STATE OF MICHIGAN

COURT OF APPEALS

EMMETT CHASTAIN,

Plaintiff-Appellant,

V

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

UNPUBLISHED
November 30, 2001

No. 222502
Macomb Circuit Court
LC No. 93-4415-NP

Before: Wilder, P.J., and Hood and Collins, JJ.

PER CURIAM.

In this product liability action, plaintiff Emmett Chastain appeals by right the May 10, 1999 judgment in favor of defendant. This judgment was entered pursuant to a five to one jury finding that defendant was not liable for plaintiff's injuries which arose when plaintiff was involved in a single-car rollover accident. We affirm.

I. Facts and Proceedings

A. The Accident

On March 25, 1991, plaintiff Emmitt Chastain, an employee of Cashman Equipment Company (Cashman), located in Elko, Nevada, was given two boxes of parts to deliver to another Cashman employee. That employee worked out of Cashman's Round Mountain Gold Mine Office. As was standard with such deliveries, plaintiff was to meet the Round Mountain employee in Eureka, Nevada,[1] at which time the boxes would be given to the Round Mountain employee. In order to reach Eureka, plaintiff was provided with a company owned 1988 Chevrolet C/K pickup truck, one of several truck used for deliveries.

Before beginning the trip, plaintiff testified that he gave the truck a cursory look to "make sure [the] tires were inflated," that the gauges looked good and that "everything" looked alright with the truck. Plaintiff also testified that he went to a gas station in order to "fill up" the truck, put his seatbelt on, and began the trip. In order to reach Eureka, plaintiff began driving

[1] It appears as if Eureka was the half-way point between Elko and Round Mountain. In any event, it is undisputed that this was the city in which Elko and Round Mountain Cashman employees would meet to exchange parts being delivered to the other location.

southbound on State Highway 278 at a speed of sixty miles per hour. At the time plaintiff began the trip, the weather was clear and dry. However, sometime during the trip it began to snow, causing plaintiff to slow to a speed of approximately fifty miles per hour. Shortly thereafter, plaintiff lost control of the truck. According to plaintiff, the truck began to slide toward the opposite lane of traffic, then began traveling backwards, eventually going off the road, where it hit a roadway marker and a shallow embankment, rolled over, and began hitting things in a "very violent" manner. The plaintiff also testified that he was ejected from the truck through the driver's side window, landing on the ground on his back. Plaintiff found himself unable to move his legs with no way to seek assistance. He remained on the side of the highway until he was discovered by Jerry Sestanovich, a local rancher.

After being on the scene for about ten minutes, Sestanovich was able to stop a passing truck and ask the driver to call for help. Approximately ten minutes later, officers from the Lander and Eureka County Sheriff's Departments, as well as emergency medical personnel, arrived at the scene. It is undisputed that upon their arrival at the scene plaintiff, either voluntarily or in response to questions asked of him, informed them that he was wearing his seatbelt and therefore was confused and concerned about how he ended up outside of the truck.

B. Defendant's Injuries

Plaintiff was treated at the scene by, among others, Dr. Rod Phillips. Dr. Phillips noticed that while plaintiff appeared to be conscious and alert, he was complaining of pain in his neck and abdomen areas and that his legs were cold and numb. Dr. Phillips also noticed that plaintiff was ashen in color, having trouble breathing, spitting blood, and had a large contusion on his back between his T-10 and T-12 vertebrae. Based on these symptoms and complaints, Dr. Phillips believed that plaintiff probably suffered a spinal cord injury. Accordingly, after plaintiff's was stabilized, his neck and back were immobilized and he was transported by ambulance to the Eureka Airport where he was then taken by plane to the Washoe Medical Center. At Washoe Medical Center, Dr. Phillips initial assessment was proven to be correct – plaintiff had fractured his spine between the T-11 and T-12 vertebrae. Plaintiff then underwent a surgical procedure known as a bilateral fusion in which Harrington Rods were inserted in order to stabilize his spine. Despite these medical efforts, plaintiff was rendered a paraplegic, being unable to use his legs or feel any sensation below his waist. In addition to the lose of use in his legs, plaintiff, who was aged twenty-three at the time of the accident, was left sexually dysfunctional, has a neurogenic bladder,[2] cardiovascular problems, and decubitus ulcers. As a result, plaintiff requires attendant care to assist him with his daily routine.

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[2] A "neurogenic bladder" is defined as: "A urinary bladder functioning improperly or with difficulty because of a lesion (injury or disorder) somewhere in the nervous system. Similarly, a "cord bladder" is defined as: "A urinary bladder functioning improperly because of a lesion (injury or disorder) in the spinal cord which affects the nerve mechanism controlling the bladder." *Attorneys' Dictionary of Medicine and Word Finder* (2000), p B-128.

In addition to the cord or neurogenic bladder, plaintiff lost control of his bowel functions as well. As a result, in order to have a bowel movement, plaintiff must insert a suppository and then digitally stimulate his rectum.

C. Accident Investigation

The official accident investigation was conducted by Officer John Schweble of the Nevada Highway Patrol, who arrived at the scene approximately two-and- one-half hours following the accident, after plaintiff had been taken to the hospital and no one was present at the scene.[3] Officer Schweble examined the accident scene and truck, took photographs and measurements, and drew a diagram. After returning to Eureka he also conducted interviews with people who came to the aid of plaintiff immediately after the accident.

In examining the truck, Officer Schweble determined that the lack of tread on the rear tires approached illegal levels. Officer Schweble also noted, based on the witness statement of Sestanovich, that plaintiff was driving approximately fifty miles per hour and that the road conditions were snowy and icy at the time of the accident.[4] Therefore, Officer Schweble concluded that, based on the conditions of both the weather and the tires, plaintiff was driving at an unsafe speed, causing the truck to hydroplane and lose control. He also concluded, and was permitted to testify at trial, that plaintiff was not wearing his seatbelt at the time of the accident. Officer Schweble reached this conclusion even though he never interviewed plaintiff; never touched, examined, or tested the seatbelt; and had been informed by Officer Mark Salopek, of the Eureka County Sheriff's Department, that plaintiff told him and others at the scene that he was wearing the seatbelt at the time of the accident.

D. The Complaint, Discovery Requests and Trial

In September 1993, plaintiff filed the instant complaint against defendant and Allied-Signal, Inc.[5] Specifically, plaintiff's complaint alleged that the seatbelt, known as a Joint Development Company (JDC) buckle was defective and that because of this defect, the buckle, instead of restraining him, released either before or after the accident, causing him to be ejected from the truck. Plaintiff contended that the buckle released either because it was "false latched"[6] or because it was subject to inertial release.[7]

Prior to trial, on March 30, 1998, four years after the end of discovery, plaintiff filed a motion to compel discovery. That motion requested production of the following materials: (1)

[3] This is true even though officers from the Lander and Eureka County Sheriff's Departments were at the scene while plaintiff was still present.

[4] The road being snowy and icy was also corroborated by the witness statement and testimony of William Hicks, who was that state highway employee responsible for plowing the road at the time of plaintiff's accident.

[5] Plaintiff and Allied-Signal reached settlement before trial; accordingly, Allied-Signal is not a party to this appeal. The claim was brought against both defendant and Allied-Signal because the seatbelt in question had been designed, tested, and manufactured by Allied-Signal on behalf of defendant.

[6] "False latch" means that a seatbelt buckle appears to be properly latched; however, for various reasons, the seatbelt is not properly latched and therefore releases when force is applied.

[7] "Inertial release" means that due to the force and acceleration of the crash, parts within the seatbelt are moved, causing it to release from the lock.

crash and sled tests conducted by General Motors in which the JDC buckle was found unlatched at the conclusion of the tests; (2) inertial General Motors test incident reports (TIFS) which noted an unlatching problem with the JDC buckle, especially TIRS for post-1993 C/K vehicles,; (3) over 150 consumer reports of problems related to the JDC buckle; (4) documents pertaining to preliminary evaluations, engineering analyses and recall of some C/K trucks, including documents relating to the discovery of the conditions leading to the recall, and; (5) GM's "lawsuit list."

Plaintiff's motion was heard on April 13, 1998. However, in lieu of deciding the issue, the trial court assigned the case to another judge in the hopes that it could be settled. After settlement was impossible, the motion was again heard by the trial court. Because the trial court believed that the requested information was irrelevant, the request was denied.[8] Thus, the case was scheduled for trial.

At trial, plaintiff called, among numerous witnesses, an engineering expert who testified that the seatbelt was defectively manufactured and that as a result of this defect, the seatbelt was more likely to release due to either "false latch" or inertial release. Specifically, plaintiff's expert, Stephen R. Syson, testified that a particular part on the seatbelt latch, known as the banana slot or "L" shaped space is to have a maximum radius of two-tenths of a millimeter, however, the seatbelt on the driver's side of plaintiff's truck had a radius of approximately one millimeter. Therefore, according to plaintiff's expert, because the radius of the banana slot was about five times larger than it should have been, the seatbelt had a higher probability of being false latched or coming unlatched due to inertial release.

Syson also testified that he was able to false latch the seatbelts in the truck driven by plaintiff about one out of three times he attempted to do so.[9] Syson went on to testify that according to Federal Motor Vehicle Safety Standard (FMVSS) 209, if a seatbelt is false latched it is to supposed to unlatch whenever the force upon it is five pounds or less; however, the seatbelts in plaintiff's truck were, according to Syson's tests and testimony, able to withstand anywhere from six to over fifty pounds of force before the tongue would separate from the buckle. Syson indicated during his testimony that this was unsafe because it meant that a falsely latched seatbelt could remain buckled up to the time in which someone is involved in an accident, only then to release during the accident, causing injury to the occupant.

In contrast to plaintiff's theory, defendant sought to rebut plaintiff's contention that plaintiff's seatbelt was defective or that it could have come unlatched during an accident. Defendant called expert witnesses to testify that the seatbelt was not defective and that even if it was defective, plaintiff's seatbelt would not have come unlatched during this accident. Thus, defendant's main defense was that plaintiff was not wearing his seatbelt at the time of the accident. In an effort to prove this, defendant not only called Officer Schweble to testify that, in

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[8] Specifically, the court stated that it did not "think there was relevance because I don't think it would come in under 407 [subsequent remedial measures], and I'm going to deny your request."

[9] Syson testified that it is possible to attempt to achieve a false latch by holding down on the seatbelt release button while inserting the seatbelt latch into the buckle.

his opinion plaintiff was not wearing his seatbelt,[10] but also called witnesses to testify that if plaintiff had been wearing his seatbelt at the time of the accident, plaintiff would have suffered injuries to the left side of his arm, his left armpit, and the left side of his neck. In addition, defendant relied on the testimony of plaintiff's own witnesses to prove the supposition that there would have been noticeable marks on plaintiff's body, if he had, in fact, been wearing the seatbelt at the time of the accident.

On March, 15, 1999, the jury returned a five to one verdict in favor of defendant. Plaintiff now appeals.

II. Analysis

A. Officer Schweble's Testimony

[10] Specifically, Officer Schweble testified as follows:

> Q. Can you tell the jury what your opinion is about whether the plaintiff was wearing a seat belt?
>
> A. As I indicated on my report that I indicated that I felt that he – that they were not used that day.
>
> Q. Now, what was it that you based that opinion on?
>
> A. Because the defendant was ejected from the vehicle and the seatbelts were there, you know, and the vehicle – I looked at them, I didn't test them, but they looked like they were in workable order and that's where I formulated my opinion because he was ejected.
>
> * * *
>
> Q. Does your past experience serve as the basis for your opinion here?
>
> A. Yes, it does.
>
> Q. Can you tell us what it is about your past that had some affect on your opinion here?
>
> A. Because I have had other incidents where I have investigated accidents where people have said they have their seat belt [sic] on and after questioning them a little bit they have admitted that they didn't.
>
> Q. Is that one of the reasons that you concluded, based on what you saw at the scene, that the plaintiff wasn't wearing his seat belt?
>
> * * *
>
> A. Yes, I did.

Plaintiff first contends that pursuant to *Miller v Hensley*, 244 Mich App 528; 624 NW2d 582 (2001), the trial court erred when it permitted Officer Schweble to provide lay opinion testimony regarding plaintiff's seatbelt use at the time of the accident.[11] While we find this to be a close question, we disagree.[12]

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Close questions arising from the trial court's exercise of discretion on an evidentiary issue should not be reversed simply because the reviewing court would have ruled differently. *Id*.; *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *Id*. In addition, evidentiary errors are subject to a harmless error analysis. *People v Lukity*, 460 Mich 484, 491; 596 NW2d 607 (1999); *People v Mateo*, 453 Mich 203, 212; 551 NW2d 891 (1996); see also MCL 769.26 and MRE 103. Under the harmless error rule, reversal of a jury decision is only warranted if, after reviewing the whole record, it is apparent that a miscarriage of justice occurred as a result of the improperly admitted evidence. *Lukity*, *supra*; *Mateo*, *supra*.

In *Miller*, this Court indicated that investigating police officers are permitted to provide lay opinion testimony when such testimony is based on the police officers own direct observations and analysis of the accident scene. *Id*. at 531. Nonetheless, there, the Court held that because the testimony of the officers in question was not rationally based on their own perceptions as required by MRE 701,[13] it was inadmissible. *Id*. In *Miller*, the trial court permitted two police officers to testify that in their opinion the plaintiff was at fault for the accident because they concluded that the defendant's vehicle entered the intersection on a yellow light. *Id*. In reversing, this Court stated that because

> neither officer was present at the time of the collision[,] [t]he officers' conclusions as to the color of the traffic light when defendant entered the intersection were based solely on statement made by witnesses at the accident scene. Contrary to defendant's argument on appeal, the officers' opinions as to

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[11] See n 10, *supra*.

[12] Plaintiff also challenges the testimony of Emergency Medical Technician Hillery Leslie as being improper lay opinion testimony. However, because Leslie testified at trial by way of deposition and plaintiff has failed to ensure that a transcript of Leslie's testimony was made part of the lower court record, any review of Leslie's testimony would be speculative. Therefore, we cannot review the propriety of Leslie's testimony. *Band v Livonia Associates*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989).

[13] MRE 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

> fault were not based on their view of the vehicles and their observations of the point of impact. [*Id*.]

The Court then found that because the evidentiary error was not harmless, it required reversal:

> In this case, the admission of the officers' testimony that plaintiff was at fault for the collision, over plaintiff's objection, involved the principal issue of the case and the jury rendered a verdict in conformance with the officers' improper testimony. Further, contrary to defendant's argument on appeal, trial testimony did not clearly establish that plaintiff caused the collision. Plaintiff testified that the traffic light had turned red before she started to make her turn onto Campbell. The eyewitness testified that he was unable to recall the color of the light at the time defendant's vehicle entered the intersection. Consequently, substantial justice requires that we reverse the judgment for defendant and remand this matter for a new trial. [*Id.*]

Here, because *Miller* requires us to undertake a harmless error analysis in order to determine whether reversal is required, we will assume without deciding that Officer Scweble's testimony was improperly admitted and instead determine whether any error in admitting Officer Schweble's testimony was harmless. *Lukity*, *supra*; *Mateo, supra*. We conclude that it was.

Defendant's engineering expert testified that because plaintiff would not have fit through the loop of the webbing that was keeping him from getting out of the vehicle it would have been impossible for plaintiff to be expelled from the truck if he had been wearing his seatbelt. In addition, defendant put testimony in the record indicating that due to the force of leaving the road, the seatbelts in the truck would have locked up early on in the accident sequence. Thus, had plaintiff been wearing the seatbelt and it came unlatched, it would have locked in the position it was prior to becoming unlatched and would have remained in that position until someone unlocked it. Here, the seatbelt was locked fully in its dislodged position, showing no signs of ever being pulled out from its "rest" position.

