

STATE OF MICHIGAN  
COURT OF APPEALS

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GREAT AMERICAN INSURANCE COMPANIES,

UNPUBLISHED

Plaintiff-Appellant/Cross-Appellee,

v

No. 203014

Oakland Circuit Court

LC No. 95-504656 NM

GARAN, LUCOW, MILLER, SEWARD, COOPER  
& BECKER, P.C., and THOMAS F. MYERS,

Defendants-Appellees/  
Cross-Appellants.

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Before: Griffin, P.J., and Hood and Talbot, JJ.

GRIFFIN, P.J. (concurring).

I concur in the result. I would affirm on the basis that plaintiff failed to sustain its burden of establishing a genuine issue of material fact regarding its claimed legal malpractice cause of action. MCR 2.116(G)(4).

In the underlying action, it is clear that the stipulation made by defendant Myers pertained to the jury's verdict form, only:

*Mr. Myers (defense counsel):* No, I have a verdict form of damages, separate -- next page, your Honor.

*The Court: I'm looking at it.*

\* \* \*

*Mr. Asher (plaintiff's counsel):* Well, your Honor, he wants to break it down into economic, non-economic, past and future damages.

*The Court:* I don't see that. Do you have that here? I thought you were waiving all of this?

*Mr. Myers:* No. We are not doing any present values or any of that. We agreed to that. [Emphasis added.]

Later, the trial judge emphasized that it was the court's understanding that the court, not the jury, was to reduce future damages, if any, to present value:

*The Court:* All right. Well, there are a couple issues I can deal with today and a couple issues that we can't deal with.

\* \* \*

*With regard to the future damages,* I think that I can address that. It's very clear that that was left for me and you have to look at the transcript and read it in the context of what was going on; but it was my belief that *the jury was not to address it - that was -- and that it was left for me to decide* and it doesn't mean that just because the jury -- it was taken out of the jury instructions does not mean that -- I don't mean future damages -- the reduction to present cash value -- that that was something I was to do; so there's no doubt in my mind and that's not an issue anymore. [Emphasis added.]

Importantly, both attorneys in the underlying case agreed that, based on the record evidence, the trial judge was fully capable of reducing future damages to present value. However, the parties disagreed on the methodology to do so. Further, in the appeal of the present case, plaintiff, Great American Insurance Companies, as cross-appellee, makes the following admission:

. . . plaintiff acknowledges that it is possible to reduce damages to present value under the circumstances presented by this case.

The present case arose only because the trial judge in the underlying action breached her assumed duty to reduce future damages to present value. In an order dated October 9, 1992, the trial judge "exercised her discretion" by deciding not to do so. The court reasoned as follows:

Based upon the foregoing and based upon the fact that it is this court's function to see that plaintiff is completely compensated for his injuries and that justice is served, this court is exercising its discretion and reconsidering its original ruling on the present value issue. This court hereby finds that the verdict will not be reduced to present value.

Before an appeal could be heard, the underlying case was settled by plaintiff thereby preventing any appellate review of the actions of the trial judge.

In my view, there is no genuine issue of material fact that the windfall damages at issue were caused solely by the error of the trial judge. In failing to fulfill her assumed duty to reduce future damages to present value, the trial judge created the damages which are the subject of the present action. On this record, I find no evidence whatsoever to support a cause of action of alleged legal malpractice by defendant Myers.

For this reason, I concur with the majority in affirming the summary disposition granted in favor of defendants.

/s/ Richard Allen Griffin