

2014 IL App (2d) 140163-U  
No. 2-14-0163  
Order filed December 19, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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SANDI MUNYON	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellant,	)	
v.	)	No. 12-L-312
	)	
GREAT AMERICA, LLC,	)	Honorable
	)	Thomas M. Schippers,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices Hudson and Spence concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court did not err in denying plaintiff's motion for a judgment *n.o.v.*, or, in the alternative, denying the motion for a new trial. The trial court did not abuse its discretion by instructing the jury on contributory negligence. Affirmed.
- ¶ 2 Plaintiff, Sandi Munyon, filed a negligence action against defendant, Great America, LLC, for injuries she suffered while attempting to disembark from an amusement ride operated by defendant. Plaintiff alleged that defendant failed to provide her with assistance that it knew she would need to disembark safely. The trial court instructed the jury on contributory negligence and it returned a verdict for defendant. Plaintiff contends on appeal that the trial court erred in denying her motion for a judgment notwithstanding the verdict (judgment *n.o.v.*)

or, in the alternative, denying her motion for a new trial. She also contends that the court abused its discretion in instructing the jury on contributory negligence. We affirm.

¶ 3

### I. BACKGROUND

¶ 4 The following facts are undisputed. Plaintiff fell and broke her wrist while attempting to disembark the “Vertical Velocity” amusement ride operated by defendant. Plaintiff was 51 years old, and 5’2”. She was at defendant’s theme park with her brother, niece, and boyfriend. While waiting in line to board the ride, plaintiff noticed the minimum height sign and believed that she was tall enough to ride safely. Defendant confirmed that plaintiff met the height requirement.

¶ 5 While boarding, plaintiff required the assistance of one of defendant’s ride attendants. The attendant kneeled on one leg and provided her other leg to plaintiff to use as a step. Plaintiff was seated and rode next to her boyfriend, who did not offer or provide her assistance in boarding.

¶ 6 There is a 90-second “cool down” period before the ride is re-launched with new passengers. During that time, the alighting passengers must disembark and clear the area to allow new passengers to enter and board the ride. Defendant’s actual practice was to concurrently allow new, loading passengers into the unloading/loading area while the alighting passengers unload.

¶ 7 Defendant testified that its general operating policy provides that attendants must assist a rider when the rider requests it or if the attendant knows that a rider needs help. In the event that an attendant knew that a rider required special assistance to embark, the attendant was to keep in mind that he or she was to help that rider if that rider needed assistance in disembarking. Sometimes it is hard to “keep everybody in check, so it helps when someone hails” an assistant for help.

¶ 8 Defendant played a recording in the unloading area that stated:

“Welcome back. When the train stops, unfasten your safety belt and push up on your harness. Please use extra caution as you step out of your seat. Watch your step as you exit to your left and down the exit ramp. Thank you for challenging Vertical Velocity. Have a Six Flags day!”

¶ 9 Plaintiff heard the recording and took it to mean that she was required to get down from her seat herself without assistance. Plaintiff was never told that she should wait for help. When the ride stopped, plaintiff’s safety restraint automatically released. Plaintiff’s boyfriend, who was riding next to her, hopped out of his seat and left the unloading area without offering or providing assistance to plaintiff.

¶ 10 However, plaintiff waited about 10 to 15 seconds and looked around the area to see if an assistant could possibly help her in disembarking, but she did not see one. While plaintiff was still seated and waiting for assistance in disembarking, the gates restraining the next group of passengers opened and the new passengers began to enter the loading/unloading area. Plaintiff still saw no one to assist her and feeling pressured by the awaiting passengers, and in the absence of any attendant to help her, plaintiff attempted to disembark on her own. She fell head first to the deck where she lay unassisted by any of defendant’s staff until she was helped by another exiting passenger and by her boyfriend, who had returned to the area.

¶ 11 Plaintiff filed a negligence action against defendant as a common carrier. Plaintiff alleged that defendant failed to provide her with assistance that it knew she would need to safely alight from its ride because it knew plaintiff required assistance in boarding the ride and allowed a new batch of passengers to begin loading the ride before plaintiff was able to disembark safely, in violation of its own procedures.

