GENNA v. JACKSON

Court of Appeals of Michigan.

GENNA v. JACKSON.

Docket No. 285746.

Decided: December 15, 2009

Before: STEPHENS, P.J. and CAVANAGH and OWENS, JJ.Siciliano Mychalowych VanDusen and Feul, PLC (by Timothy R. VanDusen and Lindsay Kennedy James), for plaintiffs. Blake, Kirchner, Symonds, Larson, Kennedy & Smith, P.C. (by Kevin T. Kennedy, Rebecca S. Austin, Andrew F. Smith, and Christopher W. Bowman), for Beverley Jackson.

In this case involving mold, defendant Beverley Jackson, hereafter defendant, appeals as of right the trial court's denial of defendant's postjudgment motions for judgment notwithstanding the verdict (JNOV) and for a new trial. We affirm.

I. FACTS

Plaintiffs Mario and Kimberly Genna, and their two young children, Layla and Sebastian, lived at the Maplewoode Condominium complex in Royal Oak, Michigan. Defendant lived next door. Plaintiffs' and defendant's units shared a foundation, walls, an attic, and a plumbing stack.

In December 2004, defendant left her condominium to go visit her brother in Florida and did not return until May 22, 2005. While she was gone, defendant's hot water heater ruptured. When defendant returned home, her condominium was infested with mold. There were patches of mold of all different colors all over the walls and ceilings in her kitchen, family room, and dining area. The hot water tank was spewing water a few feet from the shared foundation wall and there were several inches of standing water on the floor and surface mold throughout the entire basement.

Beginning in February 2005, Layla and Sebastian began to experience flu-like symptoms including: diarrhea, vomiting, congestion, and nosebleeds. Over the next few months, their health conditions worsened. They frequently had to be taken to the doctor and the emergency room. Antibiotics and breathing treatments, among others, did not improve their conditions. By May, Layla's fingernails and lips were turning blue and she was gasping for air. Sebastian's health was also worse and he continued to have a cough, a fever, and low oxygen levels. Neither child responded to aggressive treatment. Finally, on May 18, 2005, only a few days before defendant returned and discovered the mold, Kimberly and the children moved out of the condominium and into Kimberly's parent's house. Following their removal from the condominium, Sebastian and Layla's health began to slowly improve.

Mold experts concluded that the interior of defendant's condominium was so grossly contaminated that the inside needed to be demolished. Plaintiffs' microbial expert at trial concluded that two of the molds identified in both plaintiffs' and defendant's condominiums were penicillium and aspergillus, which are molds that are known to produce toxins that can affect human health and pose safety issues. He further concluded that the levels of these two molds were unusually high, to the extent that both plaintiffs' and defendant's condominiums would not be healthy environments in which to live.

Plaintiffs filed a complaint against defendant and others. Following a jury trial, plaintiffs were awarded $303,260 in damages against defendant. After the entry of the judgment, defendant filed motions for JNOV and for a new trial, arguing that plaintiffs failed to present any expert testimony regarding mold being the cause of their personal injuries. The trial court denied defendant's motions. Defendant now appeals as of right.

II. MOTIONS FOR A DIRECTED VERDICT AND JNOV

Defendant asserts that the trial court erred by denying defendant's motions for a directed verdict and for JNOV. We disagree.

We review de novo a trial court's decision on a motion for a directed verdict. Roberts v. Saffell, 280 Mich.App. 397, 401, 760 N.W.2d 715 (2008). We must view the evidence in the light most favorable to the nonmoving

party. Moore v. Detroit Entertainment, LLC, 279 Mich.App. 195, 201-202, 755 N.W.2d 686 (2008). "A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ." Roberts, 280 Mich.App. at 401, 760 N.W.2d 715.

The trial court's decision on a motion for JNOV is reviewed de novo. Sniecinski v. Blue Cross & Blue Shield of Michigan, 469 Mich. 124, 131, 666 N.W.2d 186 (2003). When reviewing the denial of a motion for JNOV motion, the appellate court views the evidence and all legitimate inferences therefrom in the light most favorable to the nonmoving party to determine if a party was entitled to judgment as a matter of law. Id. The motion should be granted only when there is insufficient evidence presented to create a triable issue for the jury. Amerisure Ins. Co. v. Auto-Owners Ins. Co., 262 Mich.App. 10, 18-19, 684 N.W.2d 391 (2004). When reasonable jurors could honestly reach different conclusions regarding the evidence, the jury verdict must stand. Zantel Marketing Agency v. Whitesell Corp., 265 Mich.App. 559, 568, 696 N.W.2d 735 (2005).

Plaintiffs claim that defendant's negligence caused their illnesses and mental and emotional anguish. Accordingly, as in any case alleging simple negligence under Michigan law, plaintiffs must demonstrate: "(1) that defendant owed them a duty of care, (2) that defendant breached that duty, (3) that plaintiffs were injured, and (4) that defendant's breach caused plaintiffs' injuries." Henry v. Dow Chem. Co., 473 Mich. 63, 71-72, 701 N.W.2d 684 (2005).

Proving causation requires proof of both cause in fact and proximate cause. Case v. Consumers Power Co., 463 Mich. 1, 6 n. 6, 615 N.W.2d 17 (2000). "Cause in fact requires that the harmful result would not have come about but for the defendant's negligent conduct." Haliw v. Sterling Hts., 464 Mich. 297, 310, 627 N.W.2d 581 (2001). Cause in fact may be established by circumstantial evidence, but such proof "must facilitate reasonable inferences of causation, not mere speculation." Skinner v. Square D. Co., 445 Mich. 153, 164, 516 N.W.2d 475 (1994). A plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred. Id. at 164-165, 516 N.W.2d 475. A mere possibility of such causation is not sufficient; and when the matter remains one of pure speculation and conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict in favor of the defendant. Id. at 165, 516 N.W.2d 475. Normally, the existence of cause in fact is a question for the jury to decide, but if there is no issue of material fact, the question may be decided by the court. Holton v. A+ Ins. Assoc., Inc., 255 Mich.App. 318, 326, 661 N.W.2d 248 (2003).

Defendant urges this Court to adopt the requirement that, in order to prove causation in a toxic tort case, a plaintiff must show both that the alleged toxin is capable of causing injuries like those suffered by the plaintiff in human beings subjected to the same exposure as the plaintiff, and that the toxin was the cause of the plaintiff's injury. They urge this Court to find that direct expert testimony is required to establish the causal link, not inferences. We decline to adopt this requirement. There is no published Michigan caselaw on this subject.

In her brief, defendant urged this Court to follow the federal district court for the Western District of Michigan's decision in Gass v. Marriott Hotel Services, Inc., 501 F.Supp 2d 1011 (W.D.Mich., 2007). However, since defendant submitted her brief, that decision was overturned by Gass v. Marriott Hotel Services, Inc., 558 F.3d 419 (C.A.6, 2009). The district court opinion concluded that under Michigan law, the plaintiffs were required to introduce an essential element of admissible expert testimony in order to prove causation. Gass, 501 F.Supp 2d at 1026. The Circuit Court rejected that conclusion, and stated:

Defendants argue that this Court's decision in Kalamazoo River Study Group v. Rockwell International Corp., 171 F.3d 1065 (6th Cir.1999), requires Plaintiffs to introduce an "essential element" of "admissible expert testimony" in order to prove causation. That case, however, cannot be read so broadly. Kalamazoo River was an environmental contamination case, involving 38 miles of shoreline which was polluted by the chemical polychorinated biphenyl ("PCB"). Id. at 1066.

In holding that the defendant could not be held liable for the PCB contamination along the shoreline, the court noted that the plaintiff presented no reliable expert testimony which refuted evidence showing that PCB from the 1989 leak never reached the nearby waterway. Id. at 1072-73. Accordingly, the court held that, "[t]he analytical gap between the evidence presented [by the plaintiff] and the inferences to be drawn . is too wide. Under such circumstances, a jury should not be asked to speculate on the issue of causation." Id. at 1073 (quoting Turpin v. Merrell Dow Pharms., Inc., 959 F.2d 1349, 1360-61 (6th Cir.1992)).

Contrary to Defendants' assertions, the principle governing Kalamazoo River is not applicable to Plaintiffs' claims. In other words, while the Kalamazoo River defendant proved an absence of causation by introducing objectively verifiable scientific evidence, Defendants have not done so. Though it is certainly reasonable, as this Court held in Kalamazoo River, 171 F.3d at 1072-73, to require a party to refute scientific evidence with scientific evidence, Plaintiffs are not required to produce expert testimony on causation.

* * *

We conclude that when a plaintiff claims that a defendant was negligent in filling a hotel room with a cloud of a poisonous substance, and there is evidentiary support for such claims, expert testimony is not required to show negligence, and the district court erred in holding otherwise. [Gass, 558 F.3d at 432-434.]

Here, like in Gass, defendant has not submitted any scientific evidence that the mold in her condominium could not have cause plaintiffs' injuries. Defendant speculates that the children's illness was caused by a virus, because at one point the children's doctor treated them for a virus. However, she offers no scientific evidence that a virus did indeed cause the children's illness.