S T A T E   O F   M I C H I G A N

C O U R T   O F   A P P E A L S

CARRIE ROBINSON-COOK and ELVINA REIST, personal representatives to the ESTATE OF ROLAN J. ROBINSON, Plaintiffs-Appellants/Cross-Appellees,	UNPUBLISHED October 19, 2004
v	No. 246126 Otsego Circuit Court
DONALD SKLARCZYK, d/b/a SKLARCZYK SEED FARMS, and JOSEPH NOWAK, Defendants-Appellees/Cross-Appellants.	LC No. 01-009142-NI

Before: Hoekstra, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

In this wrongful death action, plaintiffs Carrie Robinson-Cook and Elvina Reist, as personal representatives of the estate of Rolan J. Robinson, appeal as of right from the trial court's final judgment of no cause of action entered after a jury trial on plaintiffs' complaint.

This case arises from a traffic accident that occurred on September 16, 1999, shortly before sunset when the sun was low in the sky. The record reveals that decedent, Rolan J. Robinson, was driving a semi truck at or slightly below the speed limit and heading westbound on M-32 in Otsego County. Likewise, defendant Joseph Nowak was driving a farm tractor, owned by defendant Sklarczyk Seed Farms and pulling a potato wagon, in the same direction, i.e., westbound, and the tractor was at least partly on the roadway of M-32. The farm tractor was traveling approximately 5 miles per hour. As decedent's vehicle approached defendant Nowak's farm vehicle, decedent's vehicle essentially clipped the rear corner of the wagon the tractor was pulling and took the left rear tire off the tractor. Decedent's vehicle jack-knifed and flipped over and decedent sustained fatal injuries. Defendant Nowak, who was not wearing a seatbelt on the farm tractor, remained on the tractor after the collision.

On May 7, 2001, plaintiffs filed the instant complaint, alleging negligence against defendant Nowak and defendant Sklarczyk and also alleging vicarious liability and nuisance/premises liability against defendant Sklarczyk. Following a three-day jury trial in December 2002, the jury returned its verdict, finding neither defendant negligent. On January 13, 2003, the trial court entered a judgment in favor of defendants. This appeal ensued.

Plaintiffs' initial claim on appeal is that the trial court erred in refusing to instruct the jury that it could find that defendant Nowak was negligent for violating the basic speed law, MCL 257.627(1), by operating the tractor at an unreasonably slow speed. This ruling arose from defendant's motion for summary disposition, in which defendants argued in part that the farm tractor had a right to be on the highway and thus plaintiffs' argument that Nowak was negligent for operating the tractor on M-32 fails as a matter of law. Part of plaintiffs' response to this argument was that Nowak was driving too slowly. During the hearing, the trial court questioned, "[h]ow can there be negligence driving too slowly? That doesn't make any sense." When plaintiffs' counsel responded that MCL 257.627 requires a person driving a vehicle on the highway to drive at a careful and prudent speed "not greater than nor less than is reasonable and proper …," the trial court responded, "[b]ut that doesn't apply to farm vehicles." The trial court stated, "[f]arm vehicles are slow moving vehicles. And, so, therefore that statute can't apply to them." The trial court concluded, "[l]et's dismiss that [apparently negligence on the basis of the tractor driving too slowly on the highway] as a grounds for negligence." Later in the hearing, during plaintiffs' counsel's argument, the trial court commented that "common sense would eliminate the slow speed. I mean, as a matter of law, you couldn't have a slow moving vehicle be required to go faster than they can go." The trial court also stated, "I think as a matter of law, it just cannot apply." Near the conclusion of the hearing, the trial court denied defendants' motion for summary disposition, and also stated that it would not "allow any theory that the vehicle was not going fast enough. I think that, as a matter of common sense and law--… I just don't think that can even be presented to the jury as a matter of law. The argument that the vehicle isn't going fast enough." The court also explained that there are "no grounds for negligence under the facts of this case, arguing that the farm implement vehicle is going too slow." From this record, the grounds for the trial court's ruling are unclear; however, ultimately the trial court disallowed a jury instruction concerning the tractor traveling at a speed "less than is reasonable" and refused to give M Civ JI 12.01,[1] which permits an inference of negligence from a statutory violation.

