

STATE OF MICHIGAN
COURT OF APPEALS

HELEN SUSAN SKIBA,

Plaintiff-Appellee,

v

KATHLEEN STANLEY and FLOYD STANLEY,

Defendants-Appellants.

UNPUBLISHED

March 19, 2002

No. 228925

Wayne Circuit Court

LC No. 98-829313-NO

Before: Bandstra, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Defendants appeal as of right the judgment entered in favor of plaintiff following a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff, the mother of Kathleen Stanley and the mother-in-law of Floyd Stanley, filed suit alleging she suffered injuries when defendants trespassed on her property and took into their possession various items she claimed were her personal property. Kathleen Stanley did not attend the trial. Plaintiff called Floyd Stanley as an adverse witness, and introduced Kathleen Stanley's deposition into the record.

Over defendants' objections, the trial court read SJI2d 6.01, which informed the jury that Kathleen Stanley did not produce her testimony, no reasonable excuse for the failure was provided, and the jury could infer the evidence would have been adverse to defendants if it believed the evidence was under the control of Kathleen Stanley and could have been produced by her. In addition, and again over defendants' objections, the trial court read SJI2d 53.01, which informed the jury that if it determined plaintiff suffered damages that would continue into the future, it was required to determine how long plaintiff would probably live, and that in order to make that determination, it could take into consideration "the mortality table which is part of our statutes." The trial court entered judgment on the verdict in favor of plaintiff, after which defendants moved for judgment notwithstanding the verdict or a new trial, alleging instructional error. The trial court denied the motion.

On appeal, defendants argue the trial court erred by reading SJI2d 6.01 to the jury. We disagree. Claims of instructional error are reviewed de novo. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Jury instructions are reviewed in their entirety rather than extracted piecemeal to establish error in isolated portions. *Cox v Flint Bd of Hosp Managers (On Remand)*, 243 Mich App 72, 83, 85; 620 NW2d 859 (2000). Reversal is not required unless the

failure to reverse would be inconsistent with substantial justice. MCR 2.613(A). Reversible error does not exist if, on balance, the instructions adequately and fairly presented the theories of the parties and the applicable law to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997).

SJI2d 6.01 permits, but does not require, the jury to infer the evidence not produced would have been adverse. *Brenner v Kolk*, 226 Mich App 149, 155-156; 573 NW2d 65 (1997). No subpoena or court order required Kathleen Stanley to appear for trial. *Rocky Produce, Inc v Frontera*, 181 Mich App 516, 517; 449 NW2d 916 (1989). However, Kathleen Stanley chose to be absent from the trial. Plaintiff was entitled to enter Kathleen Stanley's deposition into evidence. MCR 2.308. The live testimony of Floyd Stanley and the deposition testimony of Kathleen Stanley differed in some respects. Kathleen Stanley's testimony was under her own control, and no reasonable excuse was offered for the failure to produce the testimony. Contrary to defendants' assertion, the trial court did not effectively instruct the jury it was required to reject Kathleen Stanley's deposition testimony. Reversal is not required. MCR 2.613(A); *Murdock, supra*.

Defendants also argue the trial court erred by reading SJI2d 53.01 to the jury. Again, we disagree. In effect, the trial court granted plaintiff's request to read SJI2d 53.01 as a supplemental instruction.¹ The determination that a requested supplemental instruction is 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). Although the instruction given to the jury erroneously stated the mortality table is part of the state statutes, defendants do not assert that the instruction did not otherwise accurately explain the computation of future damages to the jury. Reversal is not required under the circumstances. MCR 2.613(A); *Murdock, supra*; *Stoddard, supra*.

We affirm.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Christopher M. Murray

¹ SJI2d 53.01 was deleted from the standard civil jury instructions after the mortality table was deleted from MCL 500.834 in 1994. See 1994 PA 226.