STATE OF MICHIGAN

COURT OF APPEALS

STEVEN JUNIOR PIORKOWSKI, as Personal Representative of the Estate of STEVEN MATTHEW PIORKOWSKI, Deceased,

Plaintiff-Appellant,

v

RANDY BOWMAN,

Defendant,

and

QUALITY TIRE & BATTERY SERVICE, and LOOPER'S AUTO, a/k/a LUPER'S AUTO,

Defendants-Appellees.

UNPUBLISHED
May 15, 2007

No. 266502
Jackson Circuit Court
LC No. 02-002945-NI

Before: Markey, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

In this negligence action, plaintiff appeals by right a judgment of no cause of action entered in favor of defendants following a jury trial. We affirm.

In August 1987, plaintiff's decedent, Steven Piorkowski ("Steven"), suffered a spinal cord injury and was rendered a quadriplegic. He was confined to a wheelchair. A doctor later determined that Steven was physically and mentally able to operate a motor vehicle, so in December 1997, Steven acquired a used, handicap-accessible 1992 Ford Econoline van. Based on the evidence, it appears that in March 2000 Steven replaced the left front tire on the van with a tire that he purchased from Randy Bowman. According to Bowman, the tire was in good condition and appeared to have never been on the road.

On March 28, 2000, Steven took his van to defendant Quality Tire & Battery Service ("Quality Tire"). Quality Tire sells, mounts, and balances tires. Steven issued a check to Quality Tire in the amount of $30 for services performed. The owner of Quality Tire did not have a record of the service that was actually performed on Steven's van, but based on the amount of the invoice, he surmised that Quality Tire either balanced one of Steven's tires or rotated them.

On March 29, 2000, Steven took the van to defendant Luper's Auto Parts & Service ("Luper's"), an automobile repair facility that performed general automotive repairs. Luper's has never engaged in the business of selling or installing tires. Luper's replaced the front shock absorbers on Steven's van. According to Larry Demey, the owner of Luper's, and Rory Demlow, the mechanic who replaced the shock absorbers, Luper's did not remove the front tires on Steven's van to replace the shock absorbers. Removal of the front tires was unnecessary.

On June 2, 2000, Steven was driving the van when the left front tire blew out, causing the van to cross the center of the road and strike a southbound pickup truck. Steven died at the scene of the accident. The investigating police officers determined that the left front tire was a General brand. The other three tires on the van were Goodyear Wranglers. Based on the serial number and condition of the General tire, the officers estimated that the tire was manufactured in 1989. One of the officers determined that tire failure was the cause of the accident.

Steven's father, Steven Junior Piorkowski ("plaintiff"), initiated an action against Quality Tire and Luper's, alleging that they were negligent.[1] Specifically, plaintiff alleged that Quality Tire was negligent in failing to identify and inform Steven of the potential problems associated with the "unsafe" General tire. Plaintiff further alleged that Luper's was negligent in failing to identify the potential problems associated with Steven's van and failing to correctly repair the van. The jury found that neither Quality Tire nor Luper's was negligent. The trial court entered a judgment of no cause of action in favor of defendants.

Plaintiff moved for a judgment notwithstanding the verdict ("JNOV") or a new trial on the grounds that the verdict in favor of Luper's was against the great weight of the evidence. MCR 2.611(A)(1)(e). Plaintiff argued that, because Demlow admitted that he (1) failed to check the tire pressure in Steven's front tires, (2) failed to inspect the tires, and (3) failed to advise Steven that his front tires were mismatched, there was no evidence to support the jury's finding that Luper's was not negligent. The trial court denied plaintiff's motion.

We review a trial court's decision a motion for a new trial for an abuse of discretion. *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor & Merrill, Inc,* 267 Mich App 625, 644; 705 NW2d 549 (2005). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Further,

> This Court reviews de novo a trial court's ruling on a motion for JNOV. In reviewing a trial court's denial of a motion for JNOV, this Court should examine the testimony and all legitimate inferences therefrom in the light most favorable to the nonmoving party. *Attard v Citizens Ins Co of America,* 237 Mich App 311, 321; 602 NW2d 633 (1999). "A trial court should grant a motion for JNOV only where there was insufficient evidence presented to create an issue for the jury." *Id.* [*Detroit/Wayne Co Stadium Auth, supra* at 642-643.]

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[1] Other defendants were also named in the complaint, but their status is irrelevant to this appeal.

To establish a prima facie case of negligence, the plaintiff must prove that (1) the defendant owed a duty to the plaintiff; (2) the defendant breached that duty; (3) the defendant's breach of the duty was the proximate cause of the plaintiff's damages; and (4) the plaintiff suffered damages. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "Duty" is a legally recognized obligation to conform to a particular standard of conduct toward another. *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 96; 485 NW2d 676 (1992). Reasonable care or ordinary care is "general standard of care" in negligence cases. *Case*, *supra* at 6-7. "Ordinary care means the care that a reasonably careful person would use under the circumstances." *Id.* at 7. In this case, the jury concluded that Luper's was not negligent, i.e., that Luper's did not fail to exercise the care that a reasonably careful person, or business, would use under the circumstances. *Id.* The jury did not reach the issues of causation or damages.

"What constitutes reasonable care under the circumstances must be determined from the facts of the case." *Riddle, supra* at 97. "[T]he jury usually decides the specific standard of care that should have been exercised by a defendant in a given case." *Case, supra* at 7. Once the specific standard of care is established, whether the defendant's conduct was reasonable under that standard is generally a question for the jury. *Riddle, supra* at 96.

Plaintiff contends that Luper's was negligent for failing to inform Steven that his front tires were mismatched. Richard Weid, an expert in automotive garage procedures, testified that any two tires that are installed on the same axle on a vehicle should be the same tire. He did not, however, specify that they should be the same brand. Tire expert William Woehrle testified that it is acceptable to install two different brands of tires on a vehicle as long as the tires are the same size and construction. He also testified that the General tire conformed to the vehicle specifications listed on the placard mounted inside of the van. It was the proper size and type of tire for Steven's van. Based on Woehrle's testimony, the jury could reasonably have concluded that Luper's did not have a duty to inform Steven that the front tires on his van were mismatched, i.e., that the tires were manufactured by different manufacturers.

Plaintiff also contends that Luper's was negligent for failing to test the air pressure in Steven's tires and for failing to inspect the tires for noticeable defects. Weid testified that "it's the technician's responsibility to always check the inflation of a tire" and that, "[a]ny time you remove a tire, put a tire on, balance a tire or anything like that, you're automatically looking at the tire for [potential problems]." Based on this testimony, the jury could have concluded that regardless of the nature of the services that Luper's performed on Steven's van, Luper's had a duty to check the air pressure in Steven's tires and inspect Steven's tires for noticeable defects. Therefore, Luper's failure to check the air in the tires, or inspect the tires, constituted negligence. A defendant's failure to implement industry standards may be evidence of negligence. See *Xu v Gay*, 257 Mich App 263, 271; 668 NW2d 166 (2003). However, the jury determines the weight given to expert testimony. *Krohn v Sedgwick James of Michigan, Inc*, 244 Mich App 289, 304 n 9; 624 NW2d 212 (2001). The jury was not required to give Weid's testimony more weight than any other witness's testimony. The jury was allowed to consider the expert testimony in the same manner as any other testimony; the testimony of experts need not be accepted in preference to any other testimony. *Anthony v Cass Co Home Tel Co*, 165 Mich 388, 399; 130 NW 659 (1911). And, it is noteworthy that at trial, Weid admitted that he was "not a tire person" or a tire expert. The jury was free to accept or disregard his testimony in determining whether Luper's had a duty to check the air pressure in Steven's tires, or inspect the tires for defects. *Id*.

Moreover, although customary usage and practice of an industry is relevant evidence useful in determining whether the standard of ordinary care has been satisfied, it cannot be determinative of the standard. *Hill v Husky Briquetting, Inc*, 393 Mich 136, 136; 223 NW2d 290 (1974). Thus, while the testimony concerning the industry standards in this case was relevant to the jury's determination whether Luper's met the applicable standard of care, the testimony was not determinative. *Id.* The jury could reasonably have concluded that, based on the circumstances of this case, and based on the nature of the services that Luper's performed on Steven's van on March 29, 2000, Luper's did not have a duty to inspect the tires or check the air pressure in the tires. Demlow did not remove the van's front tires when he replaced its shocks. Luper's did not perform any other service on the van and did not service the tires in any way. Thus, Luper's had little, if any, interaction with the front tires on Steven's van. Nothing indicated that Steven told Luper's that he was having any problems with any of the tires on his van. Furthermore, the jury could have reasonably inferred that Luper's was aware that Steven had taken the van to Quality Tire the previous day for service and that Luper's acted upon the belief that any issues or problems concerning the tires on the van would have been addressed at Quality Tire. Quality Tire, and not Luper's, was in the business of selling and installing tires. Therefore, Luper's did not have a duty to perform *any* services involving the tires on the van.

