STATE OF MICHIGAN

COURT OF APPEALS

BRENDA CARTER,

Plaintiff-Appellant,

v

CITY OF RIVER ROUGE,

Defendant-Appellee.

UNPUBLISHED
April 24, 1998

No. 199303
Wayne Circuit Court
LC No. 95-507081 NI

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

In this trip and fall action, plaintiff appeals as of right a circuit court judgment of no cause of action that was entered following a jury trial. Plaintiff presents seven issues for our review; however, we find that none require reversal.

Plaintiff testified that on the evening of December 8, 1993, she tripped and fell on a hump[1] in the road that had existed in front of her brother's store for over ten years. Defendant admitted negligence, but argued that the hump was not a proximate cause of plaintiff's injuries. Defendant argued to the jury that plaintiff's claims were a scam. In her motion for judgment notwithstanding the verdict (JNOV), plaintiff argued that because there was insufficient evidence of the perpetration of a scam, this issue should never have been presented to or decided by the jury. We disagree and conclude that the trial court properly denied plaintiff's motion for JNOV.

JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Wilson v General Motors Corp*, 183 Mich App 21, 36; 454 NW2d 405 (1991). In evaluating a ruling on a motion for JNOV, this Court is obligated to consider the evidence in a light most favorable to the nonmoving party; if the evidence is such that reasonable minds could differ, then JNOV is improper. *Davis v Wayne Co Sheriff*, 201 Mich App 572, 579; 507 NW2d 751 (1993).

Defendant presented sufficient evidence from which the jury could have inferred that plaintiff and her witnesses, primarily relatives and friends, were engaged in a sham. Plaintiff testified that the fall occurred on December 8, 1993. Yet, plaintiff's medical records regarding the date of the incident are inconsistent both internally and with plaintiff's own testimony. Plaintiff allegedly sustained a catastrophic

injury to her shoulder, yet she was not seen by a physician until a week later. Not only is this inconsistent with the nature of the injury, it is inconsistent with plaintiff's prior behavior after sustaining injury. Through medical records, defendant established a pattern of prompt treatment, usually within twenty-four hours, by plaintiff after sustaining an injury.

The testimony of plaintiff's siblings and daughter were also inconsistent with plaintiff's testimony and each other. Considering the foregoing, the jury could properly have found that plaintiff and her witnesses lacked credibility and were attempting to perpetrate a scam. When issues of credibility are involved, the decision of the trial court on a motion for JNOV is afforded great deference because the trial court, having heard the witnesses, is uniquely qualified to judge the jury's assessment of the witnesses' credibility. *Stallworth v Hazel,* 167 Mich App 345, 350; 421 NW2d 685 (1988).

Next, plaintiff argues that she is entitled to a new trial because the jury's verdict was against the great weight of the evidence. As addressed above, there was evidence to support a finding that plaintiff was not injured in the manner to which she testified. Although plaintiff contends that the jury necessarily found that plaintiff was involved in a conspiracy to defraud defendant, we believe that the jury's conclusion on the verdict form could have other interpretations (e.g., that plaintiff's fall was caused by her knee buckling as opposed to the hump in the road or that plaintiff did not sustain any injury as a result of that particular fall). Therefore, we cannot say that the jury's verdict was against the overwhelming weight of the evidence. *Heshelman v Lombardi,* 183 Mich App 72, 76; 454 NW2d 603 (1990).

Plaintiff also contends that the trial court abused its discretion when it denied her motion in limine to exclude evidence that she had initiated three prior personal injury lawsuits arising out of injuries she sustained in three personal injury accidents. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Williams v Coleman,* 194 Mich App 606, 620; 488 NW2d 464 (1992). Because the evidence had a tendency to support defendant's defense and was relevant to the issues of damages and proximate cause, we do not find that the trial court abused its discretion when it denied plaintiff's motion in limine. See, e.g., *Bartlett v Sinai Hosp of Detroit,* 149 Mich App 412, 413-418; 385 NW2d 801 (1986).

For her final four issues on appeal, plaintiff argues that improprieties occurred during the jury selection process. First, plaintiff contends that the trial court improperly denied her challenge of three jurors for cause, Jurors Drotos, Courtesis, and Neeriemer. Although the trial court should have excused Jurors Courtesis and Neeriemer for cause, there has been no error requiring reversal.

Error requiring reversal occurs when the record indicates by a clear and independent showing that: (1) the court improperly denied a challenge for cause; (2) the aggrieved party exhausted all peremptory challenges; (3) the party demonstrated the desire to excuse another *subsequently* summoned juror; and (4) the juror whom the party wished later to excuse was objectionable. *Poet v Traverse City Osteopathic Hosp,* 433 Mich 228, 241, 258-259; 445 NW2d 115 (1989) (emphasis added). In this case, plaintiff has failed to satisfy all of the above factors.

