STATE OF MICHIGAN

COURT OF APPEALS

RODNEY D. JONES and BRENDA K. JONES,

Plaintiffs-Appellees,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellant.

UNPUBLISHED
December 20, 2002

No. 229235
Berrien Circuit Court
LC No. 96-001270-NI

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

In this case arising as a result of an automobile accident, defendant appeals as of right from the judgment entered after a jury verdict in favor of plaintiffs. We affirm.

In April 1995, plaintiff Rodney Jones (hereinafter "Jones") sustained serious injuries when a Ford Aerostar minivan collided with the full-size 1985 Chevrolet van that plaintiff was driving. Plaintiff's van spun around and rolled twice, coming to rest upright. At some point while the van was rolling, plaintiff was ejected from the van and landed in the street.

On March 26, 1996, plaintiffs filed a complaint alleging product liability, negligence, breach of express and implied warranties, and loss of consortium. Of significance, Jones and his wife Brenda alleged in their complaint that Jones was wearing his seatbelt when the accident occurred: Jones "was utilizing the vehicle equipped door mounted shoulder and lap safety belt system, but the shoulder safety belt and lap safety belt both failed to act, allowing [Jones] to be ejected from the motor vehicle." A jury trial commenced in September 1999, during which the primarily contested fact issues were whether Jones had his seatbelt on at the time of the collision and whether the seatbelt buckle "inertially unlatched." After deliberations, the jury found, among other things, that defendant was negligent in the design of the 1985 Chevrolet G-van[1] "in one or more of the ways claimed by [p]laintiff," that defendant's negligence was a proximate cause of plaintiffs' injuries, that Jones too was negligent, that his negligence was a proximate cause of his injury, and that the percentage of fault attributable to Jones was twenty-five percent and to defendant was seventy-five percent. Thereafter, the trial court entered judgment in favor

[1] The record reveals that the term "G-van" refers to the full-size Chevrolet or GMC van.

of plaintiffs in the amount of $1,825,595. Defendant moved for a new trial, which the trial court denied. This appeal ensued.

Defendant first argues that the trial court abused its discretion in admitting two types of evidence, those being General Motors' crash tests involving "N-cars" and testimony from two witnesses who claimed that they were involved in accidents where their seatbelts failed. Defendant claims that the disputed evidence should not have been admitted at trial because the circumstances in both categories were not substantially similar to the accident in the present case and that this evidence did not come into existence until after Jones' van was designed and manufactured.

We review for an abuse of discretion a trial court's evidentiary decisions. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). In civil cases, an abuse of discretion occurs only when the result is so palpably and grossly violative of fact and logic that it evidences the perversity of will, a defiance of judgment, or the exercise of passion or bias. *Dep't of Transportation v Randolph*, 461 Mich 757, 768; 610 NW2d 893 (2000); *Barrett v Kirtland Community College*, 245 Mich App 306, 325; 628 NW2d 63 (2001). Courts are reluctant to overturn a jury's verdict when there is ample evidence to support it, and reversal will not be premised on an erroneous evidentiary ruling unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A); MRE 103(a); *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001).

We turn first to defendant's argument that no substantial similarity existed between the circumstances in the present case and those concerning the N-cars and the witnesses' testimony and thus the evidence was irrelevant and prejudicial and should have been excluded. With respect to the N-car crash tests, defendant's argument is two-pronged: (1) that plaintiffs' counsel attempted to use the crash test as a recreation of the instant accident, and (2) that even if the evidence had not been introduced to recreate the accident, under *Lopez v General Motors Corp*, 224 Mich App 618, 628; 569 NW2d 861 (1997), such demonstrative evidence was not reasonably and substantially similar to an issue of fact at trial.

Here, as defendant points out, the crash tests were markedly different from the Jones accident. However, the N-car tests videotapes demonstrated inertial unlatching, which is a theory on which plaintiffs relied in explaining why Jones' seatbelt, which he allegedly was wearing at the time of the accident, did not prevent him from being ejected from the van. From the record, it is apparent that the trial court gave serious consideration to its evidentiary decision. In fact, the trial court explained to the jury that

> [t]he test video was shown, ladies and gentlemen, simply for the purpose of illustrating the principal [sic] and the phenomenon of inertial unlatching. As [plaintiffs' attorney] said, there are differences between the Jones incident and . . . the circumstances surrounding this test video admittedly. The video was admitted and you were allowed to see it merely for the purpose of illustrating the – so that you could see the phenomenon of inertial unlatching.

