STATE OF MICHIGAN

COURT OF APPEALS

JOHN C. SINKE,

Plaintiff-Appellant,

and

LORRAINE C. SINKE,

Plaintiff,

v

RODNEY D. SANFORD and CITY OF SAULT STE. MARIE,

Defendants-Appellees.

UNPUBLISHED
October 13, 2005

No. 258036
Chippewa Circuit Court
LC No. 00-004920-NI

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

PER CURIAM.

Plaintiff John C. Sinke[1] appeals as of right the order, entered after a jury trial, finding no cause of action against defendants. This case stems from a collision between an emergency vehicle driven by defendant Sanford and plaintiff's automobile at an intersection controlled by a traffic light. We affirm.

Plaintiff first contends that the trial court erred by refusing to grant his motions for summary disposition and directed verdict on the issues of liability and serious impairment of a body function. This Court reviews de novo the trial court's ruling on the motion for summary disposition, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999), and we also review de novo the ruling on the motion for a directed verdict, *Tobin v Providence Hosp*, 244 Mich App 626, 642-643; 624 NW2d 548 (2001).

[1] The parties stipulated to the dismissal of Lorraine Sinke's claims against defendants after the trial court had granted her motion for a new trial. Our reference to "plaintiff" in the singular pertains to John Sinke.

MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). "Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists." *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (citations omitted).

With respect to a motion for directed verdict, this Court considers the trial court's decision by reviewing "the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000)(citation omitted). "Directed verdicts are not favored in negligence cases." *Lamson v Martin* (*After Remand*), 216 Mich App 452, 455; 549 NW2d 878 (1996).

The primary issue for the trial court to resolve was whether plaintiff had established defendant Sanford's liability for the accident as a matter of law when viewing the evidence in a light most favorable to defendants. If plaintiff failed to establish a case of liability sufficient to take the issue away from the jury, then the trial court did not err in denying plaintiff's motion for summary disposition or in denying the motion for directed verdict.

An ordinary citizen approaching a red light in his or her automobile is required to stop and may not proceed until the signal turns green. MCL 257.612(1)(c)(i). However, even where the light is green, drivers are required to surrender the right of way to authorized emergency vehicles that are sounding their siren and flashing their lights. MCL 257.653(1)(a).[2] Additionally, an emergency vehicle on an emergency run may proceed through a red light or a stop sign, but only after slowing down as may be necessary for safe operation. MCL

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[2] The driver of another vehicle shall yield the right of way and shall immediately drive to a position parallel to and as close as possible to the right-hand edge or curb of the roadway, clear of an intersection, and shall stop and remain in that position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer. [MCL 257.653(1)(a).]

257.603(3)(b). Furthermore, the driver of an emergency vehicle may exceed the speed limit "so long as he or she does not endanger life or property." MCL 257.603(3)(c).[3]

Considering the facts of this case in a light most favorable to defendants, the trial court properly concluded that material fact questions existed where there was various and conflicting evidence with respect to vehicle speed, the need, legal or otherwise, to yield or stop, the ability to yield or stop, line of vision, and whether the parties were aware or should have been aware of each other, all of which could lead reasonable jurors to reach different conclusions regarding the negligence of the parties and the degree of said negligence.[4] Accordingly, the trial court properly denied both plaintiff's motion for summary disposition regarding liability and plaintiff's motion for directed verdict.[5]

Plaintiff also contends that the trial court erred by refusing to grant summary disposition or a directed verdict on the issue whether he suffered a "serious impairment of body function." MCL 500.3135. Because the question of liability was properly submitted to the jury, and because the jury's determination that plaintiff was primarily negligent made it unnecessary to resolve whether plaintiff suffered a serious impairment of body function, we conclude that this issue is moot. *Ardt v Titan Ins Co*, 233 Mich App 685, 693; 593 NW2d 215 (1999)("This Court need not address issues that have become moot.").

Plaintiff also contends that the trial court erred in using two verdict forms and in requiring the jurors to determine his relative negligence on both forms. Plaintiff argues that requiring the jurors to calculate his negligence twice confused the jurors and caused the absurd result that he was found 75% at fault with respect to his wife's injuries, but only 55% at fault for his own injuries. Essentially, plaintiff's claim is that in asking the jurors to decide his relative

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[3] Sault Ste. Marie Fire Chief Kenneth Eagle testified that if an emergency vehicle was approaching a red light, departmental guidelines required the vehicle to stop before entering the intersection and verify that all lanes of traffic are clear.

