STATE OF MICHIGAN

COURT OF APPEALS

MINDY CARNELL, Personal Representative and Conservator of BRIAN CARNELL, Minor,

Plaintiff-Appellant,

v

GREGORY LOUIS VANDERVERE and SCOTT ENTERPRISES OF MICHIGAN, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
August 23, 2007

No. 268931
Muskegon Circuit Court
LC No. 04-043548-NI

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals as of right the judgment of no cause of action entered in favor of defendants following a jury trial. Plaintiff also appeals as of right the trial court's award of attorney fees and certain costs to defendants. We affirm.

Plaintiff Mindy Carnell's two-year-old son, Brian, was injured when he was struck by a delivery van driven by defendant Gregory Vandervere. Vandervere was employed by defendant Scott Enterprises, and at the time of the accident, was operating the van within the course of his employment. The undisputed evidence in this case established that on June 29, 2002, Vandervere was driving the van in the southbound lanes on Terrace Street. The northbound lanes were closed in preparation for the Muskegon Summer Celebration parade. Vandervere was familiar with the parade. He had contended with the parade, as a delivery driver, for 14 years. On this occasion, he saw parade spectators gathering in the median that separated the northbound and southbound lanes of Terrace. As Vandervere proceeded down Terrace, he merged into the left lane, which was the lane closest to the median. As the van approached the area where plaintiff and Brian were standing in the median, plaintiff let go of Brian's hand and Brian fell off the curb and into the roadway. Vandervere's van struck Brian, who suffered a skull fracture as a result of the accident.

Plaintiff initiated this action, alleging that defendants were negligent and that their negligence caused Brian's injuries. Defendants filed a notice of nonparty fault pursuant to MCR 2.112(K) and MCL 600.2957(1), alleging that plaintiff was wholly or partially at fault for failing to act as a reasonable and prudent person in the care, custody, and control of Brian, and that plaintiff failed to properly supervise Brian. The trial court dismissed defendant's notice of nonparty fault on the grounds that plaintiff was immune from liability for any claims arising out

of the negligent supervision of her son and that she could not be named as a nonparty at fault. However, the trial court allowed defendants to argue at trial that Brian would not have suffered any injuries but for plaintiff's actions. The jury found that defendants were not negligent and the trial court entered a judgment of no cause of action in their favor.

Plaintiff first contends that, because she was immune from liability for claims arising out of the negligent supervision of her son, the trial court erred in permitting defendants to argue at trial that her actions were the proximate cause of her son's injuries. This issue is moot. "An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief." *Jackson v Thompson-McCully Co*, 239 Mich App 482, 493; 608 NW2d 531 (2000). "As a general rule, an appellate court will not review a moot issue." *Id*. The first question on the verdict form in this case was, "Were the defendants negligent?" The jury answered "No" to this question and the verdict form instructed the jury not to answer any further questions. The jury therefore did not answer the questions on the verdict form regarding causation and damages. The jury's verdict in favor of defendants, which was based solely upon the jury's determination that defendants were not negligent, rendered moot the issue of nonparty fault. Comparative fault, including the fault of nonparties, "is relevant to the issue of damages, an issue not reached in this case." *Colbert v Primary Care Medical, PC*, 226 Mich App 99, 104; 574 NW2d 36 (1997).

Because the trial court dismissed defendants' notice of nonparty fault, the issue in this case concerns defendants' proximate cause defense at trial rather than the actual allocation of fault to a nonparty. The issue of proximate cause is usually a factual question to be decided by the jury. *Helmus v Michigan Dep't of Transportation*, 238 Mich App 250, 256; 604 NW2d 793 (1999). "The defense of failure to establish proximate causation is an elemental defense." *Veltman v Detroit Edison Co*, 261 Mich App 685, 694; 683 NW2d 707 (2004). "[I]t is entirely proper for a defendant in a negligence case to present evidence and argue that liability for an accident lies elsewhere, even on a nonparty." *Id*., quoting *Mitchell v Steward Oldford & Sons, Inc*, 163 Mich App 622, 627; 415 NW2d 224 (1987).

We recognize that plaintiff was immune from liability stemming from her alleged negligent supervision of Brian. See *Ashley v Bronson*, 189 Mich App 498, 501-502; 473 NW2d 757 (1991). We also recognize that it is impermissible for a defendant to raise the issue of a parent's negligence in an action against a third party for injuries sustained by the parent's child. See *Wymer v Holmes*, 144 Mich App 192, 196-199; 375 NW2d 384 (1985); *Lapasinskas v Quick*, 17 Mich App 733, 739; 170 NW2d 318 (1969). However, nothing in the lower court record indicates that the jury's verdict was influenced by any arguments regarding plaintiff's alleged fault, or by any improper innuendo regarding the alleged parental negligence. The trial court did not instruct the jury regarding plaintiff's alleged fault, and the verdict form did not address the issue of nonparty fault. Furthermore, the trial court instructed the jury that, when determining whether defendants' actions were the proximate cause of the injury, the jury "must not consider whether there was negligence on the part of [Brian] Carnell's parents because under the law any negligence on the part of the parent cannot affect a claim on behalf of the child." The jury is presumed to understand and follow the trial court's instructions. *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). Thus, we presume that the jury's verdict was not influenced by any reference to plaintiff's conduct, or any suggestion that plaintiff was at fault in causing the accident. Moreover, because the jury did not reach the issue of proximate

cause, any error by the trial court concerning the propriety of defendants' arguments regarding proximate cause was harmless. Cf. *Merrow v Bofferding*, 458 Mich 617, 634; 581 NW2d 696 (1998).

Plaintiff next contends that the jury's verdict was against the great weight of the evidence. Plaintiff preserved this issue by moving for a judgment notwithstanding the verdict (JNOV) or a new trial on this basis. *Phinney v Perlmutter*, 222 Mich App 513, 524; 564 NW2d 532 (1997). We review the trial court's decision on a motion for a new trial for an abuse of discretion. *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc*, 267 Mich App 625, 644; 705 NW2d 549 (2005). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

> This Court reviews de novo a trial court's ruling on a motion for JNOV. In reviewing a trial court's denial of a motion for JNOV, this Court should examine the testimony and all legitimate inferences therefrom in the light most favorable to the nonmoving party. "A trial court should grant a motion for JNOV only where there was insufficient evidence presented to create an issue for the jury." [*Detroit/Wayne Co Stadium Auth*, *supra* at 642-643 (citations omitted).]

To establish a prima facie case of negligence, the plaintiff must prove that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of the duty was the proximate cause of the plaintiff's damages, and (4) the plaintiff suffered damages. *Chivas v Koehler*, 182 Mich App 467, 475; 453 NW2d 264 (1990). Reasonable care or ordinary care is the "general standard of care" in negligence cases. *Case v Consumers Power Co*, 463 Mich 1, 6-7; 615 NW2d 17 (2000). "What constitutes reasonable care under the circumstances must be determined from the facts of the case." *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 97; 485 NW2d 676 (1992). "[T]he duty of care is generally a question of fact for the jury." *Benton v Dart Properties, Inc*, 270 Mich App 437, 444; 715 NW2d 335 (2006).

Based on the evidence presented at trial, reasonable minds could have concluded that Vandervere exercised reasonable care under the circumstances of this case. The evidence established that the southbound lanes on which Vandervere was driving were open to vehicular traffic. Although some witnesses testified that there were no other vehicles in the vicinity, one witness described the traffic in the area as "heavy." Vandervere testified that he was traveling within the posted speed limit. He testified that, although he saw spectators gathering on the median, he did not see Brian in the roadway until Brian was only 10 to 15 feet in front of the van. Vandervere testified that he tried to avoid hitting Brian, but that he could not avoid the impact because "it just happened so fast." Further, plaintiff testified that, after she let go of Brian's hand, Brian tripped and fell backwards off the curb and into the roadway and that "he never even had a chance to hit the pavement before he was struck by the van."

> When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld . . .

> "'[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" [*Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006) (citations omitted).]

The evidence supported the jury's determination that defendants were not negligent. Thus, the verdict must be upheld. *Id.* The trial court did not err in denying plaintiff's motion for JNOV. Moreover, the evidence in this case did not preponderate so heavily against the jury's verdict that it would be a miscarriage of justice to allow the jury's verdict to stand. A new trial was not warranted. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003).

Plaintiff next contends that the trial court erred in giving a sudden emergency instruction in this case. We disagree.

We review claims of instructional error de novo. *Case*, *supra* at 6. In determining whether the evidence entitled defendants to the sudden emergency instruction, we must view the evidence presented at trial in the light most favorable to defendants. *VanderLaan v Miedema*, 385 Mich 226, 229; 188 NW2d 564 (1971). "[F]or the emergency doctrine to apply an 'emergency' within the meaning of that rule must have existed." *Id*. at 231-232. "To come within the purview of the sudden-emergency doctrine, the circumstances surrounding the accident must present a situation that is unusual or unsuspected." *White v Taylor Distributing Co, Inc*, ___ Mich App ___; ___ NW2d ___ (2007). "The term 'unusual' is employed here in the sense that the factual background of the case varies from the everyday traffic routine confronting the motorist." *VanderLaan*, *supra* at 232. "To come within the narrow confines of the emergency doctrine as 'unsuspected' it is essential that the potential peril had not been in clear view for any significant length of time, and was totally unexpected." *Id*. Where a driver is confronted with a sudden emergency that is created solely by the act of a pedestrian in suddenly jumping or stepping into the path of the driver's vehicle, the driver is entitled to a sudden emergency instruction at trial. See, e.g., *Lepley v Bryant*, 336 Mich 224, 235-236; 57 NW2d 507 (1953); *Farris v Bui*, 147 Mich App 477, 481; 382 NW2d 802 (1985).

Viewing the evidence in the light most favorable to defendants, a reasonable jury could have concluded that Vandervere was confronted by an unsuspected emergency not due to his own misconduct. The evidence supported the conclusion that Vandervere was operating his van in a reasonable manner, that Brian suddenly and unexpectedly fell off the curb in front of the van, and that Vandervere was unable to stop before colliding with Brian in the roadway. There was no evidence that the peril was in clear view or that Vandervere suspected the situation. Thus, the trial court did not err in giving the sudden emergency instruction. *Id.*; *Wright v Marzolf*, 34 Mich App 612, 613-614; 192 NW2d 56 (1971).

Plaintiff also argues that it was improper for the trial court to give the sudden emergency instruction because the instruction conflicted with M Civ JI 10.07, which provides that a defendant has a duty to exercise greater vigilance when he knows or should know that a child or children are likely to be in the vicinity. However, this Court rejected just such an argument in *Ivy v Binger*, 39 Mich App 59, 60; 197 NW2d 133 (1972). In that case, the Court opined:

> The jury was authorized to find that such sudden emergency existed only if defendant was exercising the greater vigilance required when one drives through an area where children are likely to be present. Therefore, the trial court properly

> instructed the jury that if defendant was confronted with a sudden emergency not of his own making then his subsequent behavior should be judged according to the way a reasonable man would act under those circumstances. [*Id.* at 60-61.]

Similarly in this case, the jury was permitted to find both that Vandervere was exercising the greater vigilance that was required in the presence of a child, and that a sudden emergency nevertheless existed. *Id*.

Plaintiff next contends that the trial court erred in excluding a portion of the statement that Vandervere made to the police at the scene of the accident.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). However, questions of law regarding admissibility, including the proper application of the rules of evidence, are reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

The record reflects that shortly after the accident, Vandervere told police, "There's too many [expletive] kids running around here." Before trial, defendants moved to exclude this statement on the basis that it was irrelevant and unduly prejudicial. The trial court ruled that the statement was admissible at trial, but that the expletive had to be redacted. The trial court determined that the unredacted statement "could give a very bad impression to a jury" that "[h]e just doesn't care, just disregards [children] or just thinks very little of them and that type of thing." The court concluded that the evidence was "pretty prejudicial" and that the danger of unfair prejudice "could outweigh" the probative value of the evidence.

All relevant evidence is generally admissible. MRE 401; MRE 402. "Pursuant to MRE 403, '[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'" *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 272; 730 NW2d 523 (2006). "[I]n applying MRE 403, 'unfair prejudice' does not mean 'damaging.'" *Lewis v LeGrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003). "Unfair prejudice, as contemplated by MRE 403, 'exists when marginally relevant evidence might be given undue or preemptive weight by the jury or when it would be inequitable to allow use of such evidence.'" *Dep't of Transportation v Frankenlust Lutheran Congregation*, 269 Mich App 570, 583; 711 NW2d 453 (2006) (citation omitted).

The trial court legally erred in its application of MRE 403, and therefore also strictly erred in excluding the statement in its unredacted form. The statement was relevant because it tended to show that Vandervere was aware that there were children in the vicinity at the time of the accident. Yet the trial court did not find that the danger of unfair prejudice *substantially outweighed* the probative value of the evidence. Thus, the trial court erred in applying the wrong legal standard. MRE 403.

However, the trial court's error was harmless and does not warrant reversal. "A trial court error in admitting or excluding evidence will not merit reversal unless a substantial right of a party is affected . . . and it affirmatively appears that failure to grant relief is inconsistent with substantial justice . . . ." *Lewis*, *supra* at 200. Arguably, the unredacted statement may have

better reflected Vandervere's state of mind at the time of the accident. However, Vandervere testified at trial that he was "very upset" and "angry" after the accident. Moreover, it is clear from the record that he was still upset about the incident at the time of the trial. Thus, the trial court's evidentiary ruling, although technically erroneous, did not preclude the jury from making a fair and proper determination of liability in this case. It does not affirmatively appear to us that a failure to grant relief in this instance would be inconsistent with substantial justice, *id.*, and it is well settled that we will not reverse on the basis of harmless error, *Ypsilanti Fire Marshal v Kircher*, 273 Mich App 496, 529; 730 NW2d 481 (2007).

Finally, plaintiff contends that the trial court erred in awarding costs and attorney fees to defendants under MCR 2.403(O). Plaintiff has waived these issues. Plaintiff did not challenge the amount of attorney fees that defendants requested below. Rather, plaintiff's counsel stated on the record that, "[o]f course, attorney fees are discretionary with the Court in these circumstances, and I will leave that to the good judgment of the Court." Thus, plaintiff essentially consented to whatever award of attorney fees that the trial court determined was appropriate in this case. Furthermore, plaintiff's counsel stated on the record that he "[did not] have a problem with the costs" after certain items of non-taxable cost were removed from the calculation by defendants. "A party waives an issue by affirmatively approving of a trial court's action." *Muci v State Farm Mut Auto Ins Co*, 267 Mich App 431, 443; 705 NW2d 151 (2005), rev'd on other grounds 478 Mich 178 (2007). Moreover, "[e]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence." *Phinney*, *supra* at 537. "A litigant may not harbor error, to which he or she consented, as an appellate parachute." *In re Gazella*, 264 Mich App 668, 679; 692 NW2d 708 (2005). Plaintiff cannot now seek relief on the basis that the attorney fees requested by defendants were excessive, or that the trial court erred in awarding defendants the cost of a certain deposition transcript.

Affirmed.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen