STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY TYLER, Next Friend of SARAH TYLER, Minor, and Individually, and KAREN TYLER,

Plaintiffs-Appellants,

v

FOWLERVILLE COMMUNITY SCHOOL DISTRICT,

Defendant-Appellee,

and

LISA PARKE, MARIE HACKETT, and WENDY GREEN,

Defendants.

UNPUBLISHED
April 5, 2011

No. 295906
Livingston Circuit Court
LC No. 08-023710-NZ

Before: SHAPIRO, P.J., and HOEKSTRA and TALBOT, JJ.

PER CURIAM.

In this action for a violation of the Persons With Disability Civil Rights Act (PWDCRA), MCL 37.1101 *et seq.*, plaintiffs appeal as of right the judgment of no cause of action entered after a jury trial. Specifically, plaintiffs appeal the December 21, 2009 order denying their motion for judgment notwithstanding the verdict or new trial. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

Sarah Tyler, the daughter of plaintiffs Jeffrey and Karen Tyler,[1] is cognitively impaired. She has also been diagnosed with ADHD, bipolar disorder, and expressive receptive communication problems. Sarah has been a special education student in defendant school

[1] Jeffery Tyler died while the case was proceeding in the trial court. After his death, Karen Tyler was appointed Sarah's next friend.

district since kindergarten. Although Sarah had progressed to the eighth grade, she functioned at the level of a second or third grader. In compliance with federal and state law, defendant created an individualized education plan (IEP) for Sarah for each academic year. In February 2006, plaintiffs requested that Sarah's IEP include a note "to keep Sarah safe. Keep her from the mean kids. So she isn't tricked into doing something she don't [sic] want to do."[2] A subsequent revision to Sarah's IEP for the 2005-2006 academic year, when Sarah was in the seventh grade, stated, "Sarah is easily swayed (gullible) by other students. Please keep her in safe situations."

One day in March 2007, Sarah and T.H., a male student, asked their special education teacher for permission to use the "sensory room," a triangular-shaped room off their classroom, to complete a math assignment. The teacher allowed them to use the room. In the sensory room, T.H. exposed his penis. He begged Sarah to touch it, and she did. Sarah also showed T.H. her breasts when asked. In addition, T.H. put his hands down Sarah's pants and digitally penetrated her.

Plaintiffs sued defendant for a violation of the PWDCRA.[3] They claimed that because Sarah had a disability that was unrelated to her ability to utilize and benefit from the educational opportunities offered by defendant, defendant had a duty to accommodate Sarah. They alleged that defendant violated its duty to accommodate Sarah when it failed to take reasonable measures to protect her from sexual assaults when it knew or should have known that Sarah was in danger of being sexually assaulted by other students in the special education program.[4]

During trial, the parties agreed on the verdict form to give the jury. The first question of the form asked:

> Have the Plaintiffs proved that Sarah Tyler suffers from a disability which is unrelated to her ability to utilize and benefit from the educational opportunities, programs and facilities at the Fowlerville Community Schools?

If the jury answered "yes," it was to proceed to question two; however, if it answered "no," the jury was not to answer any further questions.

Over the objection of plaintiffs, the trial court decided to hold closing arguments, instruct the jury, and let the jury begin deliberations late in the afternoon of the fifth day of trial, which

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[2] Sarah had previously reported to her mother that B.P., a male student, kept trying to touch her butt and kiss her.

[3] Plaintiffs also sued defendant for a violation of Title IX, 20 USC 1681, but they voluntarily dismissed that claim after defendant moved for summary disposition.

[4] Defendant moved for summary disposition on the PWDCRA claim. Their arguments did not claim that Sarah did not suffer from a qualified disability.

was a Wednesday. Plaintiffs had requested that the trial court wait until the following Monday to instruct the jury.[5]

In its closing argument, defendant did not dispute that Sarah was a person with a disability. It did argue, however, that Sarah's disability was related to her ability to utilize and benefit from the educational opportunities at defendant's school because her cognitive impairment interfered with her ability to take advantage of the educational opportunities. It contrasted Sarah with a hearing-impaired student who, when given the opportunity to sit in the front of the classroom, was able to utilize and benefit from the educational opportunities. Plaintiffs argued that Sarah's disability was not related to her ability to utilize and benefit from educational opportunities because the requested accommodation, to keep her in safe situations, did not affect her ability to participate in the special education program. Implicit in the parties' arguments was a disagreement whether Sarah's cognitive impairment, to be a qualified disability under the PWDCRA, had to be unrelated to her ability to utilize and benefit from the opportunities offered in a general education classroom or in a special education classroom.

As agreed by the parties, the trial court instructed the jury:

> We have a state law known as the Persons With Disabilities Civil Rights Act which provides that [defendant] shall accommodate a person with a disability for purposes of an education. Plaintiff has the burden of proving the following elements. A, that Sarah Tyler has a disability . . . . B, that her disability is unrelated to her ability to utilize and benefit from the educational institution. When I say unrelated to the individual's ability, I mean an individual's disability does not prevent the individual from utilizing and benefitting from educational opportunities, programs and facilities at the educational institution. . . .

The parties never requested the trial court to determine whether plaintiffs had to prove that Sarah's disability had to be unrelated to her ability to utilize and benefit from the opportunities offered in a general education or a special education classroom. Consequently, the jury received no further instructions on how to determine if Sarah's cognitive impairment was a qualified disability.

The jury returned a verdict approximately 40 minutes after retiring to the jury room for deliberations. It found that plaintiffs had failed to prove that Sarah suffered from a disability that was unrelated to her ability to utilize and benefit from the educational opportunities at defendant's school.

