STATE OF MICHIGAN

COURT OF APPEALS

SHANNON L. BOLLMAN,

Plaintiff-Appellee,

v

U-HAUL CENTER OF GROESBECK HIGHWAY,

Defendant-Appellant.

UNPUBLISHED
September 18, 1998

No. 194408
Macomb Circuit Court
LC No. 91-003998-NO

Before: Jansen, P.J., and Kelly and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from the jury's verdict in favor of plaintiff and the trial court's order denying defendant's motion for judgment notwithstanding the verdict, new trial, or remittitur. We affirm.

Plaintiff's claim of negligence against defendant arises from a May 26, 1990 motor vehicle accident that occurred while plaintiff was driving a 1984 Ford Escort and towing a 5' x 8' U-Haul trailer. Plaintiff was driving her car while hauling the trailer, and while on a freeway, the trailer began to fishtail. Plaintiff lost control of her car, the trailer broke loose, and the front of plaintiff's car hit a bridge embankment. A truck that had been behind plaintiff was unable to stop, and hit plaintiff's car. The impact of the truck caused a television set in the back seat of plaintiff's car to hit plaintiff in the head. She suffered a closed head injury as a result of the impact.

Plaintiff filed suit against defendant and its employee, Ronald Cuthbertson,[1] alleging that they breached their duties by failing to warn her that the 1984 Ford Escort might not be able to handle the anticipated load and for advising her that the 1984 Ford Escort was sufficient for the task of hauling the trailer.

I

Defendant first argues that that trial court erred by admitting into evidence the testimony of plaintiff's expert, Dr. Rahul Sangal, regarding causation between the trauma and narcolepsy because his testimony was not supported by the facts or supported by medical science.

A

Defendant first contends that Dr. Sangal's causation testimony lacked factual support because plaintiff did not give him an accurate history of her trauma. Plaintiff presented Dr. Sangal to testify as an expert regarding causation. Dr. Sangal testified that plaintiff's narcolepsy was caused by the trauma she sustained during the accident. He testified that the basis for his opinion was the history provided by plaintiff and his test findings. Defendant's specific contention in this regard is that Dr. Sangal's diagnosis was based on plaintiff's history of loss of consciousness when, in fact, plaintiff never lost consciousness as a result of being struck in the head.

The trial court permitted Dr. Sangal's testimony, ruling that the loss of consciousness question went to the weight to be given Dr. Sangal's testimony rather than to its admissibility. We review the trial court's decision to admit this evidence for an abuse of discretion. *Phillips v Deihm,* 213 Mich App 389, 401; 541 NW2d 566 (1995).

A careful review of Dr. Sangal's testimony reveals that the trial court properly admitted his testimony. Dr. Sangal testified that his diagnosis of closed head injury with a consequence of post-traumatic narcolepsy and a consequence of post-traumatic cognitive dysfunction was based on the history given to him by plaintiff and tests that he performed on her. Dr. Sangal also testified that the history he relied on was, in part, based on plaintiff telling him that she was in a motor vehicle accident in May of 1990 which caused a head injury resulting in a brief coma. Although there was really no evidence that plaintiff suffered any loss of consciousness after being struck in the head, Dr. Sangal did not testify that a loss of consciousness was a necessary condition for him to conclude that plaintiff's narcolepsy was caused by the trauma of the accident. In other words, Dr. Sangal testified that the narcolepsy was caused by the trauma of the accident; that is, being hit in the head with the television set during the collision. Dr. Sangal did not testify, and defendant elicited no such testimony, that plaintiff had to lose consciousness in order for him to diagnose post-traumatic narcolepsy.

Therefore, we agree with the trial court that, to the extent that plaintiff gave Dr. Sangal incorrect information that she lost consciousness because of the accident, this history would go to the weight to be given Dr. Sangal's testimony rather than its admissibility. This is because Dr. Sangal testified that the narcolepsy was trauma induced; however, he did not testify that it was necessary for plaintiff to lose consciousness at the time of being struck in the head in order for him to properly make such a diagnosis. There was no question in this case that plaintiff did sustain a serious trauma to the head at the time of the automobile accident because she was struck in the head by the television set in her back seat. Dr. Sangal could properly testify that, in his opinion, the trauma to plaintiff's head caused her subsequent narcolepsy.