¶ 12 At defendant’s request, and over plaintiff’s objection, the jury was instructed on contributory negligence based on plaintiff’s failure to “request” or “beckon” assistance in disembarking the ride. The jury rendered a general verdict in favor of defendant. The trial court entered judgment on the verdict and subsequently denied plaintiff’s motion for a judgment *n.o.v.*, or alternatively, for a new trial. Plaintiff timely appeals.

¶ 13 **II. ANALYSIS**

¶ 14 **A. Contributory Negligence**

¶ 15 We start by considering plaintiff’s contention that the trial court erred by submitting the instruction on contributory negligence. Plaintiff asserts that the trial court abused its discretion because (1) the evidence did not support an instruction on contributory negligence; (2) defendant did not plead the affirmative defense; (3) the instructions were confusing and misleading on the standard of care applicable to plaintiff and defendant; and (4) by allowing a common carrier to assert a standard contributory negligence defense, it undermined “the highest degree of care” expected of a common carrier.

¶ 16 **1. Sufficient Evidence**

¶ 17 Plaintiff argues that the evidence did not support a jury instruction on contributory negligence. Defendant sought to prove that plaintiff was contributorily negligent by disembarking the ride without requesting or beckoning for the assistance of an attendant and/or stool, when plaintiff knew or should have known that doing so safely would be difficult.

¶ 18 “A jury instruction is justified if it is supported by some evidence in the record, and the trial court has discretion in deciding which issues are raised by the evidence.” *Clarke v. Medley Moving & Storage, Inc.*, 381 Ill. App. 3d 82, 91 (2008). “Contributory negligence is defined as a lack of due care for one’s own safety as measured by an objective reasonable person standard.”

*McCarthy v. Kunicki*, 355 Ill. App. 3d 957, 972 (2005). “Instructions regarding plaintiff’s contributory negligence are not proper where there is no testimony or other evidence from which a finding of contributory negligence might be made.” *Id.* In the absence of any evidence of a plaintiff’s contributory negligence, it is error to submit a defendant’s instructions on contributory negligence over plaintiff’s objections. *Hickox v. Erwin*, 101 Ill. App. 3d 585, 590 (1981).

¶ 19 During the instruction conference, the trial court agreed that there was “not a whole lot” of evidence that would warrant the instruction, but there was “enough to get to a jury.” All that is necessary is some evidence in the record to support the instruction. Contrary to plaintiff’s assertion, defendant correctly points to plaintiff’s testimony that she knew she needed help in getting on the ride and, when the ride stopped, she looked for and expected to have assistance in disembarking. Plaintiff waited only 10 to 15 seconds for someone to help her before becoming “panicked” and attempting to alight herself. Thus, based on the evidence, a factual issue was raised for the jury to decide whether plaintiff knew or should have known that disembarking on her own would be difficult to do so safely. Consequently, the evidence was sufficient to instruct the jury on the issue of plaintiff’s failure to use due care, and the trial court did not abuse its discretion by allowing the jury instruction on contributory negligence.

¶ 20 2. Defense of Contributory Negligence Not Pled

¶ 21 Plaintiff next maintains that, in its answer, defendant did not allege “failed to request or beckon” as contributory negligence and never amended its answer to plead the affirmative defense. Accordingly, plaintiff argues that, because defendant failed to plead contributory negligence, it was reversible error to charge the jury on this allegation.

¶ 22 “Generally, in order to avoid surprise to the opposite party, an affirmative defense must be set out completely in a party’s answer to a complaint and failure to do so results in waiver of

the defense.” *Miller v. Lockport Realty Group, Inc.*, 377 Ill. App. 3d 369, 375 (2007). While defendant’s answer may not have alleged specifically that plaintiff “failed to request or beckon,” it did plead contributory negligence as an affirmative defense.

¶ 23 The “failure to request or beckon” theory could not have taken plaintiff by surprise where defendant specifically pled contributory negligence and the record reveals that the factual allegations underlying the defense were well known to plaintiff. See *Chemical Bank v. Paul*, 244 Ill. App. 3d 772, 784 (1993) (decision to allow amendment of pleadings is within sound discretion of trial court and should not be allowed where it would result in surprise or prejudice to other party). At trial, plaintiff acknowledged that she waited for someone to assist her in disembarking the ride. Hence, plaintiff was not forced to revise her trial strategy, and the allowance of a contributory negligence instruction was not an abuse of discretion.