Case law supports the trial court's admission of the evidence for the purpose of demonstrating general scientific principles. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 368; 533 NW2d 373 (1995) (In a products liability case arising from a Jeep roll-over accident, this Court

concluded that "any lack of substantial similarity [of Jeep roll-over tests conditions and the plaintiff's accident] did not prevent the evidence from being admitted for the limited purpose of demonstrating general principles of skidding, speed, and rates of turn."); see also *Kirk v Ford Motor Co*, 147 Mich App 337, 344; 383 NW2d 193 (1985), quoting *Gorelick v Dep't of State Highways*, 127 Mich App 324, 336; 339 NW2d 635 (1983) ("[W]here a film is not offered for the purpose of duplicating or recreating an accident, but instead merely to illustrate certain general principles, differences in surrounding conditions are less relevant and do not require the film's exclusion."). Here, plaintiffs acknowledged some differences between the crash tests and the Jones incident and did not claim that the tests recreated Jones' accident. Further, the trial court stated that it would allow defendant on cross-examination to explore the differences between the crash tests and the Jones incident, and defendant does not claim that it was not allowed to do so. Given this record, we cannot say that the admission of evidence was so palpably and grossly violative of fact and logic that it evidences the perversity of will, a defiance of judgment, or the exercise of passion or bias. *Randolph, supra*. Thus, the trial court acted within its discretion. See *Lopez, supra* at 634-635. However, even if the admission of the videotape were error, the trial court repeatedly informed the jury of the limited purpose of the video, and thus any error was harmless. MCR 2.613(A); MRE 103(a); *Krohn, supra*.

With respect to witnesses' testimony that defendant challenges as improperly admitted, we note that although the GM vehicles and seatbelts of those two witnesses were different as were the circumstances of the accidents, plaintiffs presented this evidence to demonstrate that inertial unlatching of seatbelts does occur in actual accidents. As the trial court stated in its opinion in which it denied defendant a new trial, "[p]laintiffs were entitled to demonstrate the phenomenon of inertial unlatching to the jury and to show the jury that it indeed happens in real world situations." Besides, the trial court limited such testimony to two witnesses, although the lower court record reveals that plaintiffs at first proposed seven witnesses who had experienced buckle unlatching. Further, defendant had the opportunity to cross-examine these witnesses on the differences between their accidents and the Jones incident. Under these circumstances, we cannot say that the trial court abused its discretion in admitting the testimony of those two witnesses. Moreover, inertial unlatching was a main issue at trial and thus, contrary to defendant's argument, the demonstration of this phenomenon was not irrelevant, misleading, or confusing to the jury.

With respect to the timing of the crash tests and the witnesses' accidents, defendant, citing *Gregory v Cincinnati, Inc*, 450 Mich 1; 538 NW2d 325 (1995), argues that these same "crash tests conducted six years after the accident van was designed and manufactured as well as testimony about accidents that took place at least five years after the van was designed and manufactured could have tainted the jury's verdict and should have been excluded." According to defendant, the factfinder is required to assess the risks and utilities of the product at the time of its manufacture. However, the record reveals that plaintiffs did not use the crash tests or the witnesses' testimony to demonstrate the conduct of the manufacturer post Jones' accident to show a design defect; rather, they used it to show the principle of inertial unlatch and the actuality of inertial unlatch in the real world. Because the trial court limited the purpose of this testimony and instructed the jury accordingly, on the facts of this case the trial court did not abuse its discretion in admitting the challenged evidence.

To the extent that defendant argues that plaintiffs contended that defendant knew or should have known of the dangerous condition of the product, that resolution of that issue should focus only on the time of manufacture and before, and that the trial court erred in stating that the introduction of defendant's crash tests was "to show notice to [defendant] that inertial unlatching occurred in its vehicles," we find its argument unpersuasive. The trial court corrected its previous ruling that the crash tests could be used to show notice without the jury being exposed to that previous ruling and defendant points to no place in the record where plaintiffs clearly violated that order. Although defendant is correct that in design defect cases the trier of fact must assess the product at the time of manufacture, *Gregory*, *supra* at 6, the circumstances here are distinguishable because the challenged evidence was used to demonstrate inertial unlatching rather than notice to the manufacturer. Because the trial court limited the purpose of this testimony and instructed the jury accordingly, the trial court, on the facts of this case, did not abuse its discretion in admitting the challenged evidence.

