

RENDERED: FEBRUARY 23, 2007; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2005-CA-002157-MR

MAINSTREAM TRANSPORTATION COMPANY

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE F. KENNETH CONLIFFE, JUDGE  
ACTION NO. 04-CI-008942

ANN E. BEARD, ADMINISTRATRIX  
OF THE ESTATE OF MARTHA ANN  
RANKIN, DECEASED

APPELLEE

OPINION  
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; MOORE, JUDGE; HOWARD,<sup>1</sup> SPECIAL  
JUDGE.

MOORE, JUDGE: Appellee, Ann E. Beard, the administratrix of the estate of Martha

Ann Rankin, filed a negligence action against Appellant, Mainstream Transportation

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<sup>1</sup> Special Judge James I. Howard concurred in this opinion prior to the expiration of his Special Judge assignment effective February 9, 2007. Release of the opinion was delayed by administrative handling.

Company, in Jefferson Circuit Court. Appellant filed a Motion for Summary Judgment arguing that the evidence failed to demonstrate any negligence attributed to Mainstream. The trial court denied the request and held that the jury would be permitted to hear the evidence and evaluate any liability based on the doctrine of *res ipsa loquitur*. The matter proceeded to trial and at the close of each side's proof, Appellant requested a directed verdict. The trial court denied both requests. The matter was submitted to the jury, and it returned a verdict awarding the estate \$34,372.45 for medical expenses and an additional \$18,000 for pain and suffering. Appellant filed a timely Notice of Appeal; after careful review, we affirm.

The salient facts of this matter include that prior to her death, Martha Ann Rankin was in very poor health. She was blind, described as a “brittle diabetic” and suffered from a heart condition and other health problems. Ms. Rankin used a wheelchair for mobility. On the day of the incident, she was being transported in a van operated by Appellant's employee. The employee, Connie Michaud, had only worked two days for Appellant. Ms. Michaud assisted Ms. Rankin aboard the van and buckled her into a seatbelt that secured her in her wheelchair. Appellant provided evidence at trial that Ms. Michaud used straps to secure all four wheels of the wheelchair to the floor of the van so it would not move during the trip. Ms. Michaud acknowledged that if the wheelchair is properly strapped into the van, it cannot move.

While driving, Ms. Michaud looked in the back of the van and saw that Ms. Rankin's wheelchair had tipped over backwards. She testified that she had not heard anything unusual to draw her attention to the situation. Ms. Rankin was taken to Baptist

Hospital East and admitted for treatment of a subdural hematoma and multiple fractured ribs. She was later re-admitted to Jewish Hospital for continuing care of injuries related to the wheelchair incident. She died approximately a year and a half after the incident; it is undisputed that the cause of her death was not related to the accident.

The issues on appeal are first, that the trial judge improperly allowed the jury to consider the doctrine of *res ipsa loquitur* because the essential elements were not shown by any competent evidence; second, that the trial judge allowed the jury to reach a verdict based on speculation and conjecture; third, that the jury was instructed on medical expenses which were not related to the accident involved in the action; and fourth, that the jury was instructed regarding medical expenses not actually incurred.

### **I. Standard Of Review**

A reviewing court cannot substitute its judgment for that of the trial judge unless the decision is clearly erroneous. *Davis v. Graviss*, 672 S.W.2d 928 (Ky. 1984). There must be a complete absence of proof on a material issue or no disputed issues on which reasonable minds could differ before a trial court should remove a case from the hands of a jury. The conscience of the community speaks through the verdict, not the trial court's opinion of the evidence. *Horton v. Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985). The decision in this case was properly in the hands of the jury. We affirm that judgment.

### **II. Res Ipsa Loquitur**

The doctrine of *res ipsa loquitur* dates from the late 19<sup>th</sup> century. *See Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863). Literally translated it means “the

thing speaks for itself.” *Black’s Law Dictionary* 1336 (8<sup>th</sup> ed. 2004). In modern usage it is used when, in some circumstances, the facts alone raise an inference of negligence.

There are three essential elements needed to prove *res ipsa loquitur*. First, the cause of the injury must be under the control of the defendant. Second, circumstances, according to common knowledge and experience, must create a clear inference that but for the negligence, the injury would not have happened. Third, the injury must have resulted from the situation caused by the negligence. *See J.C. Penny Co. v. Livingston*, 271 S.W.2d. 906 (Ky. 1954).

The central question in the current matter is the issue of control of the instrumentality that caused the injury. The facts are clear and unclouded. Ms. Rankin was in a wheelchair and was loaded and strapped into Appellant's van by Appellant's employee. Eventually the straps holding her wheelchair came loose, and Ms. Rankin's wheelchair flipped over backwards causing injury to Ms. Rankin.

