

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL J. BROOKS, Personal Representative
of the ESTATE OF PEPSI MORGAN, Deceased.

UNPUBLISHED
December 1, 2000

Plaintiff-Appellant,

v

KELLY LEIDE MOORE and WILLIAM ROSS
GROOVER, III,

No. 216656
Lenawee Circuit Court
LC No. 96-007292-NI

Defendants-Appellees.

Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Plaintiff Michael J. Brooks, personal representative of the estate of Pepsi Morgan, deceased, filed a wrongful death action alleging that defendant Kelly Leide Moore was responsible for the death of her granddaughter, Pepsi Morgan, who was killed when defendant Moore's negligence caused an automobile accident. Plaintiff had also sued defendant William Ross Groover, III, for negligently entrusting defendant Moore with his automobile in light of his knowledge that she was a cocaine addict. The jury returned a verdict of no cause of action against either defendant. Plaintiff appeals as of right from a judgment entered on the jury verdict. We affirm.

I

Plaintiff contends that the trial court erred by reading a jury instruction on an excused statutory violation, improperly added a sudden emergency instruction to the excused statutory violation instruction and erred by reading improper instructions on loss of memory and proximate cause. We disagree.

Plaintiff challenges the court's decision to read SJ12d 12.02 relating to an excuse for violation of a statute, and to modify it by adding an additional instruction relating to a sudden emergency. The court instructed the jury as follows:

However, if you find the defendant Kelly Groover [f/k/a Moore] used ordinary care and was still unable to avoid the violation, the violation is excused. If you

find the defendant violated the statute and the violation was not excused you must decide whether such violation was a cause of the occurrence.

If you find that the defendant Kelly Groover used ordinary care and was still unable to avoid the collision because she was confronted by a sudden emergency not due to her own misconduct, the defendants William Groover and Kelly Groover are not liable to the plaintiff.

The determination whether an instruction is accurate and applicable based on the characteristics of a case is in the sound discretion of the trial court. *Stevens v Veenstra*, 226 Mich App 441, 443; 573 NW2d 341 (1997); *Williams v Coleman*, 194 Mich App 606, 623; 488 NW2d 464 (1992).

We find that the trial court acted properly within its discretion in reading the instruction on excuse of a statutory violation. The testimony at trial by several witnesses showed that uncertainty existed as to whether defendant Moore violated any traffic laws before her accident. Under the circumstances the instruction given was necessary to give the jury guidance as to how to apply the law to its findings of fact.

The court gave the sudden emergency instruction after deciding that the standard jury instructions were insufficient under the circumstances. When the standard instructions do not adequately cover an area, the trial court is obligated to give additional instructions when requested if the supplemental instructions properly inform on the applicable law and are supported by the evidence. *Koester v Novi*, 213 Mich App 653, 664; 540 NW2d 765 (1995), *aff'd in part, rev'd in part on other grds* 458 Mich 1; 580 NW2d 835 (1998). The determination whether the supplemental instructions are applicable and accurate is within the trial court's discretion. *Stoddard v Manufacturers Nat'l Bank of Grand Rapids*, 234 Mich App 140, 162; 593 NW2d 630 (1999).

We find that the court's addition of the sudden emergency instruction was appropriate. The jury could have believed testimony by several witnesses that the roadway was covered with black ice at the time of the accident which was undetectable until the vehicle began to skid. The jury could have found that black ice created a sudden emergency that defendant Moore was unable to avoid. Contrary to plaintiff's contention, the jury had the right to decide whether it believed defendant Moore's testimony that she did not know the black ice was on the roadway. The court's decision to include this instruction is properly based on the evidence.

Next, plaintiff argues that the trial court erred by reading jury instructions on memory loss and proximate cause to the jury. The trial court read SJ12d 10.09 on memory loss to the jury as follows:

If you determine that the defendant has a loss of memory concerning the facts of this case and it was caused by the occurrence you may infer that the defendant was not negligent. However, you should weigh all of the evidence in determining whether or not the defendant was or was not negligent.

The court then read SJ12d 15.06 on proximate cause to the jury as follows:

If you decide defendant Kelly Groover [f/k/a Moore] was negligent and such negligence was a proximate cause of the occurrence it is not a defense that black ice was also a cause of this occurrence. However, if you decide that the only proximate cause of the occurrence was black ice then your verdict should be for the defendant.

We review claims of instructional error de novo. *Case v Consumers Power Co*, 463 Mich 1, 5; 615 NW2d 17 (2000). Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Wiegerink v Mitts & Merrill*, 182 Mich App 546, 548; 452 NW2d 872 (1990); *Willoughby v Lehrbass*, 150 Mich App 319, 336; 388 NW2d 688 (1986). Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A), *Case, supra*. There is no error warranting reversal if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

We find that the trial court did not err in reading the jury instructions on loss of memory or proximate cause. The jury instructions are fair when viewed in their entirety, and these instructions in particular do not prejudice plaintiff. In determining whether to read a loss of memory instruction, the trial court properly relied upon testimony by defendant Moore and her doctor that could have persuaded a jury that she was suffering from memory loss immediately after her accident. Regarding the proximate cause instruction, the court decided to allow the jury to weigh the credibility of direct and circumstantial evidence regarding any negligence by defendant Moore or other possible factors contributing to her accident. We find that plaintiff's claims of error regarding the loss of memory and proximate cause instructions are without merit.

II

Plaintiff's presentation of his final issue intertwines the concepts of judgment notwithstanding the verdict and a new trial request based on a challenge to the great weight of the evidence. We conclude that plaintiff was neither entitled to a JNOV nor a new trial.

Judgment notwithstanding the verdict should be granted only when there was insufficient evidence presented to create an issue for the jury. *Pontiac School Dist v Miller Canfield Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997).

A motion for new trial should not be granted on the ground that the jury's verdict is against the great weight of the evidence if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). This Court gives deference to the trial court's unique ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. *Id.*

We agree with the trial court that the jury's verdict was not against the great weight of the evidence and that judgment notwithstanding the verdict and a new trial were properly denied. Sufficient testimonial evidence was presented at trial to allow the jury to find that defendants Moore and Groover were not negligent in the death of plaintiff's decedent. The jury could have believed testimony that defendant Moore did not use drugs on the morning of the accident, was

not under the influence of cocaine when the accident occurred, was driving reasonably under the circumstances, and was not at fault for the accident that killed plaintiff's decedent. Of course, this testimony conflicts with plaintiff's version of the relevant events. When testimony conflicts, the jury should consider issues of credibility and circumstantial evidence. The jury did so. We do not believe that the jury's decision needs to be disturbed to prevent a miscarriage of justice.

Affirmed.

/s/ Brian K. Zahra

/s/ Harold Hood

/s/ Gary R. McDonald