STATE OF MICHIGAN

COURT OF APPEALS

LAUREN JEAN DEISLER, and
JOYCE E. KIRKDORFER,

Plaintiffs-Appellants,

v

JESSE JAMES LUTZ and
THOMAS LUTZ,

Defendants-Appellees.

UNPUBLISHED
March 31, 2005

No. 252051
Cass Circuit Court
LC No. 02-000143-NI

Before: Saad, P.J., and Smolenski and Cooper, JJ.

PER CURIAM.

Plaintiffs Lauren Jean Deisler and her mother, Joyce E. Kirkdorfer, appeal as of right from a jury verdict in favor of defendants Jesse James and Thomas Lutz[1] in this negligence action. We affirm.

I. Facts and Procedural History

At 6:45 on a dark and rainy morning on February 24, 2003, defendant was driving a Jeep Wrangler on his way to school. Defendant testified that he rounded a curve in an unlit neighborhood and was blinded by the bright headlights of another vehicle. The vehicle he was driving collided with twelve-year-old Lauren, who was crossing the road to reach her bus stop. Lauren had been dropped off across the street from her bus stop by her stepfather, Kim Kirkdorfer. Defendant testified that he slammed on his brakes and saw Lauren lying on the road illuminated by his headlights.[2] Defendant called 911 from a nearby home. Emergency workers on the scene were unable to collect evidence due to the rainy conditions and the crowd. However, they found defendant's car parked just over the center line of the roadway. Lauren suffered serious injuries as a result of the collision, requiring several operations and physical

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[1] As Thomas Lutz was sued only in his capacity as the owner of the vehicle involved in the instant collision, we will refer to Jesse Lutz as the singular defendant throughout.

[2] The first witness on the scene, Tammy Sobczak-Barbour, testified that she found defendant standing in the street with his car engine and headlights off.

therapy and causing her to miss two months of school.[3] At the conclusion of the trial, the jury returned a verdict of no cause of action in defendant's favor.

II. Jury Instructions

Plaintiffs argue that the trial court improperly refused to give several requested standard and special jury instructions. We disagree. Claims of instructional error are reviewed de novo on appeal.[4] However, we review for an abuse of discretion the trial court's determination whether a standard jury instruction is applicable and accurate.[5] As a general rule, "[w]e review jury instructions in their entirety to determine if error requiring reversal occurred."[6] It is the function of the trial court to clearly present the case to the jury and instruct them on the applicable law.[7] Even if somewhat imperfect, reversal is not required where the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights.[8] "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*.'"[9]

A. Standard Instructions

Plaintiffs assert that the trial court should have given M Civ JI 10.07 as there was evidence that defendant knew that he was driving in a residential area where children waited for a school bus. The instruction provides that:

> The law recognizes that children act upon childish instincts and impulses. If you find the defendant knew or should have know that a child or children were or were likely to be in the vicinity, then the defendant is required to exercise greater vigilance and this is a circumstance to be considered by you in determining whether reasonable care was used by the defendant.[10]

However, the record evidence also shows that defendant left at his normal time on the day of the accident. He testified that in the past, he only encountered a school bus on his route when he left

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[3] Plaintiffs' counsel delineated several injuries suffered by Lauren in his opening statement. The limited testimony elicited on this issue established that Lauren had a rod placed in her leg for more than a year, lost a kidney, and sustained scarring to her torso and legs.

[4] *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

[5] *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003).

[6] *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

[7] *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

[8] *Aldrich*, *supra* at 124.

[9] *Cox v Bd of Hosp Managers of the City of Flint*, 467 Mich 1, 8; 651 NW2d 356 (2002), quoting *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (emphasis added).

[10] M Civ JI 10.07.

late. Accordingly, the evidence does not support this instruction and the trial court properly denied plaintiffs' request to give it.

Plaintiffs argue that the trial court erred by refusing to give M Civ JI 10.09 as Lauren could not remember the accident. That instruction provides:

> [If you find that/Since] [plaintiff/defendant] has a loss of memory concerning the facts of this case and it was caused by the occurrence, you may infer that the [plaintiff/defendant] was not negligent. However, you should weigh all the evidence in determining whether the [plaintiff/defendant] was or was not negligent.[11]

However, the record reflects that Lauren did not experience a significant memory loss regarding the facts surrounding the accident.[12] Lauren testified that she had completely crossed the roadway and was on the other side of the fog line when she was struck. Again, as the instruction was not supported by the evidence, the trial court properly rejected plaintiffs' request.

Plaintiffs also argue that the trial court should have given M Civ JI 12.01 as defendant violated several statutes in relation to the accident. The instruction provides in pertinent part:

> 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. *(You must then decide whether such negligence was a proximate cause of the occurrence.)[13]

Plaintiffs first contend that the instruction was warranted by defendant's violation of MCL 257.642(1)(a). Plaintiffs assert that defendant violated the statute by crossing the fog line and striking Lauren. The statute provides in relevant part:

> (1) When a roadway has been divided into 2 or more clearly marked lanes for traffic . . .
>
> (a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that the movement can be made with safety.[14]

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[11] M Civ JI 10.09.