Generally, this Court reviews claims of instructional error de novo. *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002); *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002). However, a trial court's determination whether an instruction is supported by the evidence is entitled to deference. *Keywell, supra*. Jury 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. *Id.* (citations and quotations omitted) A determination based on a legal issue is a question of law subject to de novo review. *Jackson v Nelson*, 252 Mich App 643, 647; 654 NW2d 604 (2002). Likewise, statutory interpretation is a

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[1] M Civ JI 12.01 provides:

> We have a state statute [<u>Here quote or paraphrase the applicable part of the statute as construed by the courts.</u>].
>
> If you find that the [*defendant / plaintiff*] violated this statute before or at the time of the occurrence, you may infer that the [*defendant / plaintiff*] was negligent.…

question of law that this Court reviews de novo. *Lake Isabella Dev, Inc v Village of Lake Isabella*, 259 Mich App 393, 398; 675 NW2d 40 (2003).

MCL 257.627(1) provides:

> A person driving a vehicle on a highway shall drive at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing. A person shall not drive a vehicle upon a highway at a speed greater than that which will permit a stop within the assured, clear distance ahead.

Further, MCL 257.79 provides:

> "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, except devices exclusively moved by human power or used exclusively upon stationary rails or tracks and except, only for the purpose of titling and registration under this act, a mobile home ….

Also, MCL 257.717(2) provides:

> A person may operate or move an implement of husbandry of any width on a highway as required, designed, and intended for farming operations, including the movement of implements of husbandry being driven or towed and not hauled on a trailer, without obtaining a special permit for an excessively wide vehicle or load under section 725 [MCL 257.725]. The operation or movement of the implement of husbandry shall be in a manner so as to minimize the interruption of traffic flow. A person shall not operate or move an implement of husbandry to the left of the center of the roadway from a half hour after sunset to a half hour before sunrise, under the conditions specified in section 639 [MCL 257.639], or at any time visibility is substantially diminished due to weather conditions. A person operating or moving an implement of husbandry shall follow all traffic regulations.

Given these statutory provisions,[2] the farm tractor[3] that defendant Nowak was driving is a vehicle under the Michigan Vehicle Code, and thus the requirements of MCL 257.627(1) were applicable to him. Thus, to the extent that the trial court ruled that as a matter of law these

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[2] "[S]tatutes that relate to the same subject or share a common purpose are in pari materia and must be read together as one law …, and parts of the same statute must be construed as a harmonious whole to effectuate the intent of the Legislature …." *Burkhardt v Bailey*, 260 Mich App 636, 651; 680 NW2d 453 (2004) (citations omitted).

[3] MCL 257.21 defines "implement of husbandry" as "a vehicle which is either a farm tractor, a vehicle designed to be drawn by a farm tractor or an animal, a vehicle which directly harvests farm products, or a vehicle which directly applies fertilizer, spray, or seeds to a farm field."

requirements did not apply to defendants' farm tractor, we agree with plaintiffs that the trial court erred. However, giving deference to the trial court's determination that the evidence does not support the requested instruction, *Keywell, supra*, we conclude that the trial court did not err in declining to instruct the jury as requested. While plaintiffs state in their appellate brief that there was "ample evidence" to support a jury instruction concerning the tractor being driven too slowly, they do not set forth such evidence in their argument and our review of the record accords with the trial court's determination. The evidence at trial suggested that defendant Nowak was driving the tractor, which under statutory law was permitted to be on the roadway, MCL 257.627(1); MCL 257.79; MCL 257.717(2), at or near its maximum speed given the size of the load that it was pulling. Together, the weight of the tractor and the loaded potato wagon was approximately 25,000 pounds. Plaintiffs' witness, an automotive engineer who does accident reconstructions and accident investigations, testified during direct examination that if defendant Nowak testified that he was in fourth gear, the maximum speed he would have been going is around 5¼ miles per hour, and on cross-examination the witness stated that 5¼, 5½ was the full throttle speed, which he used throughout his calculations. However, as defendants acknowledge, there is no evidence in the record of the tractor's top speed. Nonetheless, given the load and the limited capabilities of the tractor, to go any faster would have been either impossible or unsafe and likely would itself have been a violation of the basic speed law. Thus, plaintiffs were not entitled to the requested instruction because the facts did not support giving the instruction.

Plaintiffs also argue that the trial court erred in holding that defendants could not be deemed negligent in forgoing a safe alternative route that did not involve driving the tractor on M-32. Plaintiffs challenge the trial court's ruling on defendants' motion in limine, arguing that the trial court erred in holding that plaintiffs could not present evidence or argue, and the jury could not consider, that defendant Nowak acted unreasonably in failing to use an available alternative route on defendant's property. In essence, plaintiffs contend that trial court abused its discretion in granting the challenged motion in limine and precluding plaintiffs from presenting evidence of an allegedly safer alternative route. We disagree.

