STATE OF MICHIGAN

COURT OF APPEALS

TONYA BENDER,

Plaintiff-Appellee/Cross-Appellant,

v

FARMINGTON RIDGE, L.P.,

Defendant-Appellant/Cross-Appellee.

UNPUBLISHED
September 8, 2000

No. 208545
Oakland Circuit Court
LC No. 96-518180-NO

Before: Cavanagh, P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from a final judgment awarding plaintiff $397,253.57, plus interest, costs and attorney fees, following a jury trial, in this premises liability case. Plaintiff cross-appeals, challenging the trial court's decision to allow the jury to consider comparative negligence. We affirm.

This case involves a claim for damages arising from a slip and fall accident in an apartment complex carport owned and operated by defendant. At the time of the incident, plaintiff was a tenant in the apartment complex and had use of the carport pursuant to her lease. The front door of plaintiff's apartment opened directly onto a sidewalk that led to plaintiff's assigned parking space underneath the carport. In the early morning on the day of the incident, plaintiff walked from her apartment down several steps on the sidewalk to the unlit carport without incident. However, as she attempted to step from the sidewalk over a curb that was in front of her car, her right foot slipped out from under her, causing her to fall. As plaintiff was laying on the ground, she noticed that the blacktop underneath her was covered with a thin layer of ice. As a result of the fall, plaintiff suffered serious injuries to her right knee and leg.

Defendant first argues that the trial court erred by not reducing the jury's award of $100,000 for future medical expenses to present value pursuant to MCL 600.6306(1)(d); MSA 27A.6306(1)(d). We conclude that defendant waived this claim because it failed to timely and appropriately raise the issue in the trial court. Defendant's argument focuses on the verdict form, which, in part, required the jury to indicate any amount of future medical and health care costs it found plaintiff will incur. To preserve an instructional issue for appeal, a party must object on the record before the jury retires to

deliberate. MCR 2.516(C); *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 9-10; 535 NW2d 215 (1995); see *Mina v General Star Indemnity Co*, 218 Mich App 678, 680; 555 NW2d 1 (1996), rev'd in part on other grounds 455 Mich 866 (1997). Failure to timely and specifically object precludes appellate review absent manifest injustice, which results if the defect is of such a magnitude as to constitute plain error requiring a new trial or if it pertains to a basic and controlling issue. *Mina, supra* at 680-681; *Janda v Detroit*, 175 Mich App 120, 126; 437 NW2d 326 (1989).

Here, as defendant notes, the form of the verdict did not provide a delineation by year for future medical expenses. However, our review of the record shows that defendant did not object to the verdict form. In fact, defense counsel approved the form on the record and also by initialing each page to illustrate defendant's approval.[1] That verdict form was thereafter submitted to the jury. Therefore, defense counsel stipulated to the verdict form that is now claimed to be erroneous. See *Weiss v Hodge (After Remand)*, 223 Mich App 620, 636; 567 NW2d 468 (1997). Error requiring reversal must be that of the trial court and not that to which the appellant contributed by plan or negligence. *Fellows v Superior Products Co*, 201 Mich App 155, 165; 506 NW2d 534 (1993); see *Weiss, supra* at 635-636. Accordingly, defendant is not entitled to any relief on this basis and no manifest injustice will result from our decision not to review this issue.

Defendant next argues that the trial court erred in denying its request for a set-off of $28,000 for the award of past medical expenses pursuant to the collateral source rule, MCL 600.6303; MSA 27A.6303. We disagree.

> Statutory interpretation is a legal issue, which this Court reviews de novo. The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. If the plain and ordinary meaning of a statute's language is clear, judicial construction is normally neither necessary nor permitted. If reasonable minds can differ concerning the meaning of a statute, however, judicial construction is appropriate. [*Heinz v Chicago Road Inv Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996) (citations omitted).]

Contrary to defendant's claim, the medical payments that plaintiff received from her insurance company were not collateral source benefits within the meaning of §6303(4). Subsection 4 clearly states that benefits paid by a party entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages are not collateral source benefits if the lien has been exercised. Here, evidence was submitted that plaintiff's recovery was subject to a valid lien from her insurance provider. On September 17, 1996, before the commencement of trial, plaintiff's medical health insurer

[1] We reject defendant's claim that it did not agree to the verdict form because defense counsel did not place her initials on all of the pages of the form. A review of the form shows that page 2, the page containing the pertinent question, does contain defense counsel's initials, as does pages 1, 3 and 4. The only page that does not have defense counsel's initials is page 5, the last page, with which defendant takes no issue. Moreover, defendant also approved the verdict form on the record.