¶ 24 3. Inconsistent Definition of Negligence

¶ 25 Plaintiff next claims that the trial court abused its discretion by giving confusing and misleading instructions on the standard of care applicable to plaintiff and defendant. Plaintiff points out that the trial court’s instructions defined “negligence” for defendant as “the highest degree of care” but defined “negligence” for plaintiff as the failure to exercise “ordinary care.” Plaintiff contends that asking lay jurors to reconcile this inconsistency and then apply these standards to the evidence “asks too much.”

¶ 26 Illinois Supreme Court Rule 239(a) (eff. Jan. 1, 1999) requires that “[w]henver Illinois Pattern Jury Instructions (IPI), Civil, contains an instruction applicable in a civil case, giving due consideration to the facts and the prevailing law, and the court determines that the jury should be instructed on the subject, the IPI instruction shall be used, unless the court determines that it does not accurately state the law.” Ill. S. Ct. R. 239(a) (eff. Jan. 1, 1999). If the trial court finds the

IPI instructions fail to accurately state the law, it may tender non-IPI instructions. *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002). The court has wide latitude in determining which instructions are appropriate, and its decisions will not be overturned absent an abuse of discretion. *Id.* at 273. “The standard for deciding whether a trial court abused its discretion is whether, taken as a whole, the instructions fairly, fully, and comprehensively apprised the jury of the relevant legal principles.” *Id.* at 273-74. “A reviewing court ordinarily will not reverse a trial court for giving faulty instructions unless they clearly misled the jury and resulted in prejudice to the appellant.” *Id.* at 274.

¶ 27 The trial court gave IPI, Civil, No. 10.01 (2011) to the jury defining “negligence,” “as it pertained to plaintiff only,” to mean “the failure to do something which a reasonably careful person would do, or the doing of something which a reasonably careful person would not, under circumstances similar to those shown by the evidence.” The trial court further instructed that the words “ordinary care” meant the care a “reasonable person would use under the circumstances similar to those shown by the evidence.” The court also gave IPI, Civil, No. 100.01 (2011) to the jury that defendant has “a duty to its passengers to use the highest degree of care consistent with the mode of conveyance used and the practical operation of its business as a common carrier by an amusement ride,” and that its failure to fulfill this duty is negligence.

¶ 28 The common carrier instruction was applicable specifically to defendant and the jury was informed that, if defendant did not exercise the highest degree of care to its passengers, it should be found negligent. The other instruction properly instructed the jury of the general duty of plaintiff. These instructions, taken as a whole, fairly, fully, and comprehensively apprised the jury of the relevant legal principles. Moreover, jurors are presumed to follow the instructions given to them (*In re Detention of Lieberman*, 379 Ill. App. 3d 585, 605 (2007)). Accordingly,

we find the trial court did not abuse its discretion in giving the instructions. See *New v. Pace Suburban Bus Service, a Div. of Regional Transit Authority*, 398 Ill. App. 3d 371, 381-82 (2010) (giving both instructions did not mislead the jury where the common carrier instruction was made specifically applicable to defendant and the general negligence instruction applied to all drivers on the road).

¶ 29

#### 4. Policy

¶ 30 Plaintiff argues next that allowing a common carrier to assert a standard contributory negligence defense undermines the “highest degree of care” expected of a common carrier. Plaintiff acknowledges that what she “urges” here is a modification upon Illinois’ common law, which has long allowed common carriers to defend on the basis of plaintiff’s contributory negligence. She maintains that allowing common carriers to affirmatively defend against a passenger’s injury claim by asserting the passenger’s comparative fault, but only that fault which is more culpable than simple negligence, would more closely align the law with the public safety considerations on which the common carriers’ duty to exercise the “highest degree of care” to its passengers is based without unfairly exposing common carriers to tort liability. She further asserts that it also would allow trial courts to avoid the current flaw in Illinois Pattern Jury Instructions that provide two competing definitions of “negligence” to be applied by juries considering a common carrier asserting a passenger’s contributory negligence as a defense.

¶ 31 Plaintiff’s attempt to analogize a common carrier’s standard of care to the strict products liability cases and the more stringent standard of comparative fault in those cases is inapplicable. There is simply no case law to support this broad public policy argument. “A common carrier is not an insurer of the absolute safety of its passengers, but it does have the heightened duty to exercise the highest degree of care consistent with the practical operation of its conveyances to

protect its passengers.” *New*, 398 Ill. App. 3d at 379 (citing *Browne v. Chicago Transit Authority*, 19 Ill. App. 3d 914, 917 (1974)). The Illinois Pattern Jury Instructions strike the balance between placing a higher burden on a common carrier while not making it an absolute insurer of the safety of its passengers no matter what the circumstances are surrounding the injury. Accordingly, we reject plaintiff’s argument.

¶ 32 B. Sufficiency of the Evidence

¶ 33 Plaintiff contends that the trial court erred in denying her motion for a judgment *n.o.v.*, or in the alternative, denying her motion for a new trial. A judgment *n.o.v.* can be entered only if all of the evidence, viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict could ever stand. *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967); *A.D. v. Forest Preserve District of Kane County*, 313 Ill. App. 3d 919, 922 (2000). We review *de novo* the trial court’s decision to grant or deny a motion for a judgment *n.o.v.* *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1125 (2000).

¶ 34 In contrast, on a motion for a new trial, the trial court will weigh the evidence and order a new trial if the verdict is contrary to the manifest weight of the evidence. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury’s findings are unreasonable, arbitrary, and not based upon any of the evidence. *Id.* This court will not reverse the trial court’s ruling on a motion for a new trial unless it is affirmatively shown that the trial court abused its discretion. *Id.* at 455.

¶ 35 Plaintiff’s conclusory argument that there was no evidentiary support for the jury’s verdict fails to account for her testimony. While defendant did admit to acts that would support a determination of negligence, plaintiff’s own testimony created an issue of fact concerning

whether she was contributorily negligent. As previously stated, plaintiff needed assistance boarding the ride. She also testified that she looked for and expected to have help in disembarking. All plaintiff had to do was remain in her seat when the ride stopped until someone assisted her. The evidence showed that defendant's procedures specified that the ride would not be "re-launched" for at least 90 seconds. However, plaintiff only waited 10 to 15 seconds after the ride stopped before becoming "panicked" and attempting to disembark on her own. Plaintiff asserted that it was reasonable for her to disembark by herself, while defendant asserted that she disembarked without requesting assistance when she knew or should have known that doing so safely would be difficult. Consequently, the jury was required to weigh the evidence, and it accepted defendant's interpretation of the facts. Having concluded that the jury was properly instructed on contributory negligence, there was sufficient evidence in the record from which the jury reasonably could conclude that plaintiff was 51% or more responsible for her injuries.

¶ 36 Plaintiff cites *Browne v. Chicago Transit Authority*, 19 Ill. App. 3d 914 (1974), in support of her argument and distinguishes it from *New*. Plaintiff asserts that, because there was no evidentiary support for the verdict in this case, the facts in *Browne* support reversal. In *Browne*, there was no issue of contributory negligence submitted to the jury because the trial court found that the plaintiff was in the exercise of ordinary care for her safety and that the only issue was whether the defendant was negligent. *Id.*, 19 Ill. App. 3d at 917. The facts of the case are distinguishable because here the evidence raised the issue as to whether plaintiff failed to use due care in disembarking the ride. In *New*, as in this case, the evidence supported the jury's finding that the plaintiff was contributorily negligent. *New*, 398 Ill. App. 3d at 379-80.

¶ 37 In sum, viewing all of the evidence in a light most favorable to defendant, it cannot be said that the evidence so overwhelmingly favors plaintiff that no contrary verdict could stand or that the jury verdict is so arbitrary or unreasonable that only an opposite conclusion is evident. Therefore, the trial court did not err in denying the motion for judgment *n.o.v.* and it did not abuse its discretion in denying plaintiff's motion for a new trial.

¶ 38

### III. CONCLUSION

¶ 39 For the reasons stated, we affirm the judgment of the circuit court of Lake County.

¶ 40 Affirmed.