

STATE OF MICHIGAN
COURT OF APPEALS

GWENDOLYN STUCKEY,

Plaintiff–Appellant,

v

RANDAZZO’S FRUIT MARKETS,

Defendant–Appellee.

UNPUBLISHED

August 2, 1996

No. 156770

LC No. 90-028347

Before: Cavanagh, P.J., and Hood and J.J. McDonald,* JJ.

PER CURIAM.

Plaintiff appeals as of right the jury verdict in favor of defendant in this negligence action. We affirm.

Plaintiff claims that she was injured while shopping in defendant’s produce market when an employee of defendant negligently caused a shopping cart to strike her in the back. Plaintiff alleges that the shopping cart incident caused her to suffer from a continuous burning sensation in her back, as well as pain in her legs. At trial, both parties presented ample evidence that plaintiff had a lengthy history of back trouble, hormonal problems, and disorders related to emotional stress. The jury found that defendant was negligent, but that its negligence was not a proximate cause of plaintiff’s injury.

On appeal, plaintiff argues that the trial court erred in refusing to give jury instruction SJI2d 50.11, which requires the jury to separate damages caused by the defendant’s conduct from the plaintiff’s preexisting disease, injury, or state of health. The instruction also states that the entire amount of the plaintiff’s damages must be assessed against the defendant if the jury is unable to separate the damages caused by the defendant’s conduct from those which were preexisting.

The trial court must give pertinent portions of the Michigan standard jury instructions if the instructions are applicable, if they accurately state the applicable law, and if they are requested by a party. MCR 2.516(D)(2); *Walker v City of Flint*, 213 Mich App 18, 20; 539 NW2d 535 (1995). The determination of whether an instruction is accurate and applicable to a case is in the sound

* Circuit judge, sitting on the Court of Appeals by assignment.

discretion of the trial court. *Rice v ISI Mfg, Inc*, 207 Mich App 634, 637; 525 NW2d 533 (1994). This Court will not reverse as a result of an erroneous jury charge except where the failure to reverse would be inconsistent with substantial justice. *Winiemko v Valenti*, 203 Mich App 411, 418; 513 NW2d 181 (1994).

We find no error in the trial court's refusal to give SJI2d 50.11. Although there was substantial evidence that plaintiff had suffered from back problems prior to the incident in defendant's market, plaintiff's experts testified that plaintiff's previous problems were distinct in character from the injuries she suffered as a result of the shopping cart incident. The trial judge did not abuse his discretion in determining that the instruction was not applicable.

Moreover, even if we had concluded that the trial court erred, we would find the error to be harmless because the instruction at issue relates to damages. The jury determined that defendant's negligence was not a proximate cause of plaintiff's injury and therefore never reached the issue of damages. See *Beadle v Allis*, 165 Mich App 516, 525; 418 NW2d 906 (1987).

Affirmed.

/s/ Mark J. Cavanagh

/s/ Harold Hood

/s/ John J. McDonald