The trial court did not abuse its discretion in permitting Dr. Sangal to testify as to causation between the trauma and the narcolepsy under these circumstances.

B

Defendant also argues that Dr. Sangal's causation testimony should not have been admitted because it lacks a scientific foundation. This argument was never presented in the trial court and is therefore not preserved for appellate review. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994); *Garavaglia v Centra, Inc*, 211 Mich App 625, 628; 536 NW2d 805 (1995). As this Court has noted, the purpose of the issue preservation requirements is to induce litigants to do what they can at trial to prevent error and eliminate its prejudice or to create a record of the error and its prejudice. *People v Mayfield*, 221 Mich App 656, 660; 562 NW2d 272 (1997). In this case, we have no record to review defendant's claim that the scientific community generally rejects the concept that severe trauma can cause narcolepsy. Accordingly, defendant's claim has been forfeited for appellate review.

II

Defendant next argues that the trial court erred in permitting plaintiff to introduce evidence of a 1989 Ford Escort owner's manual.

Contrary to defendant's contention, the 1989 owner's manual was not admitted into evidence. Rather, the 1989 manual was used by plaintiff's counsel to cross-examine defendant's expert Thomas Gillespie, a mechanical engineer. In this respect, Gillespie testified that a generally acceptable combination of the relative weights of the car to the trailer is a one-to-one ratio regarding stability.[2] Here, the 1984 Escort was shown to weigh approximately two thousand pounds and the loaded trailer weighed approximately 920 pounds. In cross-examining Gillespie with regard to the one-to-one ratio standard, plaintiff's counsel questioned whether Ford Motor Company disseminates or promulgates information that would militate against the one-to-one standard. Gillespie's response was that Ford's concern would be with the powertrain of the car, but not necessarily the stability of the car pulling the trailer. Gillespie specifically testified that Ford, the manufacturer of the car, would not necessarily have a view point on the one-to-one ratio, but that the trailer manufacturer would be concerned with the stability issue.

Gillespie further testified that he believed that all the necessary warnings concerning the tow weight of the car were set forth in U-Haul's user's guide and the contract. It was Gillespie's opinion that the consumer should rely on what U-Haul (the trailer) would recommend with respect to the tow load of the car with regard to stability. Gillespie further testified that he did not believe that an owner's manual from a particular car would address the issue of stability with respect to that car pulling a trailer. Plaintiff's counsel proceeded to use a 1989 Ford Escort owner's manual which contained the following warning:

> Warning says towing trailers beyond the maximum recommended gross trailer weight exceeds the limits of the vehicle can result in engine damage, trans axle damage, structural damage, loss of control and personal injury.[3]

The recommended gross trailer weight in the 1989 manual was listed at one thousand pounds. Gillespie then again explained that, although loss of control is listed in the warning, the car manufacturer's primary focus would be the powertrain issue.

There is no error to this limited use of the 1989 owner's manual. The manual was not admitted into evidence and it was not used to impeach Gillespie. Moreover, Gillespie explained several times that the primary concern of the car's manufacturer would be with powertrain and that stability was the primary concern of the trailer's manufacturer. Further, because the stipulated weight of the trailer in this case was 920 pounds and the 1989 owner's manual recommends not exceeding a gross trailer weight of one thousand pounds, thus showing that the weight recommendation was not actually exceeded in this case, we find no prejudice from the use of the owner's manual by merely reading the warning.

III

Defendant next argues that the trial court erred in permitting the jury to deliberate on the issue of wage loss and future wage loss. Defendant contends that there was no evidence presented that supported an award for wage loss.

