

STATE OF MICHIGAN
COURT OF APPEALS

DENISE C. PRICE and DOUGLAS PRICE,

Plaintiffs-Appellees/Cross-
Appellants,

and

BLUE CROSS BLUE SHIELD,

Intervening Plaintiff-Appellee,

v

K-MART CORPORATION,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

October 16, 2003

No. 233216

Grand Traverse Circuit Court

LC No. 99-019643-NO

Before: Donofrio, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial judgment of \$295,000 for negligence, and \$20,000 for loss of consortium. Plaintiffs cross appeal the portion of the judgment that vacated the jury award of \$75,000 for future medical damages. This case arose when an unattended bookcase tipped over in defendant's parking lot and struck plaintiff¹ in the back while defendant's employee was helping her load furniture purchased from defendant. We affirm in part, reverse in part, and remand.

Defendant first claims the trial court abused its discretion when it permitted plaintiffs' attorney to present demonstrative evidence by pushing over a boxed bookcase. We disagree.

¹ Because Douglas Price's loss of consortium claim is not challenged in this appeal, all references to plaintiff will be to the injured party, Denise Price.

A trial court's decision to permit the use of visual aids during oral argument is reviewed for an abuse of discretion. *Bates v Detroit*, 66 Mich App 701, 706; 239 NW2d 716 (1976). The bookcase was pushed over during closing argument after both sides rested, and accordingly was not evidence. MCR 2.507(E). By stating that the jury could put the demonstration in context, the court indicated that it weighed the probative value of the demonstration against its prejudicial effect and determined that the jury would not give the demonstration preemptive weight. *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 404; 571 NW2d 530 (1997).

In addition, the court instructed the jury twice that counsel's arguments were not evidence. Furthermore, after plaintiffs' counsel apparently tipped the box over, he indicated that the box that hit plaintiff did not fall as far, and defendant's counsel argued that the demonstration was not a reenactment and pointed out the dissimilarities. In *Lopez v General Motors Corp*, 224 Mich App 618, 634-635; 569 NW2d 861 (1997), we determined that the trial court did not abuse its discretion by admitting a videotape of a simulated crash where the plaintiff pointed out the differences between the test conditions and those of her accident, and the defendant acknowledged the differences and did not claim that the videotapes were a recreation of the accident. *Id.*

The court's decision whether to grant a new trial is also reviewed for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). The trial court determined in a post-judgment hearing for a new trial that to the extent the demonstration was error, it was harmless because liability was established through competent evidence. The court's findings were supported by the evidence where six witnesses testified that after the accident, plaintiff could not do many of the activities she did before. Her injury was confirmed by the testimony of medical personnel who indicated that the bookcase was the likely source of her injury.

Defendant next claims plaintiffs' counsel made several improper comments that denied it a fair trial. We disagree. Defendant failed to object to the comments at trial and the court's instructions to the jury that counsel's arguments were not evidence were sufficient to cure any prejudicial effect of the allegedly improper comments. *Tobin v Providence Hosp*, 244 Mich App 626, 641; 624 NW2d 548 (2001).

Defendant next claims that there was insufficient evidence to support an award of \$140,000 in future lost wages where no medical personnel testified that plaintiff would be unable to perform her previous two jobs in the future. We disagree.

A claim of insufficient evidence is reviewed in a light most favorable to the plaintiff. *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 41; 550 NW2d 809 (1996). A trial court's denial of remittitur is reviewed for an abuse of discretion. *Palenkas v Beaumont Hosp*, 432 Mich 527, 531; 443 NW2d 354 (1989). Remittitur is justified if the amount awarded is greater than the highest amount the evidence will support. *Id.* at 531-532.

Plaintiff presented evidence that she had already suffered a loss of income from her daycare business. Where the time element regarding loss of future earnings is uncertain, it will be left to the sound judgment of the trier of fact and will not be disturbed if reasonable. *Henry v*

Detroit, 234 Mich App 405, 415; 594 NW2d 107 (1999), citing *Vink v House*, 336 Mich 292, 297; 57 NW2d 887 (1953). The trial court determined that plaintiff's testimony was very credible. A trial court is in a superior position to determine whether remittitur should be granted "because of its ability to view the evidence and evaluate the credibility of witnesses." *Henry, supra* at 415.

Nevertheless, where testimony regarding damages is purely speculative, it should be stricken pursuant to MRE 403. *Phillips v Deihm*, 213 Mich App 389, 401-402; 541 NW2d 566 (1995). Damages are allowed only for reasonably certain future consequences that are the natural and proximate cause of the injury. *Prince v Lott*, 369 Mich 606, 609; 120 NW2d 780 (1963).

Of the conflicting reasons given for not accepting the position, one was proximately caused by the injury while the other was unrelated. It is for the trier of fact to weigh conflicting testimony. *Forton v Laszar*, 239 Mich App 711, 717; 609 NW2d 850 (2000). The jury could have determined that the reason plaintiff did not accept the supervisory position was because of her back injury.

Defendant has cited no cases indicating that an unoffered promotion could not be considered, especially where the employer testified that the position was available if the employee chose to take it. Several cases have indicated that a plaintiff's ability to earn money determines future lost wages rather than what the plaintiff actually earned before the injury. *Miller v Pillow*, 337 Mich 262, 272; 59 NW2d 283 (1953) (evidence of previously held jobs may be considered to determine lost earning capacity); *Prince, supra* at 610 (evidence that the plaintiff had no desire to earn and would likely spend additional time in jail determined irrelevant to what he was capable of earning); *Harris v Wiener*, 362 Mich 656, 659; 107 NW2d 789 (1961) (evidence that the plaintiff only worked two or three days a week before being injured determined irrelevant where the jury could have properly concluded that she had the ability to work a full week). When viewed in the light most favorable to plaintiff, evidence was sufficient to support the lost earning capacity award. *Scott, supra* at 41.

Plaintiff claims that evidence supported the need for future medical expenses and that the court abused its discretion by vacating the amount awarded because the amount of damages was uncertain. We agree.

Inability to prove the amount of damages is not fatal to recovery where some degree of injury is proven. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). Nevertheless, proof of future injury, including the need for future medical services, requires proof to a reasonable certainty that the need will necessarily result from the sustained injury. *Motts v Michigan Cab Co*, 274 Mich 437, 441; 264 NW 855 (1936), citing *Brininstool v Railways Co*, 157 Mich 172, 180; 121 NW 728 (1909).

Because there was evidence that Denise would continue to suffer back problems requiring future doctor's office visits and physical therapy and possibly requiring additional surgery, the trial court abused its discretion by vacating the award for future medical expenses. Where there is uncertainty regarding the amount of damages, the risk should be born by the

wrongdoer rather than the injured party. *Roustaw v McClain*, 365 Mich 167, 170-171; 112 NW2d 123 (1961).

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiffs may tax costs.

/s/ Pat M. Donofrio

/s/ David H. Sawyer

/s/ Peter D. O'Connell