Plaintiffs moved for a new trial or judgment notwithstanding the verdict. They claimed that the jury's verdict was against the great weight of the evidence when the evidence established that Sarah was enrolled in the special education program and all of the evidence established that she participated in and benefitted from the program. They also argued that they were denied a

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[5] The trial court reserved Thursdays and Fridays for motion hearings and sentencings.

fair trial when the trial court presented the jury with the "Hobson's choice" of continuing its duties beyond the fifth day by fairly considering all of the evidence or reaching a verdict within 30 minutes to avoid returning for another day. The trial court denied plaintiffs' motion.

II. ANALYSIS

On appeal, plaintiffs argue that the trial court erred in denying their motion for a new trial. They argue that the jury verdict was against the great weight of the evidence and that they were denied a fair trial when the trial court forced the jury into abbreviated deliberations.

A. STANDARD OF REVIEW

We review a trial court's denial of a motion for a new trial for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

B. GREAT WEIGHT OF THE EVIDENCE

Plaintiffs claim that the jury's verdict was against the great weight of the evidence. They argue that because the evidence showed that Sarah was enrolled in defendant's special education program and that her cognitive impairment did not prevent her from utilizing and benefitting from the program's educational opportunities, the evidence established that Sarah's impairment was a qualified disability under the PWDCRA. We disagree.

A new trial may be granted where the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). In reviewing a motion for a new trial, a court is to determine whether the overwhelming weight of the evidence favors the losing party. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). The verdict may not be set aside unless the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *Id.*

The PWDCRA prohibits an educational institution from discriminating against an individual "because of a disability that is unrelated to the individual's ability to utilize and benefit from the institution or its services." MCL 37.1402(a). A "disability" is a "determinable physical or mental characteristic of an individual, which may result from disease, injury, congenital condition of birth, or functional disorder, if the characteristic . . . is unrelated to the individual's ability to utilize and benefit from educational opportunities, programs, and facilities at an educational institution." MCL 37.1103(d)(i)(C). "Unrelated to the individual's ability" is defined as "with or without accommodation, an individual's disability does not prevent the individual from . . . utilizing and benefiting from educational opportunities, programs, and facilities at an educational institution." MCL 37.1103(l)(iii).

Here, the foundation of plaintiffs' argument is that because Sarah's cognitive impairment did not prevent her from utilizing and benefiting from defendant's *special* education program, Sarah's disability is a qualified disability under the PWDCRA. Whereas defendant's argument on appeal is that because Sarah's cognitive impairment prevented her from utilizing and benefiting from the *general* education program, Sarah's disability is not a qualified disability.

The parties' arguments reflect the implicit disagreement that was in their closing arguments at trial, which was a disagreement that the parties never asked the trial court to resolve.

The jury was presented with two opposing theories for determining if Sarah's cognitive impairment was a qualified disability. Without any instruction from the trial court whether Sarah's impairment, to be a qualified disability, had to be unrelated to her ability to utilize or benefit from a general education classroom or only a special education classroom, the jury was free to use either theory to reach a verdict. By finding that plaintiffs failed to prove that Sarah suffered from a disability that was unrelated to her ability to utilize and benefit from the educational opportunities at defendant's school, the jury implicitly chose defendant's theory. There was substantial evidence to support defendant's claim that Sarah's cognitive impairment, with or without accommodation, prevented Sarah from utilizing or benefiting from the educational opportunities offered in a general education classroom. For example, Karen Tyler testified that Sarah functioned at the level of a child in second or third grade. In addition, Dennis McBride, defendant's Director of Special Education, testified that cognitively impaired students "do not have the ability . . . to succeed in the general education curriculum. . . . They just mentally don't have the capacity to do that." Accordingly, we conclude that the verdict was not against the great weight of the evidence.[6] The trial court did not abuse its discretion in denying plaintiffs' motion for a new trial based on the verdict being against the great weight of the evidence.

C. PROCEDURAL IRREGULARITY

Plaintiffs argue that they were denied full and fair consideration of their case by the jury when the trial court, knowing that the jurors were anxious to conclude the case, forced the jury into deliberations late on the fifth day of trial. We disagree.

A new trial may be granted for an irregularity in the proceedings. MCR 2.611(A)(1)(a). At the hearing on plaintiffs' motion for new trial, the trial court explained that it refused plaintiffs' request to postpone instructing the jury for five days because it wanted the jury to begin deliberations while the case was fresh in the jurors' minds. A trial court has wide discretion in matters of trial conduct. *City of Lansing v Hartsuff*, 213 Mich App 338, 349; 539 NW2d 781 (1995). We find no abuse of discretion in the trial court's decision to instruct the jury

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[6] Whether a student's cognitive impairment, to be a qualified disability under the PWDCRA, must be unrelated to the student's ability to utilize or benefit from the opportunities in a general education classroom or only those offered in a special education classroom presents an interesting legal issue. However, because the issue was not raised before the trial court and was not included in the questions presented in plaintiffs' appellate brief, the issue is not properly preserved or presented for our review, *Ammex, Inc v Dep't of Treasury*, 273 Mich App 623, 646; 732 NW2d 116 (2007); *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005), and we decline to address the issue. The parties were satisfied with the trial court's instructions to the jury, and plaintiffs, as the losing party, must accept the consequences of the jury not accepting its theory.

on the same day defendants rested. Consequently, there was no irregularity in the proceedings, and the trial court did not abuse its discretion in denying plaintiffs' motion for a new trial based on a procedural irregularity.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ Michael J. Talbot