That a party is forced to use a peremptory challenge is the truly egregious result of a trial court's erroneous denial of a challenge for cause. *Bishop v Interlake, Inc*, 121 Mich App 397, 401-403; 328 NW2d 643 (1982). In *Poet, supra* at 239, the Court recognized that as part of the "challenge for cause quagmire," an additional problem arises "when a trial court's exercise of discretion in denying a challenge for cause creates the situation where a peremptory challenge is necessarily forfeited without choice." In this case, that did not occur. Plaintiff concurrently challenged Courtesis and Drotos. When plaintiff's challenges for cause were denied, she exercised her first peremptory challenge on Courtesis. Plaintiff exercised her second peremptory challenge on Neeriemer after her challenge for cause was denied. Plaintiff's third peremptory was exercised on Juror Roberts, not Drotos. With respect to Roberts, there had been *no* challenge for cause. Plaintiff could have exercised her last peremptory on Drotos. Instead, plaintiff used it on Roberts. Plaintiff was not forced to forfeit her third peremptory without choice.

Moreover, although plaintiff may have exhausted all her peremptory challenges, she did not demonstrate a desire to excuse another subsequently summoned juror. *Poet, supra* at 241. In *Poet*, the Court noted:

> We stress that a party need only demonstrate on the record a *desire* to excuse another subsequently summoned juror. The manifestation of this desire may be a motion to challenge for cause, a request for additional peremptory challenges in the case of exhaustion, or a simple expression of dissatisfaction with a juror who cannot be excused because of improperly compelled exhaustion. [*Id.* at 255 n 26; emphasis in original.]

After she exhausted her final peremptory challenge, plaintiff never indicated a desire to challenge a subsequently summoned juror. Plaintiff contends that her challenge of Drotos satisfies this requirement; however, we find to the contrary. Drotos was not a "subsequently summoned juror." When Drotos was summoned, there were peremptory challenges available to plaintiff. Indeed, as addressed above, plaintiff made a conscious decision not to peremptorily challenge Drotos. Plaintiff was required to identify a specific additional juror that she would have used a peremptory challenge to excuse. *Harville v State Plumbing and Heating, Inc*, 218 Mich App 302, 321; 553 NW2d 377 (1996). Plaintiff did not do this. For this reason, plaintiff's claim of error must fail.

Next, plaintiff contends that the trial court erred because it perfunctorily conducted voir dire itself rather than allowing the attorneys to participate. We disagree. The trial court itself may conduct voir dire or the court may permit the attorneys to do so. MCR 2.511(C). In *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994), the Supreme Court stated:

> However, this Court has determined that where the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised. *Fedorinchik v Stewart*, 289 Mich 436, 438-439; 286 NW 673 (1939).

After reviewing the record, we find, contrary to plaintiff's assertion, that the trial court sufficiently probed the jury in order to reveal potential biases.

Next, plaintiff, an African-American, claims that the jury was a product of a jury selection process that systematically and substantially underrepresented the black population of Wayne County. This claim has been considered and rejected by this Court in *Harville, supra.* Plaintiff does not demonstrate that the jury selection process in Wayne County has changed since *Harville* was decided.

Finally, plaintiff contends that defendant improperly used its peremptory challenge to remove Juror Davis, the only African-American prospective juror to reach the jury box. Because plaintiff failed to establish a prima facie case of discrimination, we find to the contrary.

In *Harville, supra* at 319, this Court set forth the process articulated by the United States Supreme Court in *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986), for evaluating the type of claim being made by plaintiff:

> (1) the complaining litigant must make a prima facie showing of discrimination, (2) the burden then shifts to the party exercising the peremptory challenge to articulate a race-neutral rationale for striking the juror at issue, and then (3) the court must determine whether the complaining litigant carried the burden of proving "purposeful discrimination."

In this case, plaintiff simply brought to the court's attention that defendant's peremptory challenge was made with respect to the first black juror drawn. In *Clarke v Kmart Corp*, 220 Mich App 381, 383; 559 NW2d 377 (1996), we stated that the "race of a challenged juror alone is not enough to make out a prima facie case of discrimination."

Even if plaintiff had made out a prima facie case of discrimination, the trial court properly found that defendant's articulated reason for the challenge was race-neutral. As defendant indicated, Juror Davis' husband had been involved in a personal injury lawsuit arising out of injuries he sustained in a motor vehicle accident. In particular, Davis' husband had experienced the aggravation of a preexisting back problem. "[U]nless a discriminatory intent is inherent in the reason offered, which does not have to be persuasive or even plausible, the reason will be deemed race-neutral." *Clarke, supra* at 384. There is nothing inherently discriminatory in the reason articulated by defendant for exercising its peremptory challenge. Under the foregoing circumstances, the trial court did not abuse its discretion when it overruled plaintiff's objection to defendant's peremptory challenge of Juror Davis.

We affirm.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] Plaintiff testified on direct examination that, before the fall, she knew about the defect in the road.