This Court reviews a trial court's decision concerning the admission of evidence for an abuse of discretion. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188; 600 NW2d 129 (1999); *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 200; 555 NW2d 733 (1996). "An abuse of discretion is found only in the extreme case where the result is so palpably and grossly contrary to fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, or where an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made." *Lewis v LeGrow*, 258 Mich App 175, 200; 670 NW2d 675 (2003). Reversal is not required on the basis of an error in the admission or exclusion of evidence unless a substantial right of the party is affected and it affirmatively appears that failure to grant relief is inconsistent with substantial justice. *Id.*; MRE 103(a); MCR 2.613(A).

Before trial, defendants presented several motions in limine, one of which sought exclusion of evidence of a "back route" to the potato barn as irrelevant and inadmissible and preclusion of plaintiffs' argument that defendants should have taken the alternative route back to the potato barn. After argument at the motion hearing, the trial court stated, having referenced plaintiffs' trial brief, that "[t]he back route's a red herring" and that "the law permits [defendant]

Nowak to operate the vehicle on M-32." The trial court concluded that the "twenty-page trial brief talks about the negligent manner in which [defendant] Nowak operated the farm tractor. That's the issue." Accordingly, the trial court granted defendants' motion in limine and excluded the testimony of one of defendants' employees who was expected to testify that he had never seen a wagon-load pulled down M-32 and there was no reason for it because there was a back route.

At this point, the case had already been mediated, the parties had filed trial briefs, the trial court was hearing multiple motions in limine, and the trial was to begin in less than a week. The trial court heard the parties' arguments and determined that the evidence was inadmissible. Although plaintiffs' argue on appeal that the trial court excluded a claim of negligence, more accurately the trial court was preventing plaintiffs' from propounding a new theory of negligence just days before trial.[4] Moreover, while plaintiffs also argue in their appellate brief that the trial court effectively, and improperly, granted summary disposition by its ruling, plaintiffs do not cite where in the lower court record they made this argument. No such objection was made at the motions in limine hearing when the trial court granted defendants' motion. Given this record, we cannot say that the trial court abused its discretion in granting defendants' motion in limine.

Further, to the extent that plaintiffs complain that they should have been able to argue that defendant Nowak acted unreasonably in not using the other allegedly safe, available alternative route on defendants' property, we disagree. "To establish a prima facie case of negligence, a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). The threshold question in any negligence action is whether the defendant owed a legal duty to the plaintiff. *Johnson v Bobbie's Party Store*, 189 Mich App 652, 659; 473 NW2d 796 (1991). In *Valcaniant v Detroit Edison Co*, 470 Mich 82, 86 n 4; 679 NW2d 689 (2004), our Supreme Court explained:

> Duty concerns whether a defendant is under *any* legal obligation to act for the benefit of the plaintiff. *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992). This concept should be distinguished from the standard of care, which, in negligence cases, always requires reasonable conduct. See *id*. (distinguishing "between duty as the problem of the relational obligation between the plaintiff and the defendant, and the standard of care that in negligence cases is always reasonable conduct").

Duty exists in the present case precisely because Nowak chose to drive the tractor on M-32. Thus, whether defendant Nowak was negligent depends on *how* he acted in using the highway, not whether he could have accomplished his task without using the highway. Cf *Boyt v Grand Trunk Western RR*, 233 Mich App 179, 186; 592 NW2d 426 (1998) ("With respect to the negligence claim, the relevant inquiry was whether defendant exercised reasonable care, not

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[4] In their complaint, plaintiffs did not allege negligence based on the failure of defendant Nowak to use an available and allegedly safer alternate route.

whether the procedures used by defendant could have been made safer."). Plaintiffs are not entitled to relief.

Plaintiffs next argue that the trial court erred in ruling that defendant Sklarczyk was entitled to store crates and farm equipment on the highway right of way. In this issue, plaintiffs basically challenge two evidentiary rulings by the trial court.[5]

First, to the extent that plaintiffs challenge the trial court's sustaining of defendants' counsel's objection to plaintiffs' counsel's questioning of an employee of defendant Sklarczyk's farm concerning whether defendant Sklarczyk instructed his workers to keep the shoulder clear, we find no error requiring reversal. Regardless of whether defendant Sklarczyk instructed his workers to keep the shoulder clear, the record contained abundant testimony that crates were on the shoulder somewhat near the highway. As defendants point out, the record was replete with evidence, including testimony and photographs and drawings/diagrams concerning the location of crates near the highway Thus, even if the trial court's evidentiary ruling was error, it was not error requiring reversal. Declining to grant relief would not be inconsistent with substantial justice. MCR 2.613(A).

