

STATE OF MICHIGAN  
COURT OF APPEALS

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CLARENCE E. DOSTER,

Plaintiff-Appellant,

v

WILLIAM C. DAVIS and BUTTON'S  
RENT IT,

Defendants-Appellees.

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March 14, 1994

No. 144516  
LC No. 87-340866 NI  
AMENDED OPINION

Before: Hood, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

This is a personal injury case arising from an auto accident. The jury returned a verdict of no cause of action. Plaintiff appeals as of right from the trial court's denial of his motion for judgment notwithstanding the verdict or for a new trial. We reverse.

Plaintiff was rear-ended by a heavy vehicle driven by defendant Davis and owned by defendant Button's Rent It. Plaintiff suffered a serious back injury and severe pain which, he alleges, has never disappeared and which constitutes a major impairment of a bodily function. Defendants have admitted negligence in causing the accident. However, they argue, the jury was within its rights in finding that the accident was not the proximate cause of plaintiff's pain. We disagree.

Judgment notwithstanding the verdict should be granted only where there are no factual questions upon which reasonable minds could differ. Brisboy v Fibreboard Corp, 429 Mich 540, 549; 418 NW2d 650 (1988). In reviewing the trial court's decision, the evidence and all legitimate inferences arising therefrom should be viewed in the light most favorable to the party opposing the motion. Id. The trial court's decision should not be disturbed absent an abuse of discretion. Constantineau v DCI Food Equipment, Inc, 195 Mich App 511, 514; 491 NW2d 262 (1992).

A motion for a new trial, on the other hand, may be granted where the verdict is "contrary to the great weight of the evidence," that is, where "after a careful review of the record it is plainly a miscarriage of justice." Middleton v Smigielski, 366 Mich 302, 305-306; 115 NW2d 84 (1962); see also MCR 2.611(A)(1)(e). Where there are credibility disputes, due deference should be given to the trial court's opportunity to observe the witnesses and assess their credibility. Termaat v Bohn Aluminum & Brass Co, 362 Mich 598, 603; 107 NW2d 783 (1961); see also People v Herbert, Mich ; NW2d (Docket No. 93441, rel'd 12/21/93) (judge may assess the credibility of witnesses in deciding a motion for new trial). Therefore, although a jury is entitled to disbelieve even the most positive and uncontroverted evidence, its verdict may be set aside and a new trial ordered when it is "perverse" in light of the evidence on the whole record. SC Gray, Inc v Ford Motor Co, 92 Mich App 789, 804; 286 NW2d 34 (1979). The trial court may not, however, substitute its judgment for the jury's where the evidence is conflicting. Id. The trial court's decision is reviewed for abuse of discretion. Herbert, supra, slip op at 11.

Here, plaintiff testified that he suffered from intense lower back pain since the date of the accident. He admitted that he had a second accident four months after the first but stated that it was less serious and did not aggravate his back condition. There was extensive evidence of the damage caused to plaintiff's life by the unremitting back pain. There was also evidence that, since the accident, plaintiff had gained somewhere between twenty-five and fifty pounds, allegedly because he was no longer able to engage in any kind of sustained exercise, including swimming and walking.

Plaintiff's doctor testified that, after the first accident, plaintiff was in severe pain, suffered from headaches and muscle spasms, and could hardly move. Although x-rays were negative, a fracture of the spinous process of one of plaintiff's lumbar vertebrae was discovered with the use of a CAT scan about six weeks after the accident. The scan also showed that the top third of the surrounding ligaments had been jerked away from the vertebrae and had probably caused the fracture. Because plaintiff had no prior history of back problems, the doctor determined that the fracture was the result of the accident.

After the second accident, plaintiff continued to complain of severe back pain. A new CAT scan was done which showed a herniated disc at the same vertebrae where the fracture had been seen and which appeared to be pressing against the nerve root.

Defendants' expert testified that he examined plaintiff and ordered a third CAT scan. He reported some herniation of the disc at the same level as reported by plaintiff's doctor. He opined that this may have been partially due to plaintiff's age and/or weight. However, on cross examination, he admitted stating in his report that:

apparently this examinee did sustain an avulsion fracture of the spinous process at some level of the lumbar spine [prior?] to the second accident of late July of 1987. However, I feel that he should have sufficiently recovered from this and be able to return to work. I feel that his pain was a direct result of the automobile accident, but his weight is a contributing factor. I would think that the actual cause of the problem was the accident of March of 1987.

Defendants' expert further indicated that, after seeing the results of the scan, he felt that the herniated disc was not the cause of plaintiff's pain but rather that the pain was due to a problem with the back muscles themselves "which can have some roots in the accident but is contributed to by body habitus and life-style and things along those lines." We note that plaintiff's doctor had found that some of the ligaments which attach back muscles to the spine had been torn away during the first accident.

After carefully reviewing the record, we find that the trial court did not abuse its discretion in declining to grant plaintiff's motion for JNOV because there were some factual questions upon which reasonable minds could differ. However, we find that the trial court abused its discretion in denying plaintiff's motion for a new trial because the verdict was "contrary to the great weight of the evidence" regarding causation, including the testimony of defendants' expert.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Harold Hood  
/s/ William B. Murphy  
/s/ E. Thomas Fitzgerald