

STATE OF MICHIGAN
COURT OF APPEALS

EDWARD C. TAVORN,

Plaintiff-Appellant/Cross-Appellee,

v

ANTHONY ULDERICO CERELLI and
REDFORD BUILDING SUPPLY, INC.,

Defendants-Appellees/Cross-
Appellants.

and

ALLEN GAVINS and CITY OF DETROIT,

Defendants.

UNPUBLISHED

July 31, 2007

No. 268311

Wayne Circuit Court

LC No. 02-212449-NI

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals, and defendants Cerelli¹ and Redford Building Supply cross-appeal, from a judgment of the circuit court entered on the jury's verdict in favor of defendants on plaintiff's negligence claim. We affirm in part, reverse in part and remand.

Plaintiff alleges injuries arising out of an accident while he was a passenger on a Detroit city bus that collided with a commercial vehicle driven by defendant Cerelli and owned by defendant Redford Building Supply. The accident occurred while Cerelli was making a left-hand turn onto westbound Plymouth Road and was struck by the oncoming bus. Plaintiff's theory of the case is essentially that Cerelli turned in front bus and the bus was unable to stop in time to

¹ We note that the overwhelming usage of defendant's name in the lower court has it spelled "Cerilli." But the final judgment in the trial court and the docketing statement in our Court spelled it as "Cerelli." Because we use the spelling on the judgment as the official spelling in our Court, we will continue the use of that spelling in our opinion.

avoid a collision. Defendants' theory is that the bus was a safe distance away when Cerelli began his turn and that the collision occurred because the bus was moving at an excessive rate of speed and failed to slow down in time to avoid the accident.

Plaintiff's first argument is that the trial court erred in failing to give certain required specialized jury instructions. We disagree. The Supreme Court summarized the standard of review of instructional issues in *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000):

We review claims of instructional error de novo. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. MCR 2.613(A); *Johnson v Corbet*, 423 Mich 304; 377 NW2d 713 (1985).

Plaintiff first complains that the trial court erred in denying his requested modification to CJI 10.02. That instruction reads as follows:

Negligence is the failure to use ordinary care. Ordinary care means the care a reasonably careful person would use. Therefore, by "negligence," I mean the failure to do something that a reasonably careful person would do, or the doing of something that a reasonably careful person would not do, under the circumstances that you find existed in this case.

The law does not say what a reasonably careful person using ordinary care would or would not do under such circumstances. That is for you to decide.

Plaintiff's requested modification was to substitute "commercial truck driver" for "person" in the first paragraph of the instruction. Not only did the trial court not err in declining the requested modification, but also it would have been error to grant the request.

As the Court explained in *Case, supra* at 6-7, there is a general standard of care applicable in negligence cases:

The disputed instruction in this case was intended to aid the jury in determining whether defendant breached its duty to plaintiffs to exercise "reasonable care." This is the so-called "general standard of care" applicable in negligence cases. See *Moning v Alfonso*, 400 Mich 425, 443; 254 NW2d 759 (1977). Ordinary care means the care that a reasonably careful person would use under the circumstances. See SJI2d 10.02; *Detroit & Milwaukee R Co v Van Steinburg*, 17 Mich 99, 118-119 (1868) ("Negligence . . . consists in a want of that

reasonable care which would be exercised by a person of ordinary prudence under all the existing circumstances, in view of the probable danger of injury”).

Ordinarily, it is for the jury to determine whether a defendant’s conduct fell below the general standard of care. Stated another way, the jury usually decides the *specific* standard of care that should have been exercised by a defendant in a given case. *Moning, supra* at 438. However, *the court* sometimes decides the specific standard of care if it is of the opinion “that all reasonable persons would agree or there is an overriding legislatively or judicially declared public policy” *Id.*

The Court went on to emphasize that the exception to the general rule that the jury determines the specific standard of care is very limited. *Case, supra* at 9. It contrasted the situation in *Case*, where the plaintiffs’ dairy cows were allegedly harmed by stray voltage, and an earlier case where the plaintiff’s decedent was killed when his aluminum ladder came into contact with a high-voltage electrical line. The exception to the general rule applied in the second case, but not the first. *Id.* at 9.

Turning to the case at bar, perhaps a more specialized instruction would have been warranted had defendant been driving a truck which contained hazardous materials and plaintiff was injured by exposure to those hazardous materials after an accident. But this was an ordinary traffic accident with an ordinary question: was the truck driver negligent in turning when he did rather than yielding the right-of-way and waiting for the bus to pass. While it is certainly true that if a person is driving a vehicle that takes longer to complete a turn, then greater distance must be allowed with respect to the oncoming traffic before starting the turn. But that does not change the nature of the duty. The duty remains that of ordinary care as exercised by a reasonably careful person.

For these reasons, we conclude that the trial court did not err in declining plaintiff’s request to modify the jury instruction.

Next, plaintiff argues that the trial court erred in declining to give two requested special instructions. First, plaintiff requested the court to give the following “Proper Lookout” instruction:

The motor vehicle operator is required to take notice of the conditions before him or her. If it is apparent that, because of some particular method of proceeding, the operator is likely to bring about an injury, it is his or her duty to adopt some safer method if with ordinary care that [sic, can?] be done.

One is bound to anticipate the possibility of meeting other vehicles at any point in the street, and he or she must keep a proper lookout for them.

Plaintiff also requested a “Duty to see Obvious Danger” instruction:

If the Defendant looked as the Defendant says—he did and you find that the bus was in the range of the Defendant’s vision, it was the Defendant’s duty to see the bus and take precautions.

Plaintiff based the first instruction on one approved in *Corbin v Yellow Cab Co*, 349 Mich 434; 84 NW2d 775 (1957), and the second instruction was adapted from *Korstange v Kroeze*, 261 Mich 298; 246 NW 127 (1933).

With respect to the “Proper Lookout” instruction, plaintiff’s reliance on *Corbin, supra*, is misplaced. *Corbin* involved a rear-end collision and the instruction was specifically designed to instruct on the “assured clear distance rule.” *Id.* at 439. Thus, *Corbin* and its instruction are inapplicable here. Moreover, while plaintiff’s instruction is based upon the instruction in *Corbin*, it conveniently omits a key phrase. Instead of ending where plaintiff ended his proposed instruction, the instruction in *Corbin* went on to instruct the jury that not only is there a duty to keep a proper lookout, but that the defendant must keep his vehicle “under such control as will enable him to avoid a collision with any other person or object properly using care and caution.” The defense theory in this case is that the bus driver was driving at an excessive rate of speed and, therefore, was not using proper care and caution.

In any event, we agree with the trial court that the instructions that were given adequately cover the points addressed by both of plaintiff’s proposed instructions. First, CJI 10.02 covers the issue of the duty of care, which covers both of these issues. Additionally, the trial court gave an instruction on a driver’s duty when turning left to yield the right-of-way to oncoming traffic. This instruction adequately and more precisely covered the issue. Ultimately, it does not matter whether defendant Cerelli failed to yield the right-of-way because he did not see the bus or because he thought the bus was sufficiently far away to safely turn. If Cerelli was obligated to yield the right-of-way and failed to do so, the determination of his negligence does not depend upon the reason for it. Rather, the issues here are whether Cerelli failed to yield the right-of-way when obligated to do so or whether the bus driver forfeited the right-of-way by driving at an excessive rate of speed. The instructions given by the trial court not only adequately covered this point, but also did so with more precision than plaintiff’s requested “Proper Lookout” instruction.

And these same points apply to plaintiff’s proposed “Duty to see Obvious Dangers” instruction. Again, the issue is not whether Cerelli failed to see the bus, but whether he improperly turned in front of the bus.² If the bus was proceeding with ordinary care and caution and was entitled to the right-of-way and Cerelli failed to yield the right-of-way, it does not matter whether he failed to do so because he did not see the bus or whether he failed to do so because he erroneously determined that he could safely make the turn. In sum, the instructions given by the trial court adequately covered this point and did so with greater precision than the proposed instructions.

² And this would seem to be literally true as plaintiff concedes that Cerelli admitted to seeing the bus. Therefore, if Cerelli had a duty to see the bus as plaintiff’s proposed instruction suggests, he complied with that duty. And the duty to take proper precautions is already covered by the general standard of care instruction.

Plaintiff also argues that the trial court erred in refusing to give an instruction regarding certain requirements under federal motor carrier rules and not precisely following the language of the regulation in the instruction that was given. We disagree. First, plaintiff argues that the trial court erred in refusing to give an instruction based upon 49 CFR 392.1, which imposes an obligation on motor carriers to instruct their drivers on the motor carrier safety regulations and for the drivers to follow those instructions. While plaintiff argues that Cerelli admitted that he was never instructed on the motor carrier rules, Cerelli's testimony that plaintiff relies upon actually only admits that he was not familiar with the rules. Not being familiar with the rules is not the same as never having been instructed on the rules. But in any event, whether Cerelli was or was not instructed on the rules is of no consequence to the outcome of this case. Either he negligently operated the vehicle or he did not. If he did operate negligently, any failure to provide the required instruction might provide an explanation for why he was negligent, but it does not matter why he was negligent. If he did not operate negligently, then he is not responsible for the accident, and whether he was properly instructed or not is of no concern to this case. In either event, there was no need to give the jury an instruction on the issue.

Plaintiff next complains about the trial court's modification of 49 CFR 392.14. That regulation requires that extreme caution be exercised while operating in hazardous conditions, such as rain. That caution may include slowing down or even halting operation of the vehicle until conditions improve. M Civ JI 12.05 provides the instruction on violation of rules or regulations:

The *[name of state agency]* in Michigan has adopted certain regulations pursuant to authority given to it by a state statute. [Rule / Rules] _____ of *[name of state agency]* [provides / provide] that *[Here quote or paraphrase applicable parts of regulation(s) as construed by the courts.]*.

If you find that defendant violated [this regulation / one or more of these regulations] before or at the time of the occurrence, such [violation / violations] [is / are] evidence of negligence which you should consider, together with all the other evidence, in deciding whether defendant was negligent. If you find that defendant was negligent, you must then decide whether such negligence was a proximate cause of the [injury / damage] to plaintiff.

The first paragraph of the instruction directs the trial court to quote or paraphrase the applicable regulation.³ In this case, the trial court paraphrased the regulation as follows:

One of those regulations involve the hazardous conditions such as those caused by snow, ice, sleet, fog, mist, rain, dust or smoke adversely affect visibility or traction, speed shall be reduced. If conditions become sufficiently dangerous,

³ Plaintiff misrepresents this requirement in his brief. Plaintiff states in his brief that "the specific language of SJI 12.05, requires the trial court "insert" the language of the regulation and read the regulation as written to the jury."

the operation of the commercial motor vehicle shall be discontinued and shall not be resumed until the commercial vehicle can be safely operated.

While generally complaining that the trial court did not quote the regulation exactly, plaintiff appears to be primarily concerned with the fact that the trial court did not include the portion of the regulation that directs that “extreme caution” should be exercised in hazardous conditions. The trial court specifically declined to use that term out of concern that the jury might interpret it as establishing a standard of less than ordinary negligence in assessing defendants’ liability. We agree with the trial court’s concern. Moreover, we believe that the instruction as given by the trial court adequately states the applicable law. A reading of the regulation reveals that it considers “extreme caution” to be the reduction of speed and, if necessary, cessation of the operation of the vehicle until conditions improve. Therefore, the trial court’s instruction conveyed the requirements of the regulation, while avoiding the use of a term that might confuse the jury as to the standard of care applicable to the case.

Plaintiff also has an additional complaint regarding this instruction, namely that the trial court did not limit its applicability only to defendant and not to the city bus as well. This argument is without merit. Immediately following the portion of the instructions quoted above, the trial court instructed the jury that if “you find that Redford Supply through its driver Anthony Cerilli violated this regulation before or at the time of the occurrence, such violation are [sic] evidence of negligence which you may consider together with all of the other evidence in deciding whether Anthony Cerilli and or Redford Building Supply Company was negligent.” We agree with defendants that this instruction adequately limited the applicability of the regulation to defendants and not to the city bus.

Plaintiff next argues that the trial court erred in allowing defendants’ expert, Weldon Greigor, to testify before certain foundational evidence had been admitted. MRE 703 does require that facts or data relied upon by an expert in forming his opinion be in evidence. But the rule also gives the trial court discretion to receive the expert’s testimony subject to the condition that the factual bases of the opinion are admitted into evidence later. In any event, defendant’s expert was called before the witness who was to introduce the data because the expert was available in the courtroom and the other witness was not. More to the point, plaintiff did not object to the order of witnesses. But even if he had, the trial court had the authority to receive the expert’s opinion, conditioned upon the later admission of the data, which did occur.

Plaintiff does argue that there were problems with the testimony of the fact witness, Rodney Veil. But that does not change the fact that the data was entered into evidence. Plaintiff was free to challenge the reliability of that data and, therefore, the reliability of defendant’s expert, in his arguments to the jury. But that does not render the expert’s testimony inadmissible or create error requiring reversal in the order of witness presentation. In short, had the issue been properly raised, the trial court either would have received Greigor’s testimony conditioned upon Veil’s later testimony or would have recessed the trial until Veil arrived and had Veil testify before Greigor. In either event, the result ultimately would have been the same.

Next, plaintiff argues that the trial court erred in precluding plaintiff from cross-examining defendants’ expert regarding a failed experiment performed in this case. We disagree. 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). Defendants initially sought to obtain the actual bus involved in the accident to use to collect data for the expert's use. The City of Detroit provided a similar bus, but not the actual bus. Furthermore, the testing was done in a different location than where the accident occurred. Apparently, when the bus was being driven in the test, it did not reach the speed that defendants' expert estimated the bus in the accident was traveling at when it applied the brakes, after accelerating over a similar distance at the time of the accident. Plaintiff wanted to cross-examine defendant's expert on this failure. Defendants opposed the admission of evidence of this test on the grounds that it was done with a different bus on a different road under different conditions. The trial court agreed and excluded the use of the results of the experiment.

We are not persuaded that the trial court erred in excluding evidence of the experiment. While plaintiff argues that the bus used in the test was identical to the bus involved in the accident, he does not direct us to the evidence that establishes that fact. Even if the two buses were identical models, with identical features, manufactured at the same time, they might perform differently dependent upon the condition they were in at the time. And even more potential for variation is introduced by the fact that the experiment was performed in a different physical location. With this in mind, the trial court did not abuse its discretion in excluding the evidence.

Plaintiff also argues that the cumulative effect of the errors at trial merit a new trial. Because we found no error, there can be no cumulative effect of errors.

Plaintiff next argues that the trial court erred in denying his motion for new trial on the basis that the jury verdict was against the great weight of the evidence. We disagree. We review the trial court's denial of a motion for new trial for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006).

The essence of plaintiff's argument is that the jury should have rejected the testimony of defendant's expert because plaintiff had effectively impeached the basis for the expert's opinion that the bus was speeding and, therefore, had forfeited the right-of-way. While plaintiff did certainly do damage to the expert's opinion, it does not compel the conclusion that the jury was obligated to reject it. It is for the jury, not this Court or the trial court, to determine if the expert's opinion was believable. *Detroit v Larned Associates*, 199 Mich App 36, 41; 501 NW2d 189 (1993). Moreover, even if the jury were to reject the expert's opinion, which it may have, there was lay testimony that estimated the bus' speed even higher than did defendants' expert. In sum, there was competing evidence from which the jury could reasonably have concluded that the bus was not speeding and had the right-of-way or that the bus was not speeding and had forfeited the right-of-way.

Moreover, we do not believe that a conclusion that the bus was not speeding would necessarily compel the conclusion that Cerelli was negligent. Cerelli testified that he saw the bus before he began his turn, that the bus was approximately two blocks away, and Cerelli concluded that he could safely make his turn without the bus colliding with his truck. The jury could have reasonably concluded that Cerelli was correct in his belief that it was safe to turn and that the bus driver failed to maintain a speed that would have avoided the accident.

For these reasons, we conclude that the trial court did not abuse its discretion in denying the motion for new trial.

Plaintiff's final argument is that the bus' speed was not a proximate cause of plaintiff's injuries. This does not appear to be an independent issue so much as an additional argument as to why the verdict was against the great weight of the evidence.

In any event, plaintiff's assertion is incorrect. Plaintiff relies on three cases in support of his argument, none of which are helpful to plaintiff. Plaintiff cites *Harding v Blankenship*, 274 Mich 118; 264 NW 312 (1936), for the proposition that speed is not material unless it contributed to the accident. *Id.* at 124-125. This is true, but defendants argue that the bus' speed contributed to the accident. Moreover, *Harding* makes it clear that that is a jury determination to make. *Id.* at 125. The second case, *Bernstein v Brody*, 256 Mich 512, 514; 240 NW 62 (1932), also states that speed is not relevant unless it contributed to the accident. But there the Court reversed a judgment for the plaintiff after a bench trial because there was evidence to support the conclusion that the plaintiff was speeding and it contributed to the accident. Finally, plaintiff relies on an unpublished opinion of this Court, *Walker v Williams*, unpublished opinion per curiam (No. 249776, issued November 16, 2004). Not only is this case not precedentially binding, MCR 7.215(C)(1), but it fails to assist plaintiff. In *Walker*, we affirmed the trial court's conclusion that the defendant's speeding was not a cause of the accident where the plaintiff failed to stop for a stop sign. Clearly, in the case at bar, the bus' speed was relevant to the determination whether Cerelli's decision to make his turn was faulty.

