

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

LLOYD HAMMOND and ANGELA  
HAMMOND,

Plaintiffs-Appellants,

v

SALVATION ARMY,

Defendant-Appellee.

---

UNPUBLISHED  
August 8, 2006

No. 260122  
Wayne Circuit Court  
LC No. 2002-037300-NO

Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a judgment of no cause of action in favor of defendant following a jury trial. We affirm.

This case arises out of a motorcycle accident that occurred on Sunday, October 22, 2000. Defendant's thrift store was closed, and a chain attached to a pair of posts was in place to close the entrance to the parking lot. The chain and the posts to which it was attached were located five feet within the public right-of-way, rather than on defendant's property. Plaintiff was riding his motorcycle on M-59,<sup>1</sup> and attempted to enter defendant's parking lot to turn around. Plaintiff alleges his motorcycle struck the chain hanging across the entrance, stating that he did not see the chain before he hit it, but that he saw it moving after he felt an impact. The chain apparently slid up the front of the motorcycle and the windshield, and struck Hammond in the mouth, causing severe dental and jaw damage. After the accident, plaintiff drove his motorcycle home and then his wife drove him to the hospital.

Plaintiffs filed a complaint alleging that defendant had been negligent in locating the posts and chain within the public right-of-way, and in failing to properly maintain the chain so that it would be visible to others. After a trial, the jury returned a verdict of no cause of action, specifically finding that defendant was not negligent. Plaintiffs then moved for judgment

---

<sup>1</sup> At the location in question, M-59 includes two traffic lanes in each direction plus a center turn lane.

notwithstanding the verdict (“JNOV”) or a new trial, arguing that the verdict was against the great weight of the evidence, that the trial court erred in denying plaintiffs’ motion for a partial directed verdict on the issues of negligence and proximate cause, and that the trial court erred in refusing to give a special jury instruction requested by plaintiffs. The trial judge denied the motion, specifically noting that after trial, she had “talked to the jury,” and [t]hey did not believe the Plaintiff’s testimony.” This appeal followed.

Plaintiffs argue that the trial court erred in denying their motion for a partial directed verdict on the issue whether defendant negligently placed its posts and chain within the public right-of-way.<sup>2</sup>

This Court reviews a trial court’s decision on a motion for a directed verdict de novo. *Candelaria v B C Gen Contractors, Inc*, 236 Mich App 67, 71; 600 NW2d 348 (1999). All the evidence presented up to the time the motion was made must be examined in the light most favorable to the nonmoving party to determine whether a question of fact existed. *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986); *Candelaria, supra* at 71-72. “A directed verdict is appropriate only when no material factual question exists upon which reasonable minds could differ.” *Id.* at 71-72; see also *Matras, supra* at 681-682.

In their complaint, plaintiffs alleged that defendant was negligent for placing the posts and chain within the public right-of-way. Major Wolf, who was director of defendant’s Oakland County district for three and one-half years before he retired on February 28, 2002, during which time the posts and chain were installed, testified that, while the posts were not placed exactly where he directed, he assumed they were located on defendant’s property and did not check any records in that regard. Conversely, plaintiffs’ surveyor testified that the posts and chain were located five feet inside the public right-of-way, on property owned by the state of Michigan. Defendant did not attempt to show otherwise.<sup>3</sup>

We agree with plaintiffs that there was no question of material fact that defendant negligently installed the posts and chain within the public right-of-way, rather than on its own property. Therefore, the trial court erred in denying plaintiffs’ motion for a partial directed verdict on that limited issue. However, “an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order,

---

<sup>2</sup> Plaintiffs additionally argue that they were entitled to a directed verdict on the issue of proximate cause. At trial, however, plaintiffs conceded that there was a question of fact for the jury on the issue of proximate cause. Therefore, that issue has been waived and is not susceptible to review on appeal. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

<sup>3</sup> Although defendant argues that plaintiffs failed to show that a permit was required in order to install the posts and chain at that location, plaintiffs did not claim that defendant was negligent for failing to obtain a permit. Rather, plaintiffs’ theory was that defendant negligently located the posts and chain within the public right-of-way.

unless refusal to take this action appears to the court inconsistent with substantial justice.” MCR 2.613(A).