Plaintiffs also challenge the trial court's ruling sustaining defendants' counsel objection to plaintiffs' expert witness' testimony concerning who owns the thirty-three feet on either side of the highway center line and striking the answer. However, at that point, plaintiffs' counsel "agree[d] that the [s]tate doesn't own the land." Given counsel's agreement with the trial court's ruling, this issue has been waived. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). To the extent that plaintiffs focus their appellate argument on the exclusion of the information that the right of way was 33 feet and included the area where the crates, farm equipment, and worker were located, we note that that information was not the focus of defendants' objection that the trial court sustained. In any event, other evidence presented at trial informed the jury that the statutory right-of-way is 66 feet wide. A police officer testified that the right-of-way is 33 feet from the center line and the trial court instructed the jury on the statutory language that "'[s]treet or highway means the entire width of every way, public[ly] maintained, when any part there is open to the use of the public for the purpose of vehicular traffic' … A street or highway is defined as being sixty-six feet for M-32."

Next, plaintiffs argue that the trial court erred in failing to instruct the jury on M Civ JI 6.01(C), which allows the jury to draw an adverse inference from the defendants' destruction of the potato wagon. Plaintiffs contend that they were entitled to this jury instruction because as a

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[5] We need not address plaintiffs' limited argument concerning the trial court's instructions to the jury and plaintiffs' inability "to establish by testimony what the final instructions addressed" because this argument is not listed in the statement of questions and is not adequately developed in the briefing. *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995); MCR 7.212(C)(5); *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.").

result of defendants' destruction of the wagon, plaintiffs were unable to inspect the wagon or to use the condition of the wagon to reconstruct the collision. According to plaintiffs, the trial court allowed defendants to benefit from their destruction of evidence and erred in relying on plaintiffs' failure to request that the wagon be preserved before the destruction and in relying on its conclusion that there was no "culpability" for the destruction.

The jury instruction that plaintiffs' desired but that the trial court did not give provides:

> The [defendant] in this case has not offered [the potato wagon]. As this evidence was under the control of the [defendant] and could have been produced by [him], you may infer that the evidence would have been adverse to the [defendant], if you believe that no reasonable excuse of [defendant's] failure to produce the evidence has been shown. [M Civ JI 6.01(C).]

We conclude that plaintiffs were not entitled to this instruction and the trial court did not err in failing to give it. As the trial court noted, the potato wagon was destroyed before plaintiffs commenced this action and plaintiffs had made no request that the wagon be preserved. The trial court stated that "there was no realistic possibility of litigation for them to be on some type of high alert that they ought to be saving this wagon for any time period beyond [when they did]"; thus, the trial court essentially ruled that the destruction was not in bad faith or done to manipulate the evidence available in potential litigation. Further, the trial court determined that the parties were on an even playing field. While a trial court may remedy unfair advantage by instructing the jury it may draw an adverse inference from a party's failure to produce evidence, M Civ JI 6.01; *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 146; 640 NW2d 892 (2002), the trial court here did not determine that the unavailability of the potato wagon unfairly disadvantages plaintiffs, and thus no sanction was warranted. See *MASB-SEG Property/Casualty Pool, Inc v Metalux*, 231 Mich App 393, 400-401; 586 NW2d 549 (1998). Moreover, plaintiffs have failed to show the prejudice resulting from the failure to have the opportunity to inspect the actual potato wagon when they had significant information about it, including a manual and photographs. The circumstances in the present case did not show that an inference that the evidence would have been adverse to defendants would have been appropriate.

Finally, plaintiffs argue that where the prosecutor was not presented as a witness, the trial court erred in admitting into evidence the prosecutor's report, which is inadmissible hearsay. The report indicated: "No charges are appropriate. The accident appears to have been caused by the actions of the deceased driver due to inattention and/or the glare of the sun." We agree that the admission of the report was improper, MRE 802; however, we conclude that such error does not require reversal.

Regardless of the improper admission of the prosecutor's report, the error does not require reversal because the information contained in the report is cumulative evidence. A police officer had testified that the prosecutor filed no charges and no ticket was issued. Testimony from various witnesses indicated that the setting sun was very bright and it was difficult to see anything. Further, testimony indicated that decedent did nothing that indicated that he saw the tractor on the roadway. Thus, reversal on this basis is not warranted. *Lewis, supra*; MCR 2.613(A); MRE 103(a).

In light of our conclusions, we need not reach the issues that defendants raise in their cross-appeal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly