STATE OF MICHIGAN

COURT OF APPEALS

EKATERINI THOMAS and TOM THOMAS,

Plaintiffs-Appellees,

v

SUBURBAN MOBILITY AUTHORITY FOR REGIONAL TRANSPORTATION (SMART) and the ESTATE of JOHN CLAY,

Defendants-Appellants.

UNPUBLISHED
October 4, 1996

No. 178890
LC No. 91-129733-NI

Before: Corrigan, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

In this negligence action, defendants appeal by right the order denying their motion for a judgment notwithstanding the verdict or a new trial under MCR 2.610 and MCR 2.611. At trial, the jury awarded plaintiffs more than $300,000 in damages, reduced by fifteen percent comparative negligence. We affirm.

Plaintiff[1] Ekaterini Thomas testified that while moving toward the front of a SMART bus on November 19, 1988, she slipped and fell on water that had accumulated on the floor. Marie Maynard, another passenger on the bus that day, testified that the floor was wet from the front to at least halfway to the back of the bus. Maynard said that John Clay, the bus driver,[2] had been speeding and driving carelessly that morning. Clay sped up, then slammed on the brakes, then stopped in a "jackrabbit" manner.

Maynard testified that she heard a loud thump and then saw plaintiff Thomas on the floor of the bus with her legs spread in an awkward position. Plaintiff testified that she fell "very hard and very fast" on her right side. Clay did not stop the bus at first; then, he came to another "jackrabbit" stop, which caused plaintiff to slide forward on the floor. Plaintiff had not broken any bones, but had pain in her back, hip, right side, ribs, neck and ankle. Plaintiff now sleeps on the floor because she is in pain. She

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

testified that the pain prevents her from performing many activities, and that she has sought pain management treatment and psychological therapy for the resulting depression.

Defendants first assert that a lack of evidence about the wet floor, Clay's sudden stopping of the bus, and Maynard's testimony were not enough to establish that defendants were negligent. Specifically, defendants argue that plaintiffs did not present evidence on how the floor of the bus became wet or evidence that Clay was aware the floor was wet. Defendants assert that the evidence did not support the jury verdict. We disagree.

When reviewing a trial court's refusal to grant a defendant's motion for a judgment notwithstanding the verdict, this Court examines the testimony and all resulting legitimate inferences most favorably to the plaintiff. *Matras v Amoco Oil Co*, 424 Mich 675, 681; 385 NW2d 586 (1986). The court should deny the motion if reasonable jurors could have honestly reached different conclusions. *Id*. at 681-682. If reasonable jurors could disagree, neither the trial court nor the reviewing court has the authority to substitute its judgment for the jury's judgment. *Id*. at 682. Also, we examine a trial court's refusal to grant a motion for a new trial for an abuse of discretion. *Flones v Dalman*, 199 Mich App 396, 406; 502 NW2d 725 (1993).

Defendants argue that plaintiff failed to produce sufficient evidence to establish negligence. To establish a prima facie case of negligence, a plaintiff must demonstrate the following elements: (1) a duty, (2) a breach of the duty, (3) causation, and (4) damages. *Poe v Detroit*, 179 Mich App 564, 568; 446 NW2d 523 (1989). Regarding duty, a special legal relationship exists between a common carrier and its passenger. *Dykema v Gus Macker Enterprises, Inc*, 196 Mich App 6, 8; 492 NW2d 472 (1992). Therefore, a legal duty existed between Clay and SMART and plaintiff. The next question is whether Clay breached that duty in failing to clean up the liquid and in his manner of driving. Maynard's testimony established that the floor of the bus was wet, which plaintiff confirmed. Plaintiff said she slipped and fell on the water and was hurt, and was further injured by Clay's reckless driving. Considering those facts in a light most favorable to plaintiff, a reasonable jury could have reached different conclusions. The circuit court did not abuse its discretion in denying defendants' motion for a judgment notwithstanding the verdict or a new trial. Thus, this Court does not have the authority to substitute its judgment for that of the jury under *Matras*.

Defendants next argue that the circuit court should have instructed the jury to reduce plaintiff's future damages to present cash value. In the alternative, defendants assert that the circuit court itself should have reduced the future damages. Whether defendants were entitled to have plaintiff's future damages reduced to present cash value is a question of law, which we review de novo. *Labor Council v Detroit*, 207 Mich App 606, 607; 525 Nw2d 509 (1994); *In re Lafayette Towers*, 200 Mich App 269, 273; 503 NW2d 740 (1993).

Prior to October 1, 1986, trial courts were bound to instruct the jury on the reduction of an award for future damages to present value even if the parties failed to request the instruction, SJI2d 53.03. Alternately, the trial court could reduce the award to present value itself. *Howard v Canteen Corp*, 192 Mich App 427, 441-442; 481 NW2d 718 (1992). That standard jury instruction,

however, no longer applies to personal injury actions filed as of October 1, 1986. Plaintiff filed her suit in October, 1991. Instead, this case is governed by MCL 600.6306(1); MSA 27A.6306(1), which holds that the court should enter an order of judgment where all future damages are reduced to present cash value. Thus, ordinarily the court should have ordered a set-off.

Plaintiff contends, however, that defendants ignore on appeal the agreement regarding jury instructions reached by both parties' trial counsel in chambers. In exchange for defense counsel's consent to omit SJI2d 53.03,[3] the present cash value instruction, plaintiff's counsel agreed to omit SJI2d 53.06,[4] the "inflation" instruction. Plaintiff's counsel asserts that the litigants neglected to put their agreement on the record. Plaintiff argues that the instructions offset each other. At oral argument, plaintiff's counsel again asserted that the parties had agreed to omit the instructions. Appellate defense counsel merely countered that assertion by a statement that defense counsel did not recall what had occurred. The record reveals, however, that defendants did not request the instruction at trial and that plaintiff's counsel did not request an inflation instruction and did not argue the issue. This Court is sufficiently satisfied that the parties reached an agreement. Because defendants agreed to omit the instruction, they have waived their right to reduce the future damages award to present cash value.

Defendants also argue that the circuit court should have used a verdict form that listed the two defendants separately because the jury may have considered that SMART should be responsible even if Clay should not have been responsible. The use of the proper verdict form is an instructional issue. *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 10; 535 NW2d 215 (1995). The trial court has discretion in deciding if a jury instruction applies. *Bordeaux v Celotex Corp*, 203 Mich App 158, 168-169; 511 NW2d 899 (1993). A party must present sufficient evidence to warrant the instruction for a court to give the requested jury instruction. This Court reviews jury instructions in their entirety and should not extract the instructions in a piecemeal manner. This Court should not reverse if, on balance, the parties' theories and the applicable law were adequately and fairly presented to the jury. *Id*. Because SMART'S liability was derivative, no basis existed to separate defendants on the verdict form. See generally *Hall v Detroit Board of Education*, 186 Mich App 469, 472; 465 NW2d 12 (1990).

Defendants finally argue that the circuit court should have instructed the jury under SJI2d 41.04. The trial court did exactly that at trial. Therefore, defendants' argument is meritless.

Affirmed.

/s/ Maura D. Corrigan
/s/ Kathleen Jansen
/s/ Meyer Warshawsky

[1] For the purposes of this opinion, "plaintiff" will refer to Ekaterini Thomas.

[2] Bus driver John Clay died before plaintiffs filed their complaint in November, 1991.

[3] SJI2d 53.03 provides: "If you decide plaintiff will sustain damages in the future, you must reduce that amount to its present cash value. The amount of damages you determine [he/she] will sustain the first year is to be divided by 1.05. The amount of damages you determine [he/she] will sustain the second year is to be divided by 1.10. The amount [he/she] will sustain the third year is to be divided by 1.15. You then continue to use a similar procedure for each additional year you determine [he/she] will sustain damages. The total of your yearly computations is the present cash value of plaintiff's future damages."

[4] SJI2d 53.06 provides: "If you decide that the plaintiff will sustain damages in the future, you may consider the effect of inflation in determining the damages to be awarded for future losses."