The jury found Appellant's employee had control of the situation. While there are a myriad of extreme possibilities that may have caused the wheelchair to come loose, those options were for the jury to determine. The jury viewed the evidence of other possible intervening causes and determined that it was reasonable to believe that the acts or failures of Appellant's employee were negligent and caused the incident. It remained possible for a different person, such as Ms. Rankin, to exert control over the wheelchair straps; however, the jury concluded that the ultimate control rested in Appellant's employee. We cannot say this conclusion is unreasonable.

There are situations where the question of control of the instrumentality becomes an issue of whether or not exclusive control is required. *See Schroerlucke v. McDaniel Funeral Home*, 291 S.W.2d 6 (Ky. 1956). This is not the current situation. A plaintiff is not required to exclude all other possible conclusions. It is enough if a jury may reasonably conclude that the injury was more probably than not caused by the negligence of the defendant. Exclusive control is simply one manner of proving that the responsibility rests upon a certain party. It is not an essential element of the action. As in the current case, that responsibility may be shown in other ways. Accordingly, we find no error.

### **III. Jury Speculation**

Appellant argues that the facts were insufficient for a jury to find negligence without guessing or speculating about the cause of the accident. Speculation or conjecture is not a valid basis for a recovery at law. *See Brown Hotel v. Levitt*, 209 S.W.2d 70 (Ky. 1948). There is nothing in the record to suggest that the jury guessed or speculated. The very nature of this situation justified an inference of negligence. *See Bell & Koch, Inc. v. Stanley*, 375 S.W.2d 696 (Ky. 1964). The jury evaluated this inference in a reasonable manner.

### **IV. Recovery For Medical Expenses**

Appellant next suggests that the trial court inappropriately instructed the jury concerning an award for Ms. Rankin's actual medical expenses. The argument presented is in actuality a disagreement with the jury's findings. It is undisputed that Ms. Rankin suffered from a variety of maladies. When she was admitted to the hospital a

second time after the accident, she suffered from breathing problems and chest pain associated with the broken ribs from the accident. Her musculoskeletal injury was secondary to the chest pain she had developed from the accident. Her doctor's opinion was that the injury was caused by blunt trauma. He specifically testified that her prior conditions, including on-going heart and pulmonary problems, were not a cause of her re-admittance to the hospital. Recovery of actual expenses in this kind of situation is properly limited to actual medical expenses directly associated with the negligent acts or omissions but additionally, costs associated with any pre-existing condition aggravated by those same negligent acts or omissions may be recovered. *See Drury v. Spaulding*, 812 S.W.2d 713 (Ky. 1991).

Jury instruction number II explicitly states that the jury was to limit any recovery to costs “directly sustained by reason of the accident” and was then required to include “compensation for losses attributable or related to any pre-existing physical condition.” That compensation was however limited “to the extent that such pre-existing condition was aroused or aggravated by the accident.” Ms. Rankin had a number of medical problems unrelated to the accident. We agree with the trial court that trial testimony does establish a basis in fact for all of the amounts awarded as damages. The jury instructions encompassed the entire range of possible recovery and were bounded by the facts and the applicable law. Accordingly, we find no error.

#### **V. Recovery For Medical Expenses Paid By Insurance**

The final issue presented is the question of insurance payments. The evidence in the record clearly shows that insurance proceeds paid most of the medical

bills. The costs of those medical expenses were awarded as damages by the jury. The result is that the estate was awarded a sum of money to pay medical bills that had already been paid. Appellant relies on the holding in *Kentucky Cent. Ins. Co. v. Schneider*, 15 S.W.3d 373 (Ky. 2000) to negate such so called “double recovery” or “collateral source payments.”

The *Schneider* case is distinguished from the facts of the current case and is not applicable. The questions before the Court in that case involved uninsured motorist claims and punitive damages. Neither material fact is present in the current case. Receipt of collateral source payments may not negate a tort remedy as a punishment for the prudence of obtaining insurance. *O’Bryan v. Hedgespeth*, 892 S.W.2d 571 (Ky. 1995). The questions before the trial court were who was responsible for Ms. Rankin's injuries and to what degree they were responsible as measured by her monetary losses.

Further, collateral source payment evidence was excluded pre-trial when the trial court granted Appellee's Motion *In Limine*. Appellant did not object to that motion and cannot now raise an issue once waived.

Upon careful review and consideration, we find no error. The decision in this case was appropriately in the hands of the jury. Accordingly, we hereby affirm.

ALL CONCUR.

**BRIEF FOR APPELLANT:**

David S. Strite  
Beth Coppock Massey  
Louisville, Kentucky

**BRIEF FOR APPELLEE:**

Kenneth H. Baker  
Louisville, Kentucky