STATE OF MICHIGAN

COURT OF APPEALS

HAZEL YAX,

Plaintiff-Appellee,

v

AETNA CASUALTY AND SURETY COMPANY,

Defendant-Appellant.

June 5, 1991

No. 124153

Before: Wahls, P.J. and Hood and Cavanagh, JJ.

PER CURIAM.

In this insurance liability action, defendant appeals by right from a November 30, 1989 Washtenaw Circuit Court jury verdict and corresponding December 7, 1989 judgment, which awarded plaintiff $210,951 in first-party no-fault insurance benefits for underpaid attendant care expenses and replacement services, plus statutory interest for overdue benefits. We affirm.

The parties agree that on April 20, 1987, plaintiff, then age 90, was a passenger on a bus insured by defendant, when she slipped and fell, suffering a fractured hip. Plaintiff underwent surgery and, upon her release from the hospital in May 1987, went to live with the Gibsons, her granddaughter's family. From May through July 1987, the Gibsons took care of plaintiff's laundry, cooking, shopping, transported her to doctor visits, and hired a medical service to provide 24-hour attendant care. In July 1987, when the Gibsons decided to change medical services, the defendant refused to authorize payment to the new care service and refused to pay plaintiff replacement service and allowable expenses after August 31, 1987, on the grounds that it did not have sufficient medical proof that the services were needed as a result of the accident. Defendant further informed the Gibsons that it was awaiting a report from Dr. Schneider, plaintiff's surgeon.

On July 31, 1987, Dr. James O'Conner, plaintiff's personal physician, prescribed 24-hour attendant care and on August 3, 1987, Dr. Schneider sent defendant a report stating that plaintiff continued to require 24-hour attendant care. Further, Dr. Lawrence Handlesman, a physical rehabilitation specialist, testified by video deposition that as of September 1987, although plaintiff could walk with the aid of a walker or cane, she could only do so for a few steps and she was unbalanced when standing, requiring standby assistance. In Dr. Handlesman's opinion, plaintiff required around the clock care at that time and would continue to require such care indefinitely, as her condition was unlikely to improve. Dr. Handlesman also opined that plaintiff's medical needs resulted from the accident and from the flexion contracture of her hip following surgery.

Dr. Paul Kelly examined plaintiff at defendant's request on September 20, 1987 and testified that he did not believe that plaintiff required around the clock nursing care as a result of the accident. In Dr. Kelly's opinion, plaintiff's medical needs were a result of her advanced age.

After defendant refused to authorize payments for attendant care, the Gibsons continued to care for plaintiff and billed defendant for their services.

Prior to her injury, plaintiff walked extensively, used public transportation, maintained her own apartment, and did her own shopping, cooking, and cleaning. Plaintiff had been an active participant in senior citizen activities, attending weekly dances at a social club and monthly dances at a senior citizens' center.

On appeal, defendant contends that the jury verdict was against the great weight of the evidence. We disagree.

An objection going to the weight of the evidence can be raised only by a motion for a new trial presented to the trial court. Armstrong v Woodland Mutual Fire Ins Co, 342 Mich 666, 671–672; 70 NW2d 786 (1955). Failure to raise the appropriate motion waives the issue on appeal. B & M Die Co v Ford Motor Co, 167 Mich App 176, 184; 421 NW2d 620 (1988). Defendant failed to move for a new trial below and has, therefore, waived this issue. Moreover, even if the issue was properly before this Court, it is without merit. There was ample evidence presented at trial to support the jury verdict and the jury's findings were not against the great weight of the testimony.

Second, defendant contends the trial court erred in allowing plaintiff, over defendant's objection, to refer to an alleged medical report which was not evidence. Specifically, defendant argues that during opening and closing arguments, plaintiff's counsel improperly referred to a letter written by plaintiff's surgeon although the surgeon did not testify and the letter itself had not been admitted into evidence. Defendant moved the court for a mistrial which was denied.

We note initially that the parties stipulated to the admission of the letter in question. The stipulation, as read to the jury, absent a defense objection, was that on August 3, 1987, Dr. Schneider wrote a report, received by defendant shortly thereafter, which stated: "Still needs 24 hour assistance as [plaintiff] cannot ambulate alone."

Defendant claims that during opening and closing arguments, plaintiff's counsel improperly exceeded the stipulation. However, after reviewing the record, we conclude that the references to the letter in question, made by plaintiff's counsel were not improper. The balance of the comments were within the parties' stipulation and were appropriate remarks regarding the evidence. See MCR 2.507(A) and (E); Heintz v Akbar, 161 Mich App 533, 538–539; 411 NW2d 736 (1987).

Third, defendant contends that the trial court erred in allowing plaintiff's counsel to demonstrate that plaintiff's sight was sufficient for her to read in response to a physician's testimony that plaintiff had undergone surgery for glaucoma. Further, defendant asserts the trial court engaged in improper dialogue with plaintiff following her testimony. We disagree.

With respect to the reading demonstration, defendant has failed to show any prejudice resulting from the trial court allowing plaintiff to read a few lines of text before the jury. While plaintiff's vision was not at issue, during the examination of plaintiff's personal physician, defense counsel created an inference that plaintiff's infirmities were indirectly caused by her failing eyesight. Defendant opened the door and no scientific evidence or expert opinion was necessary to refute that inference.

Following plaintiff's testimony the court and plaintiff, who was then age 93, engaged in the following dialogue:

THE COURT: Thank you, Mrs. Yax, and good to meet you.

THE WITNESS: What's that?

THE COURT: When you have your 100th birthday, I'm going to be watching the Today program to be sure they got your picture on it.

THE WITNESS: I can't hear you, honey.

THE COURT: I haven't heard that for a long time. Happy next birthday.

THE WITNESS: Well, thank you. Thank you.

Here, not only did defendant fail to object to the alleged improper remarks, nothing in the record suggests that the trial court's remarks regarding plaintiff's longevity nor the judge's apparent amusement when

plaintiff called him "honey" unduly influenced the jury. Furthermore, following the close of proofs, the trial court instructed the jury that its rulings, conduct or remarks during trial was not meant to indicate any opinion as to the facts. Defendant was not denied a fair trial. See, Mourad v Automobile Club Ins Ass'n, 186 Mich App 715, 732; ___ NW2d ___ (1991).

Fourth, defendant contends the trial court erred in allowing the use of depositional testimony at trial. Specifically, defendant argues that while a deposition may be used in lieu of testimony at trial where a witness is unavailable, plaintiff made no such showing and, therefore, the trial court erred in allowing two depositions to be read to the jury. We disagree.

In this case, the deponents were employees of defendant at the time the deposition testimony in question was taken. The statement of a party's employee is admissible as a nonhearsay admission of the party if it was made by the employee while acting in the scope of employment or merely concerns a matter within the scope of employment, MRE 801(d)(2)(D); Shields v Reddo, 432 Mich 761, 773; 443 NW2d 145 (1989), and no showing of availability is required.

Fifth, defendant argues that the trial court erred in allowing an accountant to testify for plaintiff regarding the amount of interest on the benefits plaintiff claimed were overdue. Specifically, defendant argues that the accountant's testimony was irrelevant, cumulative, and prejudicial. We disagree.

Here, the witness testified as to the accumulated interest, calculated at 12% as provided in SJI 2d 35.04, from the time defendant stopped payments through the time of trial. The witness testified as to weekly benefit periods using amounts based on the testimony of a provider of similar services. The calculations also allowed for the statutory thirty-day grace period as to each week a benefit payment was due. Further, the witness prepared exhibits which summarized the calculations regarding the time periods involved and the benefit rates plaintiff claimed.

Upon review, we agree with the trial court's determination that the testimony was admissible as an illustration of the interest calculations which were an element of plaintiff's claim for damages. The exhibits were offered as part of the measure of damages and, as summaries of the witness' calculations, they were admissible pursuant to MRE 1006. West Central Packing Inc v A F Murch Co, 109 Mich App 493, 507; 311 NW2d 404 (1981), lv den 414 Mich 971 (1982). There is no indication on the record that the trial court endorsed any part of plaintiff's damage claim and, in fact, both the trial court and plaintiff's counsel emphasized to the jury that, while the interest calculations were part of plaintiff's claim, it was ultimately up to the jury to decide the issue of damages.

Finally, defendant contends that the trial court erred in instructing the jury on a modified version of SJI 2d 50.10, "Defendant Takes the Plaintiff as He Finds Her". Specifically, defendant argues that SJI 2d 50.10 is applicable to negligence cases and was inapplicable to the case at bar which was a contract case. We disagree.

Upon review, we note initially that the instruction as given omitted any reference to negligence. Second, one of the defenses to plaintiff's claim was that plaintiff's need for 24-hour attendant care resulted from her advanced age. Plaintiff's theory was that although her recovery may have been hindered by her age, her infirmities were not due solely to her advanced age. Under the circumstances of this case, we cannot conclude that the trial court abused its discretion in giving the modified version of SJI 2d 50.10 to the jury during the instructional phase of the trial.

Affirmed.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Mark J. Cavanagh