[4] We recognize, of course, that the summary disposition motion required review of the documentary evidence presented at the time of the motion prior to trial, whereas the motion for directed verdict required review of the testimony and evidence presented at trial. This fact, however, does not alter our conclusion.

[5] We reject plaintiff's suggestion that he was not negligent because he lost his memory of the accident as a direct result of the accident. While M Civ JI 10.09 indicates that a jury *may infer* that a plaintiff was not negligent where there is a loss of memory and it was caused by the occurrence, this jury instruction for use at trial has no bearing or control in the context of motions for summary disposition and directed verdict, where the evidence is viewed in a light most favorable to the nonmoving party. Michigan Civil Jury Instruction 10.09 also cautions and directs that the jury "should weigh all the evidence in determining whether the [defendant] was or was not negligent." We also reject plaintiff's argument that, because he had a green light, he had no duty to determine whether anyone was entering the intersection from the crossing lanes of traffic. The argument fails to take into consideration that an emergency vehicle was involved, and it is contrary to MCL 257.653 and the case law. See *Holser v Midland*, 330 Mich 581; 48 NW2d 208 (1951).

negligence twice, the court over-emphasized the issue of his culpability and caused them to erroneously find him negligent.

Plaintiff did not object that the verdict forms were flawed on the basis that they required the jury to weigh plaintiff's negligence twice, which is the issue presented in plaintiff's statement of questions involved. Indeed, this issue was necessarily raised in hindsight because only after the jury returned its verdict could defendants form their argument that the verdict forms were problematic in light of the different degrees of responsibility indicated in the verdicts. Plaintiff did not foresee this particular issue at the time the verdict forms were discussed and no objection was raised on this ground. Thus, the issue was waived for appellate consideration. *Napier v Jacobs*, 429 Mich 222, 227-228; 414 NW2d 862 (1987). Additionally, assuming proper preservation, we see no basis for reversal.

In this case, there is no evidence of juror confusion and the verdict forms do not indicate that the jury overstepped its authority. Rather, the jurors apportioned the negligence of plaintiff and defendant Sanford, relative to plaintiff's injuries and then as to Lorraine Sinke's injuries, thereby properly applying the law as given to them by the court to the facts as they determined them. There was evidence that can be viewed as supporting the jury's findings differentiating the degrees or levels of responsibility, and the jury did find plaintiff primarily responsible with regard to both his own and his wife's injuries. Regardless, there is nothing in the record that suggests the jurors were confused by the trial court's instructions or that the verdict forms over-emphasized the question of plaintiff's negligence. We therefore conclude that the trial court did not err by utilizing two separate verdict forms.

Finally, plaintiff contends that the trial court abused its discretion by denying his motion for a mistrial based on comments made by defendants' counsel in his opening statement regarding traffic tickets. Again, we disagree. A trial court's decision on a motion for mistrial "will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice." *Persichini v William Beaumont Hosp,* 238 Mich App 626, 635; 607 NW2d 100 (1999).

Defendants correctly argue that it was plaintiff who introduced the subject of traffic tickets and driving records in his opening statement. Specifically, plaintiff's counsel informed the jury that plaintiff still had his driver's license and that he "has never had a ticket." Defense counsel's response did not claim that plaintiff had received a traffic ticket. Rather, defense counsel simply informed the jury that defendant Sanford also did not have any traffic tickets before this accident.[6] There was no evidence presented during the trial suggesting that either party received a traffic ticket. Moreover, plaintiff is required to show prejudice in order to demonstrate that the trial court abused its discretion in refusing to grant a mistrial. *Schutte v Celotex Corp,* 196 Mich App 135, 142; 492 NW2d 773 (1992). Plaintiff has failed to demonstrate how the remarks of defense counsel prejudiced him.

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[6] If there is any negative implication to be derived from this comment, it is that defendant Sanford received a traffic ticket as a result of the accident. In truth, of course, neither party received a ticket.

Further, we reject plaintiff's assertion that the trial court failed to carry through on its offer to give a cautionary instruction to the jury on this issue. The trial court offered to give the jury a cautionary instruction and asked plaintiff's counsel, "With that thought, then, anything further?" Plaintiff's counsel responded, "No, your Honor. Thank you. That's all." Thus, when offered the means to alleviate whatever possible prejudice might have been caused by the comments of both counsel, plaintiff declined any instruction. We therefore conclude that plaintiff has failed to demonstrate that the trial court abused its discretion in refusing to declare a mistrial.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ William B. Murphy