In this case, defendant’s expert, Weldon Greiger, testified that, even if the posts and chain had been located entirely on defendant’s property, plaintiff Lloyd Hammond still would not have been able to stop in time. Thus, he concluded that the location of the posts and chain was not the proximate cause of the accident. Plaintiffs did not attempt to rebut this testimony by, for example, showing that Hammond would have seen the chain sooner if it had been located on defendant’s property. Thus, even if the trial court had directed a partial verdict for plaintiffs on this narrow issue, the ultimate verdict of no cause of action would have been the same. Therefore, reversal is not required.

Plaintiffs next argue that the trial court erred in denying their motion for judgment notwithstanding the verdict (“JNOV”) or a new trial. We disagree.

This Court reviews a trial court’s decision on a motion for JNOV de novo. *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). “The appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party” to determine whether a question of fact existed. *Id.* “Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted.” *Id.*

A trial court’s decision to grant or deny a motion for a new trial will not be reversed absent a palpable abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997). A new trial may be granted for, among other things, “an order of the court or abuse of discretion which denied the moving party a fair trial”; “[a] verdict or decision against the great weight of the evidence or contrary to law”; or an “[e]rror of law occurring in the proceedings, or mistake of fact by the court.” MCR 2.611(A)(1)(a), (e), and (g).

In their motion for JNOV or a new trial, plaintiffs argued that the jury’s verdict was against the great weight of the evidence, that the trial court erred in denying plaintiffs’ motion for a partial directed verdict on the issues of negligence and proximate cause, and that the trial court erred in refusing to give a special jury instruction requested by plaintiffs.

We previously concluded that the trial court erred in denying plaintiffs’ motion for a partial directed verdict on the issue whether defendant negligently installed its posts and chain within the public right-of-way, but that reversal was not required because plaintiffs failed to rebut Greiger’s opinion that the location of the posts and chain was not a proximate cause of the accident. Consistent with our analysis of that issue, we likewise conclude that plaintiffs are not entitled to JNOV or a new trial on this ground. Additionally, as further discussed below, the question whether plaintiffs were entitled to its requested special jury instruction on this issue of negligence is moot.

The only remaining basis for plaintiffs’ motion for a new trial was that the jury’s verdict was against the great weight of the evidence. To be entitled to a new trial on this basis, plaintiffs must show that “the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.” *People v Lemmon*, 456 Mich 625, 635, 642, 647; 576 NW2d 129 (1998). In this case, there was scant (if any) evidence tending to show that defendant’s

negligence in locating the posts within the public right-of-way was a proximate cause of the accident. Greiger's testimony to the contrary went un rebutted. Under the circumstances, we cannot conclude that the ultimate verdict of no cause of action is against the great weight of the evidence. While we agree that it was improper for the trial court to consider its conversation with the jurors as a basis for denying plaintiffs' motion, see *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997), and *Hoffman v Monroe Pub Schools*, 96 Mich App 256, 261; 292 NW2d 542 (1980), the trial court reached the right result because plaintiffs failed to rebut Greiger's testimony that the location of the posts and chain within the public right-of-way was not a proximate cause of the accident. Because the right result was reached, reversal is not warranted. *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

Plaintiffs next argue that the trial court erred in denying their request for a special instruction that would have allowed the jury to infer, from the fact that the posts and chain were located within the public right-of-way, that defendant was negligent. In light of our conclusion that the trial court erred in denying plaintiffs' motion for a partial directed verdict on this issue (which would have eliminated the need for the special jury instruction), but that the error was harmless because plaintiffs failed to rebut Greiger's testimony that the location of the posts was not a proximate cause of the accident, this issue is moot.

Plaintiffs next argue that the trial court abused its discretion in admitting a videotape produced by Greiger. Plaintiffs maintain that because Hammond admitted that he could have made a U-turn on M-59, Greiger's videotape, showing that a U-turn was possible, was irrelevant. We agree.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). "Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case." *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003). "The demonstrative evidence must be relevant and probative." *Id.*

In this case, defendant offered the videotape to show that Hammond could have made a U-turn on M-59, using defendant's driveway approach if necessary, but without having to enter defendant's parking lot. However, Hammond already testified that he could have made a U-turn on M-59, but explained that he chose to turn in defendant's parking lot instead. Hammond also conceded that he did not see the chain strung across defendant's driveway. We agree with plaintiffs that the videotape was not relevant to a contested issue in the case, because there was no question of fact concerning whether Hammond could have made a U-turn on M-59. For this reason, the trial court abused its discretion in admitting the videotape.<sup>4</sup>

---

<sup>4</sup> Although plaintiffs also challenged the videotape on the ground that Greiger was not an expert in motorcycles and that there were differences in Hammond's motorcycle compared to the motorcycle used in the videotape, these matters affected only the weight of the evidence, not its admissibility. *Lopez v General Motors Corp*, 224 Mich App 618, 627-628; 569 NW2d 861

(continued...)

But given the lack of relevance of the evidence, there is no basis to conclude that it affected the jury's verdict. Moreover, as previously discussed, plaintiffs failed to rebut Greiger's testimony that the location of the posts and chain was not a proximate cause of the accident. Additionally, Hammond testified that he simply did not see the chain. Under these circumstances, the trial court's error in admitting the videotape was harmless. MCR 2.613(A); see also MRE 103(a).

Plaintiffs next argue that the trial court abused its discretion in allowing Greiger to testify that Hammond failed to stop within the assured clear distance ahead. We disagree.

Contrary to plaintiffs' argument, the fact that Greiger's opinion may have encompassed an ultimate issue was not a basis for excluding it. See MRE 704. Further, in calculating how quickly Hammond could have stopped upon seeing the chain, Greiger addressed coefficients of friction, perception and reaction times, and stopping distances, which are matters not within the ken of common knowledge. See *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779-783, 789-791; 685 NW2d 391 (2004). Thus, under MRE 702, Greiger's opinion concerning whether Hammond stopped within the assured clear distance ahead was a proper subject for expert testimony. We also note that, upon plaintiffs' objection, Greiger omitted any mention of legal or statutory requirements.

We disagree with plaintiffs' contention that Hammond's alleged failure to stop within the assured clear distance was irrelevant to any issue in the case. Plaintiffs' theory was that defendant's negligence in locating the posts and chain within the public right-of-way was a proximate cause of the accident. Greiger's opinion that Hammond failed to stop within the assured clear distance ahead was relevant to defendant's argument that, even if the posts and chain had been located wholly on defendant's property, Hammond still would not have been able to stop in time to avoid the accident. Thus, Greiger's testimony was relevant to defendant's defense. The trial court did not abuse its discretion in allowing this testimony.

Lastly, plaintiffs argue that the trial court abused its discretion in allowing Greiger to testify that Hammond showed poor judgment in driving himself home after the accident. We agree that Greiger's opinion whether Hammond exercised poor judgment after the accident did not involve "scientific, technical, or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." MRE 702. However, the question whether Hammond exercised good judgment after the accident was not a material issue in the

---

(...continued)

(1997); *Smith v Grange Mut Fire Ins Co*, 234 Mich 119, 126; 208 NW 145 (1926).

case and plaintiffs do not even attempt to explain how this testimony may have affected the jury's verdict, so that failure to reverse would result in manifest injustice. See MCR 2.613(A); MRE 103(a). Plaintiffs have not demonstrated that reversal is warranted.

Affirmed.

/s/ Alton T. Davis

/s/ Jessica R. Cooper

/s/ Stephen L. Borrello