and principled outcomes. See *Barnett*, 478 Mich at 158.

Finally, plaintiff argues that the trial court erred when it denied plaintiff's motion for directed verdict on the issues whether plaintiff was comparatively negligent and whether her employer, Footstar, was negligent. However, as defendant argues, these issues are moot. As discussed above, the jury determined that the sole defendant in this case was not negligent; thus, the issue of comparative fault was never reached or decided. See *Jackson*, 239 Mich App at 493.

In light of our resolution of plaintiff's issues on appeal, we need not consider defendant's issues on cross-appeal that its motions for summary disposition and directed verdict should have been granted.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio