STATE OF MICHIGAN

COURT OF APPEALS

VINCENZO VALENTE,

Plaintiff-Appellant,

v

JOHN G. WECH, JR., MARY WECH and AUTO CLUB INSURANCE ASSOCIATION,

Defendants-Appellees.

UNPUBLISHED
March 31, 1998

No. 193409
Wayne Circuit Court
LC Nos. 94-415998 NI
94-414999 NI

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order denying plaintiff's motion for judgment notwithstanding the verdict or a new trial, which was filed after the jury's verdicts of no cause of action entered in favor of defendants. We affirm.

This case arises from a traffic collision that occurred when a vehicle driven by John Wech and owned by Mary Wech struck the rear of plaintiff's vehicle while plaintiff was stopped and waiting for a traffic signal to change. Defendant Automobile Club Insurance Association (ACIA) insured plaintiffs as well as the Wechs. Plaintiff's actions for negligence against the Wechs and for first-party no-fault benefits against ACIA were consolidated for trial. With respect to the action against the Wechs, the jury found no negligence. With respect to the claim against ACIA, the jury found that plaintiff's injuries did not arise out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.

Plaintiff argues that the trial court erred in denying his motion for a new trial or judgment notwithstanding the verdict. According to plaintiff, there was no clear, positive, unequivocal and strong evidence to overcome the presumption of negligence arising from the driver's violation of MCL 257.402(a); MSA 9.2102(a) and MCL 257.627(1); MSA 9.2327(1), and therefore, the court should not have entered a judgment confirming a finding of no negligence. We find it noteworthy that plaintiff did not request jury instructions with regard to the presumption of negligence arising from the violation of a statute, SJI2d 12.01, 12.02, and did not move for a

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

directed verdict on the issue of negligence, essentially conceding that the issue presented was a jury question.

Initially we note that we disagree with the standard suggested by plaintiff. Contrary to plaintiff's argument, there need not be "clear, positive, unequivocal and strong" evidence rebutting any presumption of negligence for the issue to have been submitted to the jury. See *Lucas v Carson*, 38 Mich App 552, 557; 196 NW2d 819 (1972); *Baumann v Potts*, 82 Mich App 225, 228-232; 266 NW2d 766 (1978). The standard to which plaintiff refers is the test for determining whether the presumption of negligence was rebutted as a matter of law and not whether the facts in a particular case should be submitted for jury determination. *Id.* at 233. Rather, violation of a statute "establishes a prima facie case of negligence, with the determination to be made by the finder of fact whether the party accused of violating the statute has established a legally sufficient excuse." *Zeni v Anderson*, 397 Mich 117, 143; 243 NW2d 270 (1976). The question to be decided is "whether the alleged wrongdoer has come forward with evidence showing an adequate or legally sufficient excuse under the facts and circumstances of the case with the test to be applied, by the finder of fact, to be what a reasonable person would have done under all of the circumstances of the accident." *Baumann, supra.*

In this case, we conclude that the trial court properly denied plaintiff's motion for new trial or judgment notwithstanding the verdict. Although the jurors in this case were not instructed concerning the presumption of negligence, the finding of no negligence indicates that they determined that the defendant driver did what a reasonable person would have done under all of the circumstances. The court's finding that the verdict was not against the great weight of the evidence is entitled to substantial deference by this Court. *Severn v Sperry*, 212 Mich App 406, 412; 538 NW2d 540 (1995). Having considered the evidence presented at trial, we conclude that the court's denial of the motion was not an abuse of discretion. *Id.* Likewise, we believe the motion for new trial was properly denied. Viewing the evidence in the light most favorable to the Wechs, we conclude that reasonable jurors could honestly have reached different conclusions. *Id.*

With respect to the claim against ACIA, plaintiff also argues that the jury's finding that his injuries did not arise out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle was against the great weight of the evidence. We conclude that the trial court did not abuse its discretion by finding that the overwhelming weight of the evidence did not favor plaintiff.

Plaintiff presented evidence, including his own testimony and that of his treating doctors, that his right shoulder, neck and back suffered from painful, restricted movement from the end of 1993 up to the time of trial, and claimed that the injuries were caused or aggravated by the accident. However, ACIA's independent medical examiner testified that plaintiff was able to move his neck, right shoulder and arm normally four months after the accident and that plaintiff had no findings at that time that the examiner believed were related to the accident. The examiner found that plaintiff had long-term arthritic deterioration in the joint between the shoulder and the collar bone and arthritic narrowing in the neck spinal area bones, which were *not* the result of the September 3, 1993, automobile accident. The examiner acknowledged that there may have been soft tissue changes that could have occurred as a result of the accident and resolved in the interval between the accident and his examination. However, the jury heard evidence that ACIA paid

plaintiff's medical bills for six months after the accident. Under the circumstances, including the trial court's opinion that plaintiff's credibility had been called seriously called into question, we do not find that the court abused its discretion when it denied plaintiff's motion.

Finally, plaintiff contends that the trial court created prejudicial error by refusing to sever his cases against the Wechs and ACIA for trial, particularly because plaintiff was prejudiced by a reference to no-fault insurance during the course of the trial. However, defendants, not plaintiff, brought the motion to sever plaintiff's cases on the first day of trial. Therefore, plaintiff did not preserve this issue for our review. *Bordeaux v Celotex Corp*, 203 Mich App 158, 165; 511 NW2d 899 (1993). Furthermore, it was plaintiff himself who mentioned the existence of no-fault insurance during his testimony. Plaintiff is therefore estopped from claiming error from the reference. *Cacavas v Bennett*, 37 Mich App 599, 604-605; 194 Mich App 924 (1972).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Joseph B. Sullivan