STATE OF MICHIGAN

COURT OF APPEALS

DOLORES C. FOX,

Plaintiff-Appellant,

v

GAROLD L. FOX,

Defendant/Cross Defendant-Appellee,

and

ERIC ESCHELMAN,

Defendant/Cross Plaintiff-Appellee.

UNPUBLISHED
September 3, 1996

No. 181337
LC No. 92-430183

Before: Holbrook, Jr., P.J., and Taylor and W.J. Nykamp,* JJ.

PER CURIAM.

In this negligence action, plaintiff appeals as of right from the judgment of the Oakland Circuit Court which reflected the jury's verdict of no cause of action. The trial court denied plaintiff's post-trial motion for a new trial or judgment notwithstanding the verdict. We affirm.

Plaintiff first argues that the trial court erred in allowing defense counsel to present arguments to the jury regarding defendant Fox's general character as a careful and prudent person. We agree with plaintiff that this was improper argument.

Michigan Rule of Evidence 404(a) provides, in pertinent part:

> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

In this case, defense counsel argued repeatedly during his closing argument to the jury that they should judge defendant on his general character of being a careful and prudent pilot for over thirty years. Although defense counsel's closing argument regarding defendant's character was not evidence, it was given the imprimatur of evidence when the court's final instructions to the jury included defendant's theory of the case:

> It is Defendant Garold Fox's theory of the case that Garold Fox at all times was reasonable, careful, and exercised his best judgment.
>
> *He is by nature a reasonably careful person*. He exhibited that carefulness by going through his entire check list before take-off. He was not drunk, stupid, or foolish. He was not negligent. [Emphasis added.]

Given the clear language of MRE 404(a) excluding such character evidence, and the inapplicability of any exception to the general rule of exclusion, we conclude that the trial court erred in permitting the jury to take into consideration defendant's general character as a careful person. See *McNabb v Green Real Estate Co*, 62 Mich App 500; 233 NW2d 811 (1975). Notwithstanding this error, we cannot say that any substantial right of plaintiff's was implicated and, therefore, reversal of the jury's verdict is not warranted. MRE 103(a); *McNabb, supra* at 510.

Plaintiff also argues that the trial court abused its discretion in allowing defendant Fox to present evidence that he had no prior accidents while piloting a plane. We find no abuse of discretion. Defendant's lack of prior accidents was a consistent theme throughout the trial. In his opening statement, defense counsel stated: "Mr. Fox has been piloting for a number of years. He's never had an air crash before this one." Plaintiff did not object to this statement. On direct examination, defendant testified as follows:

> *Q [BY DEFENSE COUNSEL]:* Can you—is there a way for you to estimate for me today, the best of your calculation, the number of takeoffs and landings that you have made from grass fields in the seventeen years you have been flying?
>
> *A [BY DEFENDANT FOX]:* I guess probably it would be in, you know, like in the hundreds. I don't know whether it would be one hundred or three hundred, but it was—it would be well over a hundred.
>
> *Q:* Okay. And that's in the seventeen years that you owned this particular aircraft?
>
> *A:* No, no. That's total time.
>
> *Q:* Total time that you've been flying?
>
> *A:* Yes.

Q: Somewhere between a hundred and three hundred takeoffs and landings on grass fields?

A: Yes, uh-huh.

Q: On any other occasions did you crash?

A: No.

Plaintiff immediately objected to the admission of this evidence, arguing that it was irrelevant to the issue of defendant's negligence on the day of the crash. The court overruled the objection, ruling that counsel could "ask questions about [defendant's] experience in grass fields to show what may have been on his mind when he was taking off." During closing argument, defense counsel reiterated defendant's "hundreds and hundreds of hours without a crash," and asked the jury to recall defendant's own testimony that "he flew for 33 years; 17 years in this particular aircraft. Never had an accident. Let me say that again. 33 years." Plaintiff's objection was overruled by the trial court.[1]

As a general rule, an issue as to the existence or occurrence of a particular fact, condition, or event, may be proved by evidence of the existence or occurrence of similar facts, conditions, or events, under the same or substantially similar circumstances. *Freed v Simon,* 370 Mich 473, 475; 122 NW2d 813 (1963). Similarly, evidence of a lack of accidents for exculpatory purposes may be admitted if offered for a proper purpose other than to establish a person's character or propensity for careful behavior. McCormick, Evidence (3d ed), § 200, pp 590-591. Cf. *Grubaugh v City of St. Johns,* 82 Mich App 282, 288-289; 266 NW2d 791 (1978). Here, evidence of defendant Fox's lack of prior accidents was admitted to establish his state of mind during the ill-fated takeoff. Defendant's extensive accident-free experience as a pilot was relevant and probative of a material issue in the case, especially given the testimony of plaintiff's aviation expert that the decision whether to abort a takeoff is often done "by the seat of the pants," and

> depends on how much experience that you have in that particular aircraft at that weight, and having flown that aircraft, and done many takeoffs at that weight and that power. You can tell whether the aircraft is performing correctly; it's performing the way it has before to make a successful takeoff.

Here, defendant testified that he had been a pilot since 1950 and had owned this particular airplane since 1973. He had piloted over one hundred takeoffs and landings from grass fields. Although the foundation laid for admission of the evidence of defendant's lack of accidents was thin, the requirement of substantial similarity is properly relaxed in a case such as this:

> In some cases, excluding such proof of safety may be justified on the ground that the persons passing in safety were not exposed to the same conditions as those that prevailed when the plaintiff's injury occurred. . . . However, the possibility that a very general safety record may obscure the influence of an important factor merely counsels for applying the traditional requirement of substantial similarity to evidence of the

> absence as well as the presence of other accidents. *When the experience sought to be proved is so extensive as to be sure to include an adequate number of similar situations, the similarity requirement should be considered satisfied.* [McCormick, Evidence (3d ed), § 200, p 591. Emphasis added.]

Accordingly, we are unable to say that the trial court abused its broad discretion in admitting this evidence at trial .

An appellate court may overturn a jury verdict only if it is against the great weight of the evidence. *Wischmeyer v Schanz,* 449 Mich 469, 485; 536 NW2d 760 (1995). Given the lack of evidence of the specific cause of the airplane crash in this case, and the lack of any direct evidence of negligence by defendant, we cannot say that the jury's verdict was against the great weight of evidence, even if the trial court erred in permitting the jury to consider defendant's general character as a careful person.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Wesley J. Nykamp

I concur in result only.

/s/ Clifford W. Taylor

[1] The trial court overruled plaintiff's objection, finding that defense counsel's comment was a proper response to an argument raised by plaintiff's counsel during closing argument. Plaintiff's closing argument alluded to by the court was as follows:

> His [defendant's] defense is nothing more than the claim of some driver who fails to merge onto the freeway and goes off into the ditch because there's a truck coming up behind him; that guy says, "Gee, I thought I could make it. I've gotten onto 696 a whole lot of times before and it never happened." That's no defense to the injured passengers in the case. The question is, did he make the right decision on that day on that merge onto the freeway? No.

Because the trial court had previously permitted defendant to present evidence and argument to the jury regarding defendant's lack of prior accidents, we believe plaintiff's driver analogy was a proper attempt to put her own spin on the damaging evidence.