STATE OF MICHIGAN

COURT OF APPEALS

ROSA GUEVARA-BRITO, Personal Representative of the Estate of "BABY" GUEVARA-BRITO, deceased,

Plaintiff-Appellee,

v

GRATIOT COUNTY ROAD COMMISSION,

Defendant/Third-Party Plaintiff/Appellant,

v

MARTIN GUEVARA-BRITO,

Third-Party Defendant/Appellee.

UNPUBLISHED
October 1, 1996

No. 181853
LC No. 92-1730-NI

Before: McDonald, P.J., and White and P.J. Conlin,* JJ.

PER CURIAM.

Defendant Gratiot County Road Commission appeals from the judgment for plaintiff following a jury trial, the trial court's grant of plaintiff's motion for reconsideration of the court's postjudgment order granting defendant a new trial, and the lower court's denial of defendant's motion for judgment notwithstanding the verdict or for remittitur. We affirm.

Plaintiff brought a wrongful death action against defendant arising out of fatal injuries suffered by her unborn child in an automobile accident, claiming that the accident was proximately caused by defendant's breach of its statutory duty to maintain the road in reasonable repair under the public highway exception to governmental immunity, MCL 691.1402; MSA 3.996(102). The jury returned a verdict in plaintiff's favor in the amount of $600,000. Judgment was entered by the court in the net amount of $450,000, reflecting a reduction in accordance with the jury's finding that defendant was

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

liable for seventy-five percent of plaintiff's damages and third-party defendant Martin Guevara-Brito was liable for the remaining twenty-five percent. Defendant then brought a motion for JNOV or new trial or remittitur on the basis of the court's alleged error in refusing to allow amendment of defendant's pleadings to include the affirmative defense of comparative negligence based on plaintiff's failure to wear a seat belt. The court granted a new trial following oral argument on the motion. Plaintiff subsequently filed a motion for reconsideration of that order, which the court granted finding that it had erred in reversing its original decision to exclude the evidence.

Defendant first argues that the trial court abused its discretion when it refused to allow defendant to amend its pleadings. Defendant argues that plaintiff had notice of the potential defense of comparative negligence because, although not raised in the pleadings in the instant case, it was raised in the pleadings filed in the consolidated case in which plaintiff sought recovery for her own injuries. We reject this argument.

Although plaintiff may have been aware of the availability of the defense, defendant, also aware from the inception of the case that the defense was available, did not raise it in this case. Defendant has failed to provide any justification for waiting until the third day of trial to move for leave to amend. Just as in *Harvey v Security Services, Inc*, 148 Mich App 260, 266; 384 NW2d 414 (1986), defendant's motion constituted a "material change in the case" that might have resulted in prejudice to plaintiff. *Id.* Under these circumstances, we cannot agree that the trial court abused its discretion by denying defendant's motion to amend. We observe that the nature of the relevant dispute as to causation and the focus of the expert testimony could be expected to change drastically with the amendment. As pled and until trial, the focus was on the general question whether the accident caused the loss of the fetus. If the amendment had been permitted, the focus would have shifted to whether the injuries to the fetus would have been the same if plaintiff had been wearing her seat belt, and the extent to which the seat belt might itself have injured the fetus. We conclude that given the timing of the request to amend, the court did not abuse its discretion in refusing to allow the amendment.

Defendant next contends that plaintiff impliedly consented to litigate the issue of causation by admitting in her deposition and in her opening statement that she was not wearing her seat belt. Unlike in *Leavenworth v Michigan National Bank*, 59 Mich App 309, 313-315; 229 NW2d 429 (1975), where the court held the parties tried an issue not pleaded by the plaintiff by implied consent, defendant did not state in opening statement that it intended to prove that plaintiff's injuries were caused by her failure to wear her seat belt. When defendant directly raised the issue of comparative negligence, the trial court ruled that no evidence could be introduced regarding plaintiff's failure to wear her seat belt. Moreover, the court refused defendant's request to instruct the jury regarding plaintiff's comparative negligence. Thus, because the issue was never litigated, defendant cannot now claim that plaintiff impliedly consented to litigate it. For the same reason, defendant's argument that plaintiff "opened the door" to the issue of comparative negligence is without merit.

Next we conclude that the court did not err in denying defendant's other post-trial motions. Judgment notwithstanding the verdict should be granted only when there is insufficient evidence presented to create an issue for the jury. *Constantineau v DCI Foods, Inc*, 195 Mich App 511, 514;

491 NW2d 262 (1992). If the evidence is such that reasonable minds could differ, the question is for the jury and JNOV is improper. *Id*., 515. After a thorough review of the testimony presented, we conclude that reasonable jurors could honestly have reached different conclusions regarding whether defendant breached its statutory duty to keep the road in reasonable repair. In such cases, neither the trial court nor this Court may substitute its judgment for that of the jury. *Thorin v Bloomfield Hills Bd of Ed*, 203 Mich App 692, 696; 513 NW2d 230 (1994). The record in this case also demonstrates that a directed verdict would have been improper because when all reasonable inferences are drawn in plaintiff's favor, reasonable jurors could differ regarding whether plaintiff met her burden of proof. *Rynerson v Nat'l Casualty Co*, 203 Mich App 562, 564; 513 NW2d 436 (1994). Similarly, because the overwhelming weight of the evidence did not favor defendant, the trial court did not abuse its discretion in denying defendant's motion for new trial. *Arrington v Detroit Osteopathic Hospital Corp (On Remand)*, 196 Mich App 544, 564; 493 NW2d 492 (1992).

Nor did the trial court abuse its discretion when it granted plaintiff's motion for reconsideration. The aim of MCR 2.119(F) "is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal, but at a much greater expense to the parties." *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). In this case, the court did not err in granting plaintiff's motion for reconsideration where the motion convinced the court that it had erred in granting a new trial and that its original decision at trial was correct. Moreover, defendant's claims of procedural error are without merit. MCR 2.119(F)(2) expressly states that " no response to the motion may be filed, and there is no oral argument, unless the court otherwise directs." Consequently, defendant cannot claim that the court erred by refusing to allow it to respond to the motion.

As to defendant's motion for remittitur, defendant has not demonstrated that the verdict was the result of improper methods, prejudice, passion, partiality, sympathy or mistake of law or fact. *Palenkas v Beaumont Hospital*, 432 Mich 527, 532-533; 443 NW2d 354 (1989); *Phillips v Mazda Motor Mfg.*, 204 Mich App 401, 416; 516 NW2d 502 (1994). The amount awarded was comparable to awards in similar cases. See *Jarvis v Providence Hospital*, 178 Mich App 586, 590; 444 NW2d 236 (1989). (Award of $400,000 for the plaintiff, whose daughter died in utero after plaintiff contracted hepatitis while employed at the defendant's laboratory). Consequently, the trial court did not abuse its discretion when it denied defendant's motion for remittitur.

Because defendant failed to raise the issue below, we need not address its argument that it was forced to stipulate to the viability of the fetus by the trial court's decision to admit a photograph of plaintiff's decedent into evidence. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). *People v Williams*, 153 Mich App 582, 589; 396 NW2d 805 (1986). We conclude that defendant entered into the stipulation as a matter of trial strategy and cannot now raise the issue as grounds for reversal.

Affirmed.

/s/ Helene N. White
/s/ Gary R. McDonald
/s/ Patrick J. Conlin