STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY G. DAVIS,

Plaintiff-Appellee/Cross-Appellant,

v

TOTAL PETROLEUM, INC.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
October 26, 1999

No. 213968
Mackinac Circuit Court
LC No. 95-003950 NO

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Following a jury trial, the jury returned a verdict in favor of plaintiff in the amount of $665,000. Defendant now appeals as of right from the judgment entered in favor of plaintiff. Plaintiff has filed a cross appeal. We affirm.

Defendant first claims that the trial court erred in failing to grant its motion for a directed verdict or judgment notwithstanding the verdict. We disagree.

In deciding a defendant's motion for a directed verdict or judgment notwithstanding the verdict, the court must examine the testimony and all legitimate inferences that may be drawn in a light most favorable to the plaintiff. *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986); *Reisman v Wayne State Regents*, 188 Mich App 526, 538; 470 NW2d 678 (1991). If the evidence is such that reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury. *Lester N Turner, PC v Eyde*, 182 Mich App 396, 398; 451 NW2d 644 (1990). If, on the other hand, the evidence is insufficient to establish a prima facie case, then the motion should be granted, since reasonable persons would agree that there is an essential failure of proof. *Feaheny v Caldwell*, 175 Mich App 291, 299-301; 437 NW2d 358 (1989). This Court reviews de novo the trial court's decision on a motion for a directed verdict or judgment notwithstanding the verdict. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Braun v York Properties, Inc*, 230 Mich App 138, 141; 583 NW2d 503 (1998); *Berryman v K Mart*, 193 Mich App 88, 91; 483 NW2d 642 (1992).

To establish a prima facie case of negligence, a plaintiff must introduce evidence sufficient to prove that (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) the defendant's breach of its duty was a proximate cause of the plaintiff's injuries, and (4) the plaintiff suffered damages. *Berryman, supra* at 91-92. A prima facie case of negligence may be established by use of legitimate inferences, as long as sufficient evidence is introduced to take the inferences "out of the realm of conjecture." *Ritter v Meijer, Inc,* 128 Mich App 783, 786; 341 NW2d 220 (1983).

A storekeeper's liability for injuries caused on its premises is well established in this state:

> "It is the duty of a storekeeper to provide reasonably safe aisles for customers and he is liable for injury resulting from an unsafe condition either caused by the active negligence of himself and his employees or, if otherwise caused, where known to the storekeeper or is of such a character or has existed a sufficient length of time that he should have had knowledge of it." [*Serinto v Borman Food Stores,* 380 Mich 637, 640-641; 158 NW2d 485 (1968), quoting *Carpenter v Herpolsheimer's Co,* 278 Mich 697; 271 NW 575 (1937) (emphasis omitted).]

See also *Berryman, supra* at 92; *Andrews v K Mart Corp,* 181 Mich App 666, 670-671; 450 NW2d 27 (1989). Neither party questions that defendant owed plaintiff a duty to provide reasonably safe aisles. The dispute centers on whether the evidence introduced at trial was sufficient to establish a prima facie case of negligence; specifically, whether defendant breached its duty to plaintiff. Defendant claims that plaintiff failed to prove that its employees either caused the Coke carton to be placed, or had notice that the Coke carton was lying, in the middle of aisle two, where plaintiff fell. Therefore, plaintiff failed to prove that it breached its duty to plaintiff.

The case relied upon by defendant, *Whitmore v Sears, Roebuck & Co,* 89 Mich App 3; 279 NW2d 318 (1979), involved an oil spill in the parking lot of the defendant's store. This Court found that the evidence presented by the plaintiff, which "established that there was an oily substance on Sears' parking lot at the spot where she fell," was insufficient to support an inference that the defendant's employees had caused the spot to be there or that the defendant had actual or constructive notice of the spot. *Id.*, p 10.