Defendant next argues that the trial court erred in failing to order plaintiffs to produce discovery statements that plaintiffs' attorney recorded and videotaped from nine fact witnesses in the early stages of investigation. According to defendant, despite numerous requests and motions to compel, plaintiffs failed to provide these statements that could have been used for impeachment purposes with respect to certain police officers, paramedics, and a firefighter, and that plaintiffs' expert Carly Ward relied on in preparing to testify. Defendant claims that even if the statements were "work product," they can be discoverable when good cause is shown. Further, defendant posits that it is "fundamentally unfair to allow plaintiffs to provide statements to an expert witness who relies on them and then also to foreclose [defendant] from seeing those statements on the grounds that they are work product" and that pursuant to MCR 2.302(E) plaintiffs had a duty to supplement their discovery responses. A trial court's decision to grant or deny discovery will not be overturned absent an abuse of discretion. *Lantz v Southfield City Clerk*, 245 Mich App 621, 629; 628 NW2d 583 (2001); *Baker v Oakwood Hospital Corp*, 239 Mich App 461, 478; 608 NW2d 823 (2000).

Here, defendant has presented a less than persuasive argument that the trial court abused its discretion in denying discovery concerning the witness statements. It is undisputed that plaintiffs did not produce the nine witness statements that plaintiffs' attorney videotaped before depositions were conducted and that these statements were apparently transcribed and provided to plaintiffs' expert, Carly Ward. From the amount of time and discussion surrounding this issue, the record reveals that the trial court gave this issue serious consideration. As the trial court noted, under the rules of discovery, MCR 2.301 *et seq.*, defendant could obtain the statements through discovery "only on a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." MCR 2.302(B)(3)(a). Defendant made no such showing. Defendant had the opportunity to depose the witnesses whose statements were sought. Further, at trial defendant engaged in meaningful cross-examination of Ward and of these same witnesses who testified at trial. Moreover, it hardly can be said that the motion for discovery made on the eleventh day of trial after a lengthy examination of Ward, including direct examination, cross-examination, and multiple redirect- and recross-examinations, was timely. Under these circumstances, we cannot say that the trial court's decision concerning discovery was so palpably and grossly violative of fact and logic that it evidences the perversity of will, the defiance of judgment, or the exercise of passion or bias.

Randolph, supra. Thus, we conclude that the trial court did not abuse its discretion in refusing to order plaintiffs to produce the requested witness statements. Further, to the extent that defendant argues that the trial court abused its discretion in denying defendant's motion for new trial on the basis of the failure to produce the witness statements, for the same reasons we find no abuse of discretion.[2]

Finally, defendant argues that the trial court should have granted a new trial because the jury's verdict was against the great weight of the evidence. Specifically, defendant claims that "although plaintiffs may have presented the minimum quantum of evidence necessary to get the issue of whether Jones was wearing a seat belt to the jury, that evidence was unbelievable" and "[t]he overwhelming weight of the credible evidence favored [defendant's] position." Defendant further argues that the evidence demonstrated that had Jones been wearing his seatbelt, it would have provided him reasonable safety protection. We review for abuse of discretion a trial court's denial of a motion for new trial. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001); *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e), *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990), aff'd 438 Mich 347 (1991). However, "the jury's verdict should not be set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder." *Ewing v Detroit*, 252 Mich App 149, 169-170; 651 NW2d 780 (2002); *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The trial court's determination that a verdict is not against great weight of the evidence is given substantial deference. *Morinelli, supra*. If conflicting evidence is presented, the question of credibility ordinarily should be left for the factfinder. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998); *Ewing, supra* at 170.

In the present case, the trial court concluded that the jury's verdict was not against the great weight of the evidence, recognizing that plaintiffs' evidence did not go unchallenged, and noted that such conflicts are to be resolved by juries. Although on appeal defendant attempted to explain away the evidence supporting the jury verdict, it did so by attacking the credibility of the witnesses. However, it is not this Court's role to assess the witnesses' credibility. *Lemmon, supra*; *Kalamazoo Co Rd Comm'rs v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964); *Ewing, supra*. Giving proper deference to the trial court's determination that the verdict is not against the great weight of the evidence, and having reviewed the evidence presented at trial, we cannot say that the trial court abused its discretion in denying defendant's motion for a new trial.

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[2] Whether to grant a new trial is within the trial court's discretion, and its decision will not be reversed absent an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001); *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra