STATE OF MICHIGAN

COURT OF APPEALS

CYNTHIA MARIE BEADLE,

Plaintiff-Appellant,

and

BLUE CROSS BLUE SHIELD,

Plaintiff,

v

DENNY'S RESTAURANT, a foreign corporation,

Defendant-Appellee.

UNPUBLISHED
June 6, 1997

No. 190243
Macomb Circuit Court
LC No. 93-004398

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Plaintiff appeals as of right the denial of her motion for a new trial and the entry of an order of no cause of action. We reverse and remand for a new trial.

Plaintiff argues that the trial court erred in denying her motion for a new trial on the grounds that the jury verdict was against the great weight of the evidence. With respect to a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. This Court's function is to determine whether the trial court abused its discretion in making its finding. This Court gives substantial deference to the conclusion of the trial court that a verdict is not against the great weight of the evidence. *Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).

In the instant action, the jury concluded that defendant was negligent in changing the designation of a section of its restaurant from non-smoking to smoking without warning while plaintiff, a non-smoking asthmatic, was having dinner. The jury further concluded that plaintiff suffered an exacerbation

of her underlying asthmatic condition. Nevertheless, the jury found that defendant's negligence was not a proximate cause of plaintiff's injuries.

After carefully reviewing the record, we conclude that the great weight of the evidence favors plaintiff. Although there was testimony that other factors would have had a similar effect on plaintiff, there was no testimony that plaintiff's condition was actually caused by anything other than the smoke at defendant's restaurant. Both plaintiff's expert and defendant's expert specifically concluded that the exacerbation of plaintiff's asthmatic condition was caused by secondhand smoke at defendant's restaurant.[1]

In ruling on plaintiff's motion for a new trial, the trial court noted that it disagreed with the jury verdict but denied the motion because it was the jury's role to determine the credibility of the witnesses. We agree that the credibility of the witnesses is a matter within the province of the jury. See *McCalla v Ellis*, 180 Mich App 372, 382; 446 NW2d 904 (1989). However, in the present case *no* evidence was presented that the deterioration of plaintiff's asthmatic condition was due to anything other than the exposure to smoke in defendant's restaurant.[2] Accordingly, the credibility of the witnesses was not at issue. Because reasonable jurors, relying only on the evidence presented at trial, could not have disagreed that defendant's negligence was the proximate cause of plaintiff's injuries, we find that the trial court abused its discretion in denying plaintiff's motion for a new trial. See *McAtee v Guthrie*, 182 Mich App 215, 221; 451 NW2d 551 (1990).

Contrary to defendant's assertion, plaintiff was not required to disprove that each of the possible triggers of an asthma attack did not contribute to her condition. See *McMillian v Vliet*, 422 Mich 570, 577; 374 NW2d 679 (1985) (stating that the fact that more than one cause operates to produce an injury is not determinative of the issue of proximate cause). Defendant also argues that plaintiff's failure to leave defendant's restaurant was an intervening act of negligence which effectively relieved defendant of liability. However, plaintiff's alleged inaction was not an intervening cause breaking the chain of causation. See *McMillian, supra*; *Moning v Alfono*, 400 Mich 425, 442; 254 NW2d 759 (1977). Rather, it was relevant to the issue of comparative negligence and the doctrine of avoidable consequences. *Kirby v Larson*, 400 Mich 585, 617; 256 NW2d 400 (1977). We note that defendant did not assert intervening negligence, comparative negligence, or avoidable consequences at trial.[3]

Because of our resolution of the previous issue, we need not address plaintiff's issue regarding the jury instructions.

Reversed and remanded for a new trial. Plaintiff being the prevailing party, she may tax costs pursuant to MCR 7.219.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White

[1] Although defendant's expert referred to plaintiff as "an accident waiting to happen," it has long been established that a wrongdoer takes an injured person as he finds him. Therefore, if the defendant's wrongful conduct is proved by a preponderance of the evidence to be a proximate cause of the aggravation of a latent disability, the defendant is liable for such aggravation regardless of whether he had knowledge of the disability. *Adams v Nat'l Bank of Detroit*, 444 Mich 329, 350 n 5; 508 NW2d 464 (1993) (Mallett, J.); *McNabb v Green Real Estate Co*, 62 Mich App 500, 518; 233 NW2d 811 (1975). The jury was so instructed by the reading of SJI2d 50.10, and was also instructed under SJI2d 50.11:

> If an injury suffered by plaintiff is a combined product of both a preexisting disease or state of health and the effects of defendant's negligent conduct, it is your duty to determine and award damages caused by defendant's conduct alone. You must separate the damages caused by defendant's conduct from the condition which was preexisting if it is possible to do so.
>
> However, if after careful consideration, you are unable to separate the damages caused by defendant's conduct from those which were preexisting, then the entire amount of plaintiff's damages must be assessed against the defendant.

The argument that plaintiff was "an accident waiting to happen" – that her preexisting condition made her extremely vulnerable to an asthma attack – should have been dealt with in accordance with SJI2d 50.10 and 50.11. Furthermore, if the jury concluded that the asthma attack would have happened anyway, triggered by some other inevitable cause, that conclusion should have been reflected in the damage award rather than a finding of no proximate cause, because it was undisputed that the smoke was a cause of the asthma attack. Further, there was no support for the argument that other smoke, but not immediate smoke, proximately caused the asthma attack.

[2] Plaintiff's expert testified:

> Given the history I was provided with, with the patient's known history of asthma, I felt that the exposure to secondhand smoke was a significant contributing factor to her exacerbation that evening which subsequently led her to seek care in the emergency room at South Macomb Hospital and then again at Oakland General.

Likewise, the defense expert testified:

> I think in this case it was the cigarette smoke she encountered at Denny's, but it could have been just as easily, you know, a strong odor in the lavatory at the movies or it could have been strong exhaust fumes from her car in the parking lot. I don't doubt that she deteriorated as a result of the cigarette smoke . . . .

[3]Although defendant pleaded the defense of comparative/contributory negligence as an affirmative defense, and made a brief comment that could be seen as addressing the subject in opening statement, it apparently did not request an instruction on the issue and did not pursue the issue in closing.