[12] Lauren remembered clearly all her actions leading up to the accident. Although she did not know that she had been struck by a vehicle, she knew that something hit her very hard, she landed on her left hip on the ground, and she experienced a lot of pain.

[13] M Civ JI 12.01.

[14] MCL 257.642(1)(a).

As the instruction is immaterial to the issue of whether defendant was negligent for allegedly crossing the fog line, the trial court properly denied plaintiffs' request to give it.[15]

Plaintiffs argue that the trial court erred by not giving an instruction involving defendant's violation of MCL 257.684(a), which requires drivers to use headlights whenever there is insufficient light to properly illuminate the roadway, and MCL 257.695, which requires all vehicles to be equipped with "at least one lighted lamp." Plaintiffs argue that Ms. Sobczak-Barbour's testimony that she found defendant standing in the road with his engine and headlights off created a question of fact whether defendant had his headlights on while driving. However, evidence was produced that defendant did have his headlights on while driving. Not only did defendant testify that he turned his lights on in the morning as a matter of habit, but both he and Mr. Kirkdorfer testified that the roadway was so dark that headlights were necessary to see. Without the illumination of his headlights, defendant would not have been able to see Lauren lying in the roadway. As the instruction was insupportable on the evidence, the trial court did not abuse its discretion in refusing to give this instruction.

B. Special Instructions

Plaintiffs also argue that the trial court should have given an instruction clarifying that defendant's claim—that he was blinded by the lights of an oncoming vehicle—did not excuse him from stopping within an assured clear distance. The trial court read MCL 257.627, which provides that "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,"[16] into the jury instructions. However, defendant never claimed that he failed to stop in time because he was blinded by headlights. Rather, the defense theory was that the accident happened in the middle of the road when Lauren suddenly stepped in front of defendant's vehicle. Furthermore, the trial court did not instruct the jury that being blinded by lights excused violation of a statute. As the requested instruction was immaterial to any defense, issue, or theory of the case, the trial court properly declined to give it.

Plaintiffs finally argue that the trial court should have given a modified instruction following the reading of M Civ JI 12.02 indicating that, if defendant's negligence caused the emergency, then the violation of the assured clear distance statute is not excused. The standard jury instruction provides:

> However, if you find that [defendant/plaintiff] used ordinary care and was still unable to avoid the violation because of [State here the excuse claimed.], then [his/her] violation is excused.

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[15] Although defendant's vehicle was parked just over the center line when he turned off his engine, plaintiffs never contended in the trial court or on appeal that the collision occurred because of this potential violation of the statute. Accordingly, we decline to review this issue. See *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 532-533; 672 NW2d 181 (2003).

[16] MCL 257.627(1).

> If you find that [defendant/plaintiff] violated this statute and that the violation was not excused, then you must decide whether such violation was a proximate cause of the occurrence.[17]

The trial court instructed the jury that defendant's violation of MCL 257.627(1) could be excused if, although he used ordinary care, Lauren stepped into the path of his vehicle. We note that the jury was properly instructed that, if defendant failed to use ordinary care—*i.e.,* drove at an excessive speed preventing his ability to stop in the assured clear distance—then his violation of the statute would be inexcusable. As the instruction as given clearly informed the jury regarding the applicable law, no further instruction was required to clarify the issue. Accordingly, the trial court did not abuse its discretion in declining to give plaintiffs' requested instruction.

III. Directed Verdict on Negligent Infliction of Emotional Distress

Plaintiffs contend that the trial court erred by granting defendant's motion for a directed verdict regarding Ms. Kirkdorfer's claim of negligent infliction of emotional distress, also known as bystander liability. We review de novo a trial court's decision regarding a motion for directed verdict.[18] To establish a claim for negligent infliction of emotional distress, a plaintiff must establish:

> (1) "the injury threatened or inflicted on the third person must be a serious one, of a nature to cause severe mental disturbance to the plaintiff"; (2) the shock must result in actual physical harm; (3) the plaintiff must be a member of the immediate family, or at least a parent, child, husband or wife; and (4) the plaintiff must actually be present at the time of the accident or at least suffer shock "fairly contemporaneous" with the accident.[19]

In granting defendant's motion, the trial court determined that plaintiffs' failed to show that Ms. Kirkdorfer suffered actual physical harm as a result of the shock and that the physical harm suffered from the shock was fairly contemporaneous with the accident.

In order to recover for negligent infliction of emotional distress, a plaintiff must establish that he or she suffered "a definite and objective physical injury . . .notwithstanding the absence of any physical impact upon plaintiff at the time of the mental shock."[20] Ms. Kirkdorfer testified that she suffered from a racing heart beat, shaking, confusion, and tenseness as a result of her daughter's accident. These emotional disturbances, however, do not rise to the level of an actual physical injury.

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[17] M Civ JI 12.02.

[18] *Keywell & Rosenfeld v Bithell,* 254 Mich App 300, 326; 657 NW2d 759 (2002).

[19] *Wargelin v Sisters of Mercy Health Corp,* 149 Mich App 75, 81; 385 NW2d 732 (1986), quoting *Gustafson v Faris*, 67 Mich App 363, 368-369; 241 NW2d 208 (1976).

[20] *Daley v LaCroix,* 384 Mich 4, 12-13; 179 NW2d 390 (1970).

Nor is Ms. Kirkdorfer able to establish that she suffered a shock fairly contemporaneous with the accident. Ms. Kirkdorfer did not witness the accident. She saw her daughter about an hour later when she was brought to the hospital. The time lapse is too great be considered fairly contemporaneous.[21] Plaintiffs argue that Ms. Kirkdorfer experienced the physical injury when she heard about the accident from her mother ten minutes after the accident. However, Ms. Kirkdorfer testified that she misunderstood her mother and did not know whether her father or daughter had been injured. Furthermore, as noted above, Ms. Kirkdorfer's emotional distress was not a sufficient injury to warrant recovery. Accordingly, the trial court properly granted defendant's motion for directed verdict on this claim.

IV. Evidentiary Issues

Plaintiffs contend that the trial court improperly excluded proffered lay and expert opinion testimony. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion.[22] When a trial court's decision regarding the admission of evidence involves a preliminary question of law, this court reviews the issue de novo.[23]

Plaintiffs challenge the trial court's exclusion of the lay opinion of Ms. Sobczak-Barbour that defendant was driving too fast for the road and weather conditions. The opinions and inferences of a lay witness are limited to those that are "(a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' [sic] testimony or the determination of a fact in issue."[24] A lay witness to an accident is qualified to testify regarding the speed of an involved vehicle.[25] However, Ms. Sobczak-Barbour's testimony related only to her theoretical opinion regarding safe speeds under the conditions. Her opinion was not based on her actual perception of defendant's actual speed at the time of the accident. As her opinion was merely theoretical and speculative, it could not give the jury a clear understanding of whether defendant was actually driving too fast for the road and weather conditions that morning. Accordingly, the trial court properly excluded this testimony.

Plaintiffs also argue that the trial court improperly excluded Dr. Daniel Lee's testimony about what defensive strategies defendant should have taken to avoid the accident. The version of MRE 702 in effect at the time of trial provided:

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[21] See *DAIIE v McMillan (On Remand)*, 159 Mich App 48, 55; 406 NW2d 232 (1987) (finding that the defendant's injury was not fairly contemporaneous as she arrived on the accident scene one hour later and "did not see her daughter until sometime thereafter"). See also *Gustafson*, *supra* at 369, citing *Powers v Sissoev*, 39 Cal App 3d 865; 114 Cal Reptr 868 (1974) (reasoning that a mother who sees her child an hour after an accident suffers no greater injury than any other parent whose child is involved in an accident not witnessed by the parent).

[22] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[23] *Id.*

[24] MRE 701.

[25] *Cole v Eckstein,* 202 Mich App 111, 113-114; 507 NW2d 792 (1993).

> If a court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.[26]

Plaintiffs established that Dr. Lee is a qualified expert in accident reconstruction and traffic safety, and it is undisputed that he could testify generally about strategies that a reasonably prudent driver should have employed under the driving conditions on the morning of the accident. Near the end of direct examination, plaintiffs' counsel asked Dr. Lee a hypothetical question about driving under the conditions existing at the time of the accident and Dr. Lee presented a thorough answer.[27] Plaintiffs' counsel then asked Dr. Lee to assume that defendant had just finished maneuvering an s-curve and encountered the headlights of a slow-moving, oncoming vehicle. Plaintiffs' counsel then asked: "Taking those facts into consideration what should Mr. Jesse James Lutz have done, if anything, to have avoided this collision?" The trial court sustained defendant's objection to this question on the grounds that the testimony would invade the province of the jury and was too speculative. Plaintiffs' counsel then rephrased the question into a hypothetical situation, but the trial court sustained defendant's subsequent objection on the same grounds.

Otherwise admissible opinion testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."[28] Here, the trial court improperly excluded Dr. Lee's testimony. Even if the original question was improper, plaintiffs' counsel properly rephrased the question. However, the error is harmless. Dr. Lee testified about the strategies

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[26] MRE 702. The current version of this rule took effect on January 1, 2004.

[27] The testimony occurred as follows:

> *Q*. What kind of driving strategies should be employed when you're dealing with driving on a morning like this one at six forty-five, is very dark and misty, in a rural area, with a road that was only about twenty foot wide?
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> *A*. The first thing is to slow down, maintain a proper lookout. If a car is coming at you blinding you, it should not be a surprise-type situation. If you feel the lights are very bright, you should further slow down and try to maintain your position in the roadway, don't look at those lights, and look at the shoulder of the roadway as far ahead of your car as you can without being blinded, and continue to slow down until you feel you have control of your vehicle, so you can stop if it need be, or avoid if you need to.

[28] MRE 704.

that should be used under poor driving conditions similar to the morning of the accident, including strategies to avoid being blinded by oncoming headlights. The jury naturally would have applied this testimony to defendant's conduct. Accordingly, the trial court's error does not require reversal.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Jessica R. Cooper