Examined in a light most favorable to plaintiff, the evidence in this case that defendant caused the condition that led to plaintiff's fall is stronger than that in the *Whitmore* case. Here, plaintiff entered defendant's store, walked down aisle three, went to a beer cooler and "grabbed a six-pack." As plaintiff started to turn down aisle two, he stepped on a red, plastic Coke carton. The carton that plaintiff slipped on, as well as a second carton, were lying near the end of the aisle by a display of two-liter Coke bottles (and not far from the pop cooler). Plaintiff was looking for snacks and did not see the carton. Moreover, the carton blended in with the red tiles on the floor in the aisleway. Plaintiff fell to the ground and it was eventually discovered that he had torn his left hamstring muscle and could no longer work as a catastrophic claims adjuster. The store's surveillance tapes revealed that the Coca-Cola delivery man delivered Coke to defendant's store approximately eight hours prior to plaintiff's accident. The delivery man brought several cases of Coke into the store (using cartons similar to the one that plaintiff slipped on) and took some "empty red Coke cases," which apparently came from the

stock room in the back of the store, and loaded them into his truck. Approximately ten minutes prior to plaintiff's accident, the surveillance tapes recorded a store employee, Cynthia Rangal, apparently stocking the pop coolers at the rear of the store. Don Beddow, the night clerk at defendant's store, testified that the Coke carton that plaintiff slipped on was used to deliver Coke to the store, not to display Coke. Beddow also testified that, after restocking the coolers with Coke, the employees would put the carton in the back of the store or "if it was busy, [the employee] would put them towards the window where the other Coca-Cola . . . cartons were."

The logical inference most favorable to plaintiff to be drawn from this testimony is that defendant's employees or agents were responsible for leaving the Coke carton in the middle of aisle two and that the Coke carton had been left there by an employee after stocking the Coke display. The evidence did not support a logical inference that a customer would have placed the Coke carton in aisle two. Rather, the evidence indicated that the Coke cartons were used for stocking the store with Coke, not for displaying bottles of Coke in the store. Therefore, it is highly unlikely that a customer would have had access to the cartons. Moreover, there were two cartons on the floor in aisle two, which further supports an inference that an employee, who was re-stocking the Coke display, left the cartons in the middle of the aisleway. As farfetched as it might be that a customer would move one Coke carton into the aisleway, it is even less unlikely that a customer would leave two cartons in the middle of the aisle. Unlike in the *Whitmore* case, in this case there was evidence to indicate that defendant's employees were responsible for the hazardous condition. Because the evidence leads to an inference that defendant created the condition that caused plaintiff's fall, proof of notice of the condition is unnecessary. *Berryman, supra* at 93; *Williams v Borman's Foods, Inc*, 191 Mich App 320, 321; 477 NW2d 425 (1991).

Accordingly, contrary to defendant's claim, plaintiff established a prima facie case of negligence. Because the evidence was sufficient to enable reasonable jurors to reach different conclusions, the trial court properly denied defendant's motions for directed verdict and judgment notwithstanding the verdict.

Defendant also claims that plaintiff's claim was barred by the open and obvious doctrine and, therefore, the trial court should have granted its motion for directed verdict. Plaintiff contends, however, that reasonable minds could have concluded that the Coke carton was not an open and obvious condition. In light of the evidence summarized above, we believe the proofs created a question of fact with respect to whether the danger was "open and obvious" and whether the risk of harm was unreasonable. *Eason v Coggins Memorial Church*, 210 Mich App 261, 264; 532 NW2d 882 (1995).

Next, defendant argues that the trial court erred in admitting the expert testimony of Steven Pifer regarding plaintiff's damages because the testimony was purely speculative. For a plaintiff to be entitled to damages for lost profits, the losses must be subject to a reasonable degree of certainty and cannot be based solely on mere conjecture or speculation. *Bonelli v Volkswagen*, 166 Mich App 483, 511; 421 NW2d 213 (1988). Here, even though Pifer admitted that he could only estimate plaintiff's future earnings as a catastrophic claims adjuster, his estimate was based on the earnings of top and average catastrophic claims adjusters and his experience in the industry. Therefore, his estimate was not purely

speculative. The trial court did not abuse its discretion in admitting the testimony. *Jack Loeks Theatres, Inc v City of Kentwood,* 189 Mich App 603, 611; 474 NW2d 140 (1991), modified 439 Mich 968; 483 NW2d 365 (1992).

Defendant also claims that the trial court should have granted its request for remittitur because the jury's award, $665,000, was excessive and unsupported by the evidence. We disagree. A trial court's decision regarding remittitur will not be disturbed absent an abuse of discretion. *Palenkas v Beaumont Hosp,* 432 Mich 527, 533; 443 NW2d 354 (1989); *Knight v Gulf & Western,* 196 Mich App 119, 130; 492 NW2d 761 (1992). Moreover, an appellate court must give due deference to the trial court's superior position to evaluate the witnesses and evidence presented at trial. *Id.* In determining whether remittitur is appropriate, the proper consideration is whether the jury award was supported by the evidence. *Carpenter v Consumers Power Co,* 230 Mich App 547, 562; 584 NW2d 375 (1998). The power of remittitur should be exercised with restraint. *Hines v Grand Trunk W R Co,* 151 Mich App 585, 595; 391 NW2d 750 (1985). If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the jury award should not be disturbed. *Frohman v Detroit,* 181 Mich App 400, 415; 450 NW2d 59 (1989).

The evidence indicated that plaintiff had suffered and continued to suffer from pain as a result of the accident. Additionally, the evidence indicated that, after the accident, plaintiff was unable to perform the duties of a catastrophic claims adjuster. Plaintiff earned substantially less money as a branch office adjuster. His average income as a branch claims adjuster over the two years prior to trial was $72,000 per year. The evidence indicated that he could have earned as much as $200,000 per year as a top catastrophic claims adjuster. Average catastrophic claims adjusters earned approximately $120,000 per year. Even though plaintiff was described as a top adjuster, if one compares the income figures for an average catastrophic claims adjuster and a branch office adjuster, it is clear that plaintiff suffered substantial economic damage as a result of this accident. Clearly, the evidence of plaintiff's economic losses alone, not even taking into consideration damages for pain and suffering, supported the jury's verdict. Under these circumstances, the jury's verdict does not appear to be excessive. The trial court did not abuse its discretion by refusing to reduce the jury's award. *Palenkas, supra* at 533.

Next, defendant argues that the medical illustration of plaintiff's leg should not have been shown to the jury. We disagree. Medical illustrations, like the one in the instant case, may be used at trial as a testimonial aid to help the jury understand the evidence more clearly than they could from the words of any witness. *Finch v W R Roach Co,* 295 Mich 589, 595; 295 NW 324 (1940). The proposed aid must be sponsored by a witness who uses it to relate his personal knowledge or scientific skill and understanding. *Id.* Demonstrative evidence is admissible if it bears "substantial similarity" to an issue of fact involved in a trial and aids the fact-finder in reaching a conclusion on a material matter in issue. *Lopez v General Motors Corp,* 224 Mich App 618, 627-628; 569 NW2d 861 (1997); *People v Newman,* 107 Mich App 535, 543; 309 NW2d 657 (1981). Where the correctness of the illustrative representation is disputed, "if there is room for finding in favor of the offering party, the trial court may admit it and submit the question to the jury for ultimate determination." *Finch, supra* at 596.

Here, the demonstrative aid, the medical illustration of plaintiff's leg, was substantially similar to the injury suffered by plaintiff and it was potentially helpful to the jury in that it showed the injury suffered by plaintiff and the extent of the damage done to his leg. With regard to defendant's claim that the illustration did not show plaintiff's prior knee surgeries, plaintiff was not offering the illustration for that purpose. Plaintiff was using the illustration to show the extent of the injury caused by the slip and fall in defendant's store. Moreover, with regard to defendant's claim that the drawing was not accurate because the tendons were completely severed in the illustration, plaintiff was able to and did point out to the jury the difference between the illustration and plaintiff's actual injury. Dr. Colwill testified that, although "[t]here may have been a little intact tendon, but basically much of the tendon had been separated . . . . And the muscles had bunched as they appear[ed]" in the illustration. Dr. Colwill also testified that the diagram depicted a "major tear" like the one suffered by plaintiff. According to Dr. Colwill, the diagram was "[r]easonably accurate" and consistent with his findings during the physical examination. Under these circumstances, the illustration, which was reasonably accurate and potentially helpful to the jury in determining the extent of plaintiff's injuries, was properly shown to the jury during trial. *Finch, supra* at 595-596; *Lopez, supra* at 627-628.

Defendant also argues that Texas, not Michigan, law should have been applied to this premises liability case. However, defendant has failed to provide this Court with a copy of the transcript of the hearing at which this issue was addressed. Therefore, defendant has waived review of this claim. *People v Anderson,* 209 Mich App 527, 535; 531 NW2d 780 (1995); *People v Wilson,* 196 Mich App 604, 615; 493 NW2d 471 (1992).

Lastly, plaintiff argues that the trial court erred in concluding that he was not entitled to an additional 2% interest on the judgment under MCL 600.6013(11); MSA 27A.6013(11). Unfortunately, plaintiff has failed to provide this Court with a copy of the transcript of the hearing on plaintiff's request. Therefore, we have no way of determining the trial court's reasons for denying plaintiff's request. Under these circumstances, plaintiff has waived this claim on appeal. *Anderson, supra* at 535.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski