

STATE OF MICHIGAN
COURT OF APPEALS

JOANNE DENSMORE and RAY DENSMORE,

Plaintiffs-Appellants,

v

RAYMOND SCHULTZ, Personal Representative
of the Estate of DAVID SCHULTZ, Deceased,

Defendant-Appellee.

UNPUBLISHED

May 10, 2002

No. 226904

Lapeer Circuit Court

LC No. 97-024169-NO

Before: Cooper, P.J., and Griffin and Saad, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a jury verdict of no cause of action against defendant for negligent pesticide use.¹ We affirm.

Plaintiffs contend that the trial court abused its discretion in admitting defendant's 1996 planting log under the business record exception to the hearsay rule because defendant died before he could establish a proper foundation and because the log was untrustworthy. MRE 803(6) provides:

A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all *as shown by the testimony of the custodian or other qualified witness*, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. [Emphasis added.]

¹ For purposes of this opinion, the singular "plaintiff" refers to Joanne Densmore, and "defendant" refers to David Schultz, now deceased.

Though plaintiffs assert that the maker of the record must lay the foundation for the introduction of a business record, it is well established that, as long as a qualified witness testifies about the circumstances of its preparation, it is unnecessary for the actual preparer of the log to lay the foundation for admission. *People v Safedine*, 163 Mich App 25, 33; 414 NW2d 143 (1987). Defendant's father was the custodian of the log and he testified that defendant recorded the entries at or near the time of the events using a particular method that he knew defendant followed. Defendant's father also testified with sufficient knowledge that all the handwriting in the log was defendant's, including an entry that, in plaintiffs' opinion, seemed inconsistent. Moreover, the record does not reflect that the method or circumstances under which the record was prepared lacked trustworthiness.

In reviewing claims of improperly excluded or admitted evidence, we will find that a trial court abused its discretion "only in extreme cases in which the result is so palpably and grossly violative of fact and logic that it evidences perversity of will, a defiance of judgment, or the exercise of passion or bias." *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). Clearly, no such abuse of discretion occurred here. Furthermore, were we to find that the trial court admitted the log erroneously, reversal is not warranted because this alleged error is harmless. The jury could have relied on ample, unchallenged evidence to conclude that plaintiffs failed to prove breach of duty by a preponderance of the evidence. See MCR 2.613(A); *Miller v Hensley*, 244 Mich App 528, 531; 624 NW2d 582 (2001).

Plaintiffs also assert that the trial court erred in denying plaintiffs' motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, for plaintiffs' motion for a new trial. We disagree.

A court should grant a motion for JNOV -- upset a jury verdict -- only when the evidence presented was insufficient to create an issue for the jury. *Pontiac School Dist v Miller Canfield Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997). Defendant introduced expert medical testimony that plaintiff's injuries could not have been caused by defendant's pesticide use. Further, testimony established that the pesticide at issue might not have been used on the day plaintiff was injured and that the application method would probably not produce pesticide drift onto plaintiffs' property. Because this was sufficient to create a material issue of fact when viewed in a light most favorable to defendant, JNOV was properly denied. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998).

Moreover, the trial court did not abuse its discretion by denying plaintiffs' motion for a new trial. The trial court's function in deciding a motion for new trial is "to determine whether the overwhelming weight of the evidence favors the losing party." *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). This Court gives substantial deference to the trial court's conclusion that the verdict was not against the great weight of the evidence. *Id.* Here, the record reveals no abuse of discretion and, therefore, we will not interfere in the trial court's determination, nor will we substitute our judgment for that of the jury. *Id.*

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Henry William Saad