The jury awarded plaintiff $65,000 for present noneconomic damages, $150,000 for future noneconomic damages, $65,000 for present economic damages, and $150,000 for future economic damages. Defendant had objected to the trial court's instruction to the jury that it could consider awarding economic damages, and it objected to the verdict form which allowed the jury to award economic damages. The determination whether a jury instruction is applicable and accurately states the law is within the discretion of the trial court. *Szymanski v Brown*, 221 Mich App 423, 430; 562 NW2d 212 (1997). Reversal is not required if, on balance, the theories and the applicable law were adequately and fairly presented to the jury. *Id.* Reversal is required because of an erroneous jury instruction only where failing to set aside the verdict would be inconsistent with substantial justice. *Id.*

Defendant contends that there was no evidence to establish that plaintiff was disabled from working, nor was there any evidence to even establish that plaintiff's narcolepsy was causally related to the accident. We initially reject defendant's claim that there was no evidence to establish that plaintiff's narcolepsy was caused by the accident. There was medical evidence, presented by Dr. Sangal, that properly established this causation (see also issue I, *supra*). Further, we find that there was evidence that established that plaintiff was disabled from working and that such disability was due to her injury from the accident.

Plaintiff testified that before the accident, she worked fifty to sixty hours a week as a customer sales service representative. After the accident, she worked as a waitress at Big Boy, but experienced problems staying awake. Plaintiff had to take medication for the sleepiness, but management at Big Boy did not like her taking the medication because it made her "hyper." Plaintiff testified that her hours were cut because of the problems with her medication. Plaintiff had not sought employment since her job at Big Boy because of sleepiness, headaches, and problems with concentration. Further, plaintiff's mother, Caroline Hill, testified that before the accident, plaintiff was a good worker. Hill testified that after the accident, plaintiff was depressed, tired, sleepy, did not have a long attention span, and exhibited memory lapses. Plaintiff's uncle, Timothy Smith, testified that plaintiff had been a willing and energetic worker when they worked together before the accident, but that after the accident, plaintiff was moodier and not as outgoing. Plaintiff's ex-husband, Daniel Bollman, testified that before the accident plaintiff's health was generally good, she was energetic, and she could work two jobs. After

the accident, plaintiff's sleep pattern was disrupted, she was "worn out all the time," and she did not want to do anything.

There was also medical testimony regarding plaintiff's disability. Dr. Sangal testified that narcolepsy is irreversible and that it is physically difficult to function because one is constantly sleepy. Narcolepsy affects alertness, cognitive function, and mood. Dr. Sangal found that plaintiff's cognitive deficits were severe and that the deficits would include difficulties with memory and concentration. Dr. Sangal believed that plaintiff's narcolepsy had stabilized, but she could get worse or better. Dr. Jane Perin, who had evaluated plaintiff at Beaumont Hospital, believed that plaintiff's condition of chronic myofacial pain was related to the car accident. Dr. Perin believed that plaintiff would benefit from a chronic pain program and that in the absence of participation in such a program, the prognosis for returning to work would be guarded because plaintiff was not motivated due to her pain. Dr. Perin further testified that plaintiff did not have the skills to perform non-physical work.

Based on this testimony, the trial court did not abuse its discretion in instructing the jury on economic damages. There was evidence that plaintiff suffered a disability due to the accident which prevented her from working as she had done before the accident. Thus, the trial court's instructions to the jury on the issue of economic damages were proper. See, e.g., *Canning v Hannaford*, 373 Mich 41; 127 NW2d 851 (1964).

IV

Defendant next argues that it is entitled to a new trial because of plaintiff's counsel's remark at closing argument that plaintiff was receiving Medicaid benefits. Defendant contends that such a remark was prejudicial and merely attempted to sway the jury's sympathy.

The remark of which defendant now complains was made at rebuttal argument:

> Now, [defense counsel] is implying, suggesting to you that [plaintiff] didn't want to do anything about her condition. And he's going to get instructions that she didn't want to go to this work hardening program, and she didn't want to go to this chronic pain whatever clinic it is. The lady testified she's on Medicaid, she doesn't have any money. How is she going to get the money to go to all these sophisticated doctors?

There was no objection on the record to this remark, although defendant did move for a new trial based, in part, on this remark. Although remarks concerning the wealth of the parties are improper, there is no error requiring reversal here. *Duke v American Olean Tile Co*, 155 Mich App 555, 563; 400 NW2d 677 (1986). First, this remark was made in response to defendant's claim that plaintiff was malingering and that plaintiff should have followed through with recommended medical care and treatment. Second, defendant did not object at trial to give the trial court the opportunity to correct any prejudicial effect. Third, the trial court specifically instructed the jury that sympathy must not influence its decision and that arguments, statements, and remarks of the attorneys are not evidence and anything said by an attorney not supported by the evidence should be disregarded.

Accordingly, the trial court's instructions cured any prejudicial effect of the remark made at rebuttal argument and this isolated remark does not indicate a course of conduct aimed at preventing a fair and impartial trial or inflaming the jury. *Szymanski, supra,* p 427; *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996).

V

Defendant also argues that the trial court erred by allowing a photograph of a car towing a trailer that showed a different car than was involved in the accident.

The photograph was of a 1982 Ford Escort towing a 5' x 8' U-Haul trailer. The photograph was admitted for the limited purpose of showing the jury the relative size of the car and trailer. Although the photograph did not depict an identical vehicle, specifically a 1984 Ford Escort, for purposes of showing the relative size of the car and trailer, it was substantially similar. Both the 1982 and 1984 Escorts were similarly sized cars. Moreover, it is clear that the purpose in showing the photograph was to demonstrate the general size of the car and trailer involved in the accident.

Accordingly, the trial court did not abuse its discretion in admitting the photograph, *People v Flowers,* 222 Mich App 732, 736; 565 NW2d 12 (1997), because the photographed car and trailer were substantially similar to the actual car and trailer.

VI

Defendant lastly argues that the trial court erred in permitting plaintiff's liability expert, Kenneth Lewandowski, to testify at trial because he was not qualified to render expert testimony, his opinions were not based upon scientific data establishing his propositions, and the grounds of his testimony were based upon conjecture thus necessitating speculation on the part of the jury.

Defendant did not argue whether Lewandowski was qualified to provide an opinion regarding the reconstruction of this accident.[4] Rather, defendant argued that Lewandowski was not an expert with respect to the standard of care or state-of-the-art in the field of articulated vehicle manufacturing. Regarding the one-to-one towing ratio between the towing vehicle and the trailer that defendant argued was sufficient and industry standard, Lewandowski testified that he had not authored any articles, found any articles that were recognized by professional organizations, or located government standards criticizing the safety of the one-to-one towing ratio. Lewandowski testified that he formed his opinion that the one-to-one towing ratio was dangerous after performing mathematical computations. In addition, Lewandowski would not define what towing weight was reasonably safe. Instead, he believed that towing any weight or size trailer with a car was dangerous.

The trial court did not abuse its discretion in finding that Lewandowski was qualified to testify in mechanical engineering and accident reconstruction. The extent of Lewandowski's expertise was properly left for the jury to decide. *Woodruff v USS Great Lakes Fleet, Inc,* 210 Mich App 255, 260; 533 NW2d 356 (1995).

We also reject defendant's additional arguments regarding Lewandowski's testimony. Lewandowski's testimony that the accident resulted from several factors, one of which was the weight and size of the trailer and the 1984 Escort, aided the jury in making its decision. Contrary to defendant's argument, Lewandowski was not required to opine that only one factor resulted in the accident because there may be more than one proximate cause of an injury. In addition, merely because Lewandowski did not offer testimony in all of the areas defendant believes he should have, does not affect the admissibility of his testimony. Although defendant argues that Lewandowski should have testified that the one-to-one towing ratio was negligent, that he should have spoken to specific negligence issues, and that plaintiff did not introduce evidence on all elements of her claim, whether plaintiff produced evidence regarding breach of duty and causation does not affect the admissibility of Lewandowski's testimony.

Therefore, defendant has not identified any issues with respect to Lewandowski's testimony that require reversal.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael J. Kelly
/s/ Jane E. Markey

[1] Ronald Cuthbertson was granted a directed verdict and is not involved in this appeal.

[2] In other words, the loaded trailer weight should not exceed the loaded weight of the automobile pulling it.

[3] This was read to the jury by Gillespie from the owner's manual.

[4] Lewandowski had a bachelor of science degree and masters degree in mechanical engineering. He has taught design technology, mechanical engineering, electrical engineering, and civil engineering at various colleges.