

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

DARWIN ROGERS and ROXANNE ROGERS,
Plaintiffs-Appellants,

v

No. 107226

DIANE DURGA,
Defendant-Appellee.

Before: Danhof, C.J., and Maher and Hood, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a jury verdict of no cause of action. We affirm.

Plaintiff was injured on July 26, 1985, after the motorcycle he was operating collided with a pickup truck operated by defendant. Jeffrey Tokie, a passenger on the motorcycle, was also injured in the accident. The collision occurred at the intersection of US 31 and South Airport Road in Grand Traverse County. Plaintiff was proceeding north on US 31 approaching the intersection of South Airport Road, and defendant was in the left turn lane of southbound US 31 preparing to make a left turn onto eastbound South Airport Road. The collision occurred when plaintiff's motorcycle entered the intersection and struck the rear of defendant's pickup truck as defendant was making her left-hand turn. The accident occurred during dusk, at approximately 9:30 p.m. Both vehicles had their headlights on.

On January 28, 1986, plaintiff commenced the instant negligence action seeking payment of third-party economic and noneconomic damages resulting from serious impairment of bodily function and permanent serious disfigurement pursuant to the no-fault act, MCL 500.3135; MSA 24.13135. Plaintiff's wife, Roxanne Rogers, filed a claim for loss of consortium.

The main issue at trial concerned the color of the traffic light in the intersection at the time of the collision. Conflicting testimony was presented on this issue. The testimony established that plaintiff was traveling behind a Jeep as he approached the intersection; however, the Jeep slowed up and moved into the right turn lane. According to plaintiff, he then down-shifted from 50 or 55 m.p.h. to 45 m.p.h. to pass through the intersection. Although he indicated the traffic light was green when he was 60 to 75 feet from the intersection, he did not know its color at the time he entered the intersection. Tokie testified he saw the traffic light turn yellow approximately 30 to 40 feet from the intersection. He indicated he saw the pickup truck move and he tapped plaintiff on the shoulder. Tokie next remembers the impact with the truck and flying through the air "forever". Plaintiff testified he remembered nothing between the time Tokie tapped him on the shoulder and when he awoke in his hospital bed. Other witnesses called by plaintiff presented testimony indicating that the light for northbound US 31 traffic had not yet turned red at the time of the collision.

Defendant admitted she saw the motorcycle coming from the distance. She said it appeared it was going to stop so she started her turn. When she realized it was not going to stop, she accelerated through the intersection and the motorcycle hit her vehicle in the rear. She said it was her impression that the motorcycle tried to "beat the light", and she did not believe she misjudged the distance. She did not know the color of the light during her turn.

The driver of the Jeep testified on behalf of defendant. She claims she slowed her vehicle because the traffic light turned yellow. She claims she stopped her Jeep, the light turned red, and then the motorcycle passed her on the left. It was her opinion that the motorcycle was going to fast.

After both sides rested, the trial court denied directed verdict motions of both the plaintiffs and defendant. Following deliberations, the jury returned a verdict of no cause of action. From this verdict, plaintiffs appeal as of right.

In their first issue on appeal, plaintiffs contend the trial court erred in denying their motion for directed verdict. When reviewing a trial court's denial of a motion for directed verdict, the testimony and all legitimate inferences that may be drawn are examined in a light most favorable to the nonmoving party. If there are material issues of fact upon which reasonable minds might differ, the matter is one properly submitted to the jury. If reasonable jurors could disagree, neither the trial court nor this Court may substitute its judgment for that of the jury. In re Leone Estate, 168 Mich App 321, 324; 423 NW2d 652 (1988). A directed verdict is viewed with disfavor in negligence cases. Coy v Richard's Industries, Inc, 170 Mich App 665, 672; 428 NW2d 734 (1988), lv den 432 Mich 856 (1989).

Plaintiffs argue that the evidence overwhelmingly preponderated in their favor, and therefore, a directed verdict was required. We disagree. The testimony at trial revealed the presence of factual disputes concerning both the color of the traffic light at the time of the collision, and whether defendant either slowed up, maintained his speed, or accelerated through the intersection. In fact, one defense witness unequivocally testified that the light was red when plaintiff entered the intersection. Plaintiff argues that this witness' testimony was "riddled with inconsistencies and inaccuracies" and should therefore be discarded. Questions of credibility, however, are properly left for the jury. Johnson v Corbet, 423 Mich 304, 314; 377 NW2d 713 (1985). Because the evidence revealed the presence of disputed factual issues, the trial court properly denied plaintiffs' motion for directed verdict.

Next, plaintiffs argue the trial court erred by allowing defense counsel to elicit testimony concerning Darwin Rogers' failure to comply with various motorcycle licensing requirements and permit restrictions. Plaintiffs argue these issues were collateral matters unrelated to the casual connection of the accident and therefore irrelevant.

During direct examination, plaintiff testified that he proceeded through the intersection because he could not have safely stopped the motorcycle without "laying it down and sliding" through the intersection. Plaintiff's attorney then questioned plaintiff concerning his motorcycle experience. Plaintiff explained that although he had ridden numerous trail bikes, this was his first road bike. Plaintiff then testified he had owned the bike for a couple of months before the accident, was operating the bike on a permit, and was one week away from getting his motorcycle endorsement on his driver's license.

During cross-examination, defense counsel further pursued this topic. Plaintiff admitted he had not taken the written test for issuance of a motorcycle endorsement, nor had he reviewed the manual issued by the Secretary of State in preparation for the test. Plaintiff also admitted he was unaware that the holder of a permit was required to drive only under the supervision of a licensed adult driver who had a motorcycle endorsement. Furthermore, plaintiff was also unaware that a permit holder was not permitted to ride at night, or with a passenger on his motorcycle.

A trial court has broad power to control the interrogation of witnesses; the scope of cross-examination is a matter within the trial court's discretion. People v Larry, 162 Mich App 142, 154; 412 NW2d 674 (1987). Matters concerning plaintiff's motorcycle knowledge, experience and licensing status were put into issue by plaintiff himself. The door having been opened, we do not believe the trial court abused its discretion in permitting defendant to inquire into these same areas.

As their next issue on appeal, plaintiffs contend that reversal is required because of defense counsel references to plaintiff's prior receipt of first-party no-fault benefits. Although plaintiffs allege that these references occurred "repeatedly" throughout trial, they have only referred us to one instance during closing argument where a reference was made. Because this reference was made in response to a related remark by plaintiffs' counsel during his closing argument, it did not deprive plaintiffs of a fair trial. In any event, because the comment was related to the element of damages, an issue never reached by the jury, any error arising from it was harmless. Beals v Walker, 98 Mich App 214, 235; 296 NW2d 828 (1980), rev'd on other grounds, 416 Mich 469 (1982).

Finally, plaintiffs claim the trial court erred in failing to instruct the jury as they requested. Jury instructions are reviewed by this Court in their entirety and should not be extracted piecemeal. Niemi v Upper Peninsula Orthopedic Ass'n, 173 Mich App 326, 328; 433 NW2d 363 (1988). Whether additional instructions are necessary is a matter for case-by-case analysis. Id. Where requested jury instructions correctly state the law applicable to the facts, it is error to refuse to give them unless the requests are covered by the general charge in a fair and adequate manner. Ritchie v Michigan Consolidated Gas Co, 163 Mich App 358, 371; 413 NW2d 796 (1987). A jury verdict should not be vacated for failure to give a properly requested accurate and applicable jury instruction unless the failure to set aside the verdict would be inconsistent with substantial justice. Johnson v White, 430 Mich 47, 60 (1988).

Plaintiffs first complain that the trial court erred in instructing the jury when it read the entire portion of MCL 257.650(1); MSA 9.2350(1) which provides:

The driver of a vehicle within an intersection intending to turn to the left shall yield the right of

way to a vehicle approaching from the opposite direction which is within the intersection or so close to the intersection as to constitute an immediate hazard; but the driver, having so yielded and having given a signal when and as required by this chapter, may make the left turn and the drivers of all other vehicles approaching the intersection from the opposite direction shall yield the right of way to the vehicle making the left turn.

Plaintiffs contend it was error to read the emphasized portion of the statute. We disagree. Based upon the conflicting testimony presented at trial, there was a question of fact as to whether plaintiff or defendant had the duty to yield the right of way. Accordingly, the trial court properly read the entire portion of the statute when it instructed the jury.

Further, because plaintiff was able to recall all the events leading up to the collision itself, and any negligence on his part would have occurred prior to the collision, the evidence did not warrant plaintiff's requested SJI 10.09 which creates a presumption that the plaintiff was not negligent if the jury finds he has a loss of memory concerning the facts of the case.

Finally, plaintiffs contend the court erred in refusing to read SJI 14.01 and 16.03 pertaining to the doctrine of last clear chance. We agree with this Court's recent decision in Callesen v Grand Trunk Western Railroad Co, 175 Mich App 252, 261; 437 NW2d 372 (1989), holding that the doctrine of last clear chance has been abolished with the adoption of a pure comparative negligence system in Michigan.¹ The Court noted:

If the jury is instructed that a defendant is liable if it had the last clear chance to avoid the injury, it would then have to apportion damages based on comparative negligence. That is precisely what a jury would do in a comparative negligence situation even in the absence of a last clear chance instruction. The last clear chance instruction is, therefore, superfluous. [175 Mich App at 262.]

Accordingly, we agree plaintiffs were not entitled to an instruction on last clear chance.

Affirmed.

/s/ Robert J. Danhof
/s/ Richard M. Maher
/s/ Harold Hood

¹ Judge Hood acknowledges that he was a member of the panel in Petrove v Grand Trunk W R Co, 174 Mich App 705; 436 NW2d 733 (1989) which implied without analysis that the last clear chance doctrine was still viable. He now agrees with Judge Shepherd's analysis in Callesen, supra.