Ultimately, of course, the question before the jury was not whether the bus' speed was a proximate cause of plaintiff's injuries, but whether Cerelli's negligence was. But the jury found Cerelli not to be negligent.

We turn now to the issue raised by defendants on cross appeal, namely whether the trial court erred in interpreting MCR 2.403 and 2.625 as precluding the awarding of costs to defendants as the prevailing party. We agree with defendants and reverse.

There is no dispute that defendants were the prevailing party and entitled to tax costs under MCR 2.625 unless MCR 2.403 provides otherwise. The trial court concluded that it did. MCR 2.403 concerns case evaluation sanctions and MCR 2.403(O)(6) provides in pertinent part as follows:

For the purpose of determining taxable costs under this subrule and under MCR 2.625, the party entitled to recover actual costs under this rule shall be considered the prevailing party.

In the case at bar, neither party is a prevailing party under MCR 2.403. Plaintiff accepted the case evaluation and defendants rejected it. Plaintiff is not entitled to recover case evaluation sanctions because the verdict was more favorable to defendants than was the case evaluation. MCR 2.403(O)(1). Defendants, of course, are not entitled to case evaluation sanctions because they rejected the case evaluation. *Id.* Thus, there is no "prevailing party" under MCR 2.403(O)(6).

The trial court concluded that, because defendants were not the prevailing party under MCR 2.403(O)(6), they could not be the prevailing party under MCR 2.625. Defendants argue that because there was no prevailing party at all under MCR 2.403(O)(6), then MCR 2.403(O)(6) is simply inapplicable and they should be regarded as the prevailing party under MCR 2.625 as the term is generally used. We agree with defendants.

In interpreting court rules, we apply the same principles as with statutory construction. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). We begin with the plain language of the rule and if it is unambiguous, it is to be applied as written without further judicial interpretation. *Id.*

As defendants point out, there is a need and logic to MCR 2.403(O)(6) where there is a party who is entitled to case evaluation sanctions because the party who is the “prevailing party” under the traditional definition of the term might nevertheless be obligated to pay case evaluation sanctions. In such a situation, it would be counterproductive to allow the party obligated to pay case evaluation sanctions to nonetheless tax costs under MCR 2.625. Defendants provide a good example of such a situation in their brief: A case is evaluated at \$50,000, both parties reject and the jury awards the plaintiff \$20,000. Under MCR 2.625, the plaintiff would be the prevailing party and entitled to tax costs. But under MCR 2.403(O)(1), the defendant would be entitled to actual costs. Thus, there would be the nonsensical situation of both parties being entitled to tax costs. In such a case, MCR 2.403(O)(6) would intervene to say that the defendant, as the party entitled to an award of actual costs under the case evaluation sanctions, is the only party entitled to tax costs.

But where neither party is entitled to an award of actual costs under case evaluation sanctions, there is no conflict between MCR 2.403 and MCR 2.625 to resolve. That is, in such a situation, there is no need to apply MCR 2.403(O)(6). And, in looking at the words used in MCR 2.403(O)(6), we conclude that it simply does not apply when neither party is entitled to case evaluation sanctions. MCR 2.403(O)(6) says that the party entitled to recover actual costs under MCR 2.403 shall be considered the prevailing party under both MCR 2.403 and 2.625. It does not say that a party cannot be considered a prevailing party under MCR 2.625 unless the party is entitled to recover costs under MCR 2.403. This is an important point because MCR 2.625(A)(1) provides that the prevailing party is entitled to tax costs “unless prohibited . . . by these rules.” MCR 2.403(O)(6) does prohibit a party obligated to pay case evaluation sanctions from taxing costs, but it does not prohibit a party from taxing costs where no party is obligated to pay case evaluation sanctions.

In sum, we conclude that where no party is entitled to an award of actual costs under MCR 2.403, then MCR 2.403(O)(6) does not declare either party to be the prevailing party and that rule simply does not apply by its own terms. In such a case, MCR 2.625(A)(1) operates unimpeded to allow the prevailing party to tax costs. In the case at bar, neither party was entitled to an award of actual costs under MCR 2.403. Therefore, because defendants obtained a verdict of no cause of action, they are the prevailing party under MCR 2.625(A)(1) and are entitled to tax costs under that rule.

We affirm the circuit court’s judgment in favor of defendants, but reverse its order denying defendants costs under MCR 2.625. We remand the matter to the trial court with

directions to award defendants the appropriate costs under MCR 2.625. We do not retain jurisdiction. Defendants may tax costs.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Peter D. O'Connell