Moreover, plaintiff's own doctor testified that if plaintiff had worn the seatbelt, it would have likely caused bruising or injuries to the left side of defendant's body; however, no such bruising or injuries occurred here. This testimony was corroborated by one of the emergency medical technicians at the scene, who testified that if someone was wearing a seatbelt during an accident "there is usually a read mark or something" indicating that a seatbelt had been worn. Based on this unchallenged testimony, it is apparent that the jury was free to disregard Officer Schweble's conclusion that plaintiff failed to use his seatbelt on the day in question and still conclude that the seatbelt had not been worn. Because there was substantial unchallenged testimony presented at trial regarding the likelihood that plaintiff was not belted at the time of the accident, we conclude that any error in Officer Schweble's testimony was harmless.[14]

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[14] In furtherance of this finding, we note that the jury was read the defendant's theory of the case, which, did not rely on Officer Schweble's testimony, but instead relied on the physical and scientific reasons as to why plaintiff was not wearing his seatbelt at the time of the accident. Specifically, the jury was informed that defendant's theory of the case was as follows:

(continued…)

B. Special Jury Instructions

Plaintiff also contends that the trial court erred by refusing to read his requested special jury instruction. We disagree. We review a trial court's decision regarding jury instructions for an abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997). When a party so requests, a court must give a standard jury instruction if it is applicable and accurately states the law. MCR 2.516(D)(2). Nonetheless, we will not find error requiring reversal if, on balance, the trial court adequately and fairly conveyed the applicable law and theories of the parties to the jury. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997).

Plaintiff's requested jury instruction stated:

> I charge you under Michigan law that an automobile manufacturer like General Motors Corporation is liable for negligence in manufacture or inspection of parts of an automobile directly related to its safe operation even if the defective part was supplied by others.

In lieu of the special instruction, the trial court provided the jury with the following jury instruction, modeled after the first paragraph of SJI2d 15.05:

(…continued)

> Plaintiff's ejection was due to his failure to wear his seat belt. The JDC seat belt buckle was not defective in any way. The buckle was thoroughly designed and tested and complied with all Federal Motor Vehicle Safety Standards and General Motors' specification.
>
> The size of the radius and banana slots does not affect the buckle's resistance to initial [sic] unlatch or false latch.
>
> False latch of the JDC buckle is possible only under conditions of manipulation which are dissimilar to actual use. False latch is an extremely and unusually difficult condition to achieve in conditions of actual use and particularly when replicating the method of buckle up claimed by plaintiff in the truck.
>
> Inertial unlatch of the JDC buckle could not and did not in [sic] this slow-speed accident. The forces in this accident could not product inertial unlatch.
>
> Plaintiff claimed he was belted at the scene because he was aware of state law requiring belt use and he knew that there was a penalty for violating the law. He was also aware of company policy requiring seat belt use and because he had just been involved in an accident with the company truck, he also did not want to accept responsibility for his life-altering mistake.

> If you decide that defendant General Motors Corporation was negligent and that such negligence was a proximate cause of the occurrence, it is not a defense that the conduct of Allied[-]Signal, who is not a party to this suit also may have been cause of this occurrence.

The court did not provide the jury with the second paragraph of SJI2d 15.05.

After reviewing the record in the instant case, it is apparent that plaintiff only requested the special jury instruction in the event that the trial court decided to instruct the jury with the second paragraph of SJI2d 15.05. The record also reveals that plaintiff agreed with the trial court's jury instructions as given. Thus, because plaintiff acquiesced in the trial court's decision to read only the first paragraph of SJI2d 15.05 in lieu of the special jury instruction, plaintiff is not entitled to any relief with regard to this issue. *Hilgendorf v Saint John Hospital & Medical Center Corp*, 245 Mich 670, 683, 696; ___ NW2d ___ (2001); *Dresselhouse v Chrysler Corp*, 177 Mich App 470, 477; 442 NW2d 705 (1989). Further, because the trial court also instructed the jury pursuant to SJI2d 25.31, and provided the jury with plaintiff's theory of the case, which pointed out that since defendant chose Allied-Signal to design and manufacture the seatbelts in plaintiff's truck, it was responsible for any defect in those buckles, it is evident that the jury was not misled or confused by the failure to read plaintiff's requested jury instruction and that it was adequately and fairly conveyed the applicable law and theories of the parties. *Hilgendorf, supra* at 696, quoting *Grzesick v Cepela*, 237 Mich App 554, 559; 603 NW2d 809 (1999); *Steven, supra* at 442. Accordingly, because we are unable to find error that is inconsistent with substantial justice, the jury verdict will not be reversed. *Hilgendorf, supra*.

C. Discovery Requests

Plaintiff further contends that the trial court erred when it denied its discovery request that defendant be compelled to produce all crash and sled tests documents where the JDC buckle released during the test and also erred when it denied plaintiff's discovery request for all civil claims, consumer complaints, and incident reports filed against defendant alleging that a JDC buckle opened during an accident. Specifically, plaintiff argues that the information regarding these tests is relevant because the tests involved the exact type of seatbelt plaintiff's truck was equipped with at the time of the accident and that even if inadmissible as a subsequent remedial measure under MRE 407, the information should have been discoverable. Again, we disagree.

This Court review of a trial court's decision to grant or deny discovery request is for an abuse of discretion. *Harrison v Olde Financial*, 225 Mich App 601, 614; 572 NW2d 679 (1997); *Mercy Mt Clemens v Auto Club Ins Ass'n*, 219 Mich App 46, 50; 555 NW2d 871 (1996).

Here, plaintiff sought to discover tests and documents pertaining to vehicles manufactured several years after the truck plaintiff was driving on the day in question. In addition, the test results requested by plaintiff did not pertain to accidents similar to the one plaintiff was involved in.[15] Thus, it is impossible for us to conclude that had defendant provided

[15] The recall involving 1994-95 C/K pickups dealt with concerns involving seatbelts releasing in frontal collisions, not rollover accidents. In addition, the seatbelts involved in the recall involved energy management loops that were not present on plaintiff's seatbelt. See Appendix D at 2-3.

plaintiff with the requested material, plaintiff would have been able to find evidence that made it more probable that plaintiff's seatbelt was negligently designed. See MRE 401. In addition, because plaintiff never indicated how the requested material was substantially similar to plaintiff's accident, the court was within its discretion to deny the discovery request. See *Haberkorn v Chrysler Corp*, 210 Mich App 354, 368-369; 533 NW2d 373 (1995).

We also note that a trial court is within its discretion to limit discovery when it becomes excessive or abusive. *In re Hammond*, 215 Mich App 379, 387; 547 NW2d 36 (1996); *Hartmann v Shearson Lehman Hutton, Inc.*, 194 Mich App 25, 29; 486 NW2d 53 (1992). Here, the additional discovery was requested eight years after the accident, almost five years after the complaint was filed, and three years after discovery was closed. In addition, the trial had been adjourned several times previously, plaintiff had indicated at the April 13, 1998 motion hearing that it was almost ready for trial, and it is apparent that plaintiff sought the extra discovery in an effort to open a new theory of the case. Based on these facts, we are unable to find an abuse of discretion.

Finally, the fact that the trial court ostensibly denied the discovery request based on MRE 407 has no effect on our determination. Because the trial court reached the right result, this Court should not reverse the trial court's decision regarding this discovery request. See *Hilgendorf, supra* at 685 n 8, citing *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993).

III. Conclusion

In sum, because the trial court did not abuse its discretion when it denied plaintiff's discovery requests, did not err when it refused to read plaintiff's special jury instruction, and since any error in the admission of Officer's Schweble's testimony was harmless, we are not persuaded that the jury verdict was in error.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Harold Hood
/s/ Jeffrey G. Collins