Nonetheless, even if the jury concluded that Luper's had a duty to inspect the tires for defects, the jury could reasonably have concluded, based on the evidence presented at trial, that Luper's did, in fact, inspect the tires for noticeable defects on March 29, 2000. Demlow testified that he did not inspect Steven's tires. Demlow's testimony, however, did not conclusively establish that no other employee at Luper's examined the tires for noticeable defects. Demey testified that he had no recollection of inspecting the van's tires. However, he also later testified that he did not remember noticing any cracking or dry rotting on the tires. He also stated that he had no evidence that there was anything wrong with the van's left front tire on March 29, 2000, and that, if there were something noticeably wrong with the tire, he had "no doubt" he would have brought it to Steven's attention. Thus, the jury could reasonably have inferred that Demey did, in fact, inspect Steven's tires on March 29, 2000, and that he did not observe any noticeable defects in the tires. Woehrle's testimony supported the conclusion that the General tire would have had no noticeable defects on March 29, 2000. "It is the sole province of the jury to determine the weight of the evidence and the credibility of the witnesses." *Allard v State Farm Ins Co*, 271 Mich App 394, 408; 722 NW2d 268 (2006).

Moreover, the jury could reasonably have concluded that Luper's did not have an obligation to inspect the tire for signs of circumferential indentation, which would indicate that the tire had been over-deflected, i.e., under-inflated or overloaded, for a significant amount of time. Woehrle testified that the General tire ultimately failed because of the damage sustained while the tire was over-deflected. The tire eventually delaminated, causing the treads and top belt to violently peel away from the tire, and the tire to blow. But, according to Woehrle, the damage to the tire, or the indentation, was not visible while the tire was mounted on the rim. Luper's had no reason to remove the tire from the rim on March 29, 2000. Moreover, Woehrle testified that the damage to the General tire was "subtle" but "significant" and that he "wouldn't even expect tire retailers to note this type of damage" or understand the significance of the condition. Consequently, even if Luper's had removed the General tire from the van and the rim, Luper's would not have discovered the defect in the tire. Thus, the jury could reasonably have concluded that Luper's failure to warn Steven of the allegedly dangerous condition of the

General tire or to recommend that Steven replace the tire, did not fall below the applicable standard of care. And, we note that Weid testified that he did not have any evidence to suggest that Luper's "cut corners" in this case.

Based on the evidence presented at trial, reasonable minds could differ regarding whether defendants' actions constituted reasonable care in light of the circumstances of this case. Because there was an interpretation of the evidence that provided a logical explanation for the findings of the jury, the trial court did not err in denying plaintiff's motion for JNOV. *Id*. at 406-407. Moreover, "[t]his Court and the trial court should not substitute their judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). This standard was not satisfied, so a new trial was not warranted in this case.

Plaintiff also contends on appeal that the trial court erred in denying his motion for a JNOV because in ruling on the motion, the trial court improperly relied upon a conversation that the trial judge had with jury. "Pursuant to MCR 2.610(B)(3), in ruling on a motion for JNOV, 'the court must give a concise statement of the reasons for the ruling, either in a signed order or opinion filed in the action, or on the record.'" *Badalamenti v William Beaumont Hosp-Troy*, 237 Mich App 278, 283; 602 NW2d 854 (1999). Here, in ruling on plaintiff's motion, the trial court failed to examine the evidence presented at trial in the light most favorable to defendants and apply the law to the facts. *Id.* This apparent failing of the trial court does not, however, preclude our de novo review of the evidence to determine whether the court erred in denying plaintiff's motion for JNOV. *Id.* at 284.

Finally, plaintiff challenges the jury's verdict regarding Quality Tire in his statement of the question presented on appeal. He did not, however, do so in his motion for a JNOV or new trial. Ordinarily, we will not address issues that were not raised below or on appeal, or issues that were not decided by the trial court. *Tingley v Kortz*, 262 Mich App 583, 588; 688 NW2d 291 (2004). More importantly, although plaintiff asserted in his question presented on appeal that the evidence did not support the jury's verdict in favor of Quality Tire, he failed to present any argument in support of this assertion in his brief. "It is axiomatic that where a party fails to brief the merits of an allegation of error, the issue is deemed abandoned by this Court." *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

We affirm.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Richard A. Bandstra