asserted a lien on plaintiff's civil suit for all health care costs expended on plaintiff's behalf. In addition, testimony was elicited during plaintiff's direct examination regarding the lien and the amount of the lien. Defendant did not present any evidence contradicting the existence of a valid lien from plaintiff's insurance company. We reject defendant's claim that the lien is not valid because plaintiff did not comply with § 6303(3), given that the evidence shows that plaintiff's insurer asserted a valid lien before the commencement of the trial, and ultimately provided a notice of lien to defense counsel. See *Rogers v City of Detroit*, 457 Mich 125, 157; 579 NW2d 840 (1998) (the law "does not provide a tortfeasor with a windfall, just because lien rights were exercised at a different time than within the statutory ten-day window" set forth in § 600.6303(3)); *Warden v Fenton Lanes, Inc*, 197 Mich App 618, 624-625; 495 NW2d 849 (1992) (a valid lien existed where the insurer provided notice of its lien at the commencement of the action). Accordingly, the past medical expenses are not collateral source benefits within the meaning of § 6303 and, therefore, the trial court did not err in failing to deduct the disputed benefits from the final judgment. See *Warden, supra*; see also *Heinz, supra* at 296-297.

Defendant also maintains that the trial court erred in failing to reduce the final judgment by $100,000, the award for future medical and other health care costs, pursuant to the collateral source rule. Again, we disagree.

"Collateral source" is defined in the statute as

> benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits; social security benefits; worker's compensation benefits; or medicare benefits. [MCL 600.6303(4); MSA 27A.6303(4).]

MCL 600.6306; MSA 27A.6306 provides, in relevant part:

> (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. Subject to section 2959, the order of judgment shall be entered against each defendant, including a third-party defendant, in the following order and in the following judgment amounts:
>
> (a) All *past* economic damages, *less collateral source payments* as provided for in section 6303.
>
> * * *
>
> (c) All future economic damages, *less medical and other health care costs, and less collateral source payments* determined to be collectible under section 6303(5) reduced to gross present cash value.
>
> (d) *All future medical and other health care costs reduced to gross present cash value.* [Emphasis added and footnotes omitted.]

We conclude that a plain reading of the above sections shows that the collateral source rule does not apply to future medical and other health care costs. In §6306(1)(a), the statute clearly provides that all *past* economic damages must be reduced by any collateral source payments. Further, under §6306(1)(c), all future economic damages must be reduced by any collateral source payments, but the subsection specifically excepts medical and other health care costs. Then, in § 6306(1)(d), the statute directs the payment of all future medical and other health care costs and directs that the award be reduced to gross present cash value, but makes no mention of reducing the award by any future collateral source payments. If the Legislature intended for the collateral source rule to apply to future medical and health care costs, it would have indicated such. Accordingly, the trial court did not err in failing to deduct the alleged collateral source benefits from the final judgment.

On cross-appeal, plaintiff argues that the trial court abused its discretion in instructing the jury on comparative negligence under SJI2d 11.01. We disagree. This Court reviews claims of instructional error for an abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997). Jury instructions are reviewed as a whole to determine whether they accurately state the law and are warranted by the evidence presented. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 515; 556 NW2d 528 (1996), quoting *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 182; 475 NW2d 854 (1991).

The doctrine of pure comparative negligence distributes responsibility according to the proportionate fault of the parties. It requires that a plaintiff's damages be reduced in the same proportion by which the plaintiff's own conduct contributed to her injuries. *Jennings v Southwood*, 446 Mich 125, 130-131; 521 NW2d 230 (1994); *Poch v Anderson,* 229 Mich App 40, 48; 580 NW2d 456 (1998). The question whether a plaintiff was comparatively negligent is one for the jury unless all reasonable minds could not differ or because of some ascertainable public policy consideration. *Rodriguez v Solar of Michigan, Inc*, 191 Mich 483, 488; 478 NW2d 914 (1991), citing *Lowe v Estate Motors, Ltd*, 428 Mich 439, 455-461; 410 NW2d 706 (1987). Plaintiff claims there was no evidence at trial to support a finding of comparative negligence and, therefore, that the trial court erred in instructing the jury regarding SJI2d 11.01.

We conclude that there was evidence at trial to warrant an instruction on comparative negligence. Reasonable minds could conclude that plaintiff was partly at fault given her testimony that she observed salt on the sidewalk on the cold morning of the incident and acknowledged that the presence of salt could mean there were potentially hazardous conditions. Moreover, plaintiff testified that she stepped into the carport even though she could not see where she was stepping and took no added precautions to insure her safety.[2] Questions of credibility and the weight of evidence are for the jury to decide. *Krupp v PM Engineering, Inc v Honeywell, Inc*, 209 Mich

---

[2] We reject plaintiff's claim that defendant waived the issue of comparative negligence because the issue of lighting was expressly waived by defendant during trial. Our review of the record shows that defendant only waived the issue of comparative negligence with respect to plaintiff's knowledge that there were no lights in the carport.

App 104, 110; 530 NW2d 146 (1995). Accordingly, the trial court did not abuse its discretion in instructing the jury on comparative negligence.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Brian K. Zahra