STATE OF MICHIGAN

COURT OF APPEALS

CRAIG PATRICK and PAULINE PATRICK,

Plaintiffs-Appellees,

and

CONTINENTAL CASUALTY INSURANCE, a/k/a CNA INSURANCE COMPANY,

Intervening Plaintiff-Appellee,

v No. 113183

THOMPSON-McCULLY ASPHALT PAVING COMPANY, d/b/a GRAND RAPIDS ASPHALT PAVING COMPANY, a Michigan corporation,

Defendant-Appellant.

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

PER CURIAM.

Defendant appeals as of right from a lower court order denying its post-trial motion for summary disposition, new trial, and/or remittitur, and denying defendant's motion for rehearing or reconsideration. We affirm.

The instant dispute arose from injuries sustained by plaintiff when he was knocked to the ground by an allegedly defective automatic tarpaulin device on defendant's trailer. Plaintiff was a truck driver employed by G & M Construction Company, which had contracted to haul defendant's hot asphalt to construction sites in defendant's trailer. The trailer in question was equipped with a pneumatically powered tarpaulin device which was designed to stretch a tarpaulin across the top of a fully loaded trailer so as to maintain the asphalt within a certain temperature range. Plaintiff's injury occurred when the front arm of the trailer's tarpaulin device became stuck and he attempted to free it. When plaintiff attempted to force the bar manually, it shot at him suddenly and knocked him off the trailer and down to the ground.

The trial court ruled in limine that plaintiff's claim arose under the no-fault insurance act, MCL 500.3101, et seq.; MSA 24.13101, et seq. That ruling has not been appealed, and therefore the issue of whether the no-fault act applies is not before us.

The only issue before us is whether the judgment in favor of plaintiff for economic loss damages must be reversed. We find that reversal is not required.

The jury instructions in this case were agreed to before closing argument, and defendant failed to object to the disputed instruction regarding loss of earning capacity. Accordingly, error as to the instruction has not been preserved for appeal, and we will reverse only to avoid manifest injustice. MCR 2.516(C); Cornforth v Borman's, 148 Mich App 469, 478; 385 NW2d 645 (1986). Moreover, in People v Hardin, 421 Mich 296, 322-323; 365 NW2d 101 (1984), our Supreme Court stated that strict enforcement of the court rule is necessary to avoid a procedure whereby counsel may "sit back and harbor error to be used as an appellate parachute in the event of jury failure." Id., citing People v Brocato, 17 Mich App 277, 305; 169 NW2d 483 (1969); People v Allen, 102 Mich App 655, 661; 302 NW2d 268 (1981), lv den 411 Mich 870 (1981).

There is no doubt that the instruction given to the jury regarding damages incorrectly stated the law. The trial court and plaintiff's counsel acknowledged the error; that the jury was instructed with regard to loss of earning capacity in addition to lost wages. The trial court denied defendant's post-trial motions on the ground that the evidence supported a claim for actual loss of future wages in the amount awarded, therefore the error was harmless. We agree with the trial court.

Defense counsel approved of the jury instructions prior to closing argument. Plaintiff made its closing argument regarding damages in reliance on that approval. To allow defense

counsel to now assert error would be to allow defendant the "appellate parachute" that the court rule was designed to preclude.

Further, our review of the record confirms the trial court's conclusion that no manifest injustice will result from our failure to vacate the jury's award of damages. The evidence presented at trial was sufficient to support a verdict under the proper standard. Accordingly, we conclude that the unobjected-to instructional error was harmless and the lower court did not err in denying defendant's post-trial motions.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Richard Allen Griffin