

STATE OF MICHIGAN
COURT OF APPEALS

WANDA SMITH,

Plaintiff-Appellant,

v

NOPA, LTD. PARTNERSHIP d/b/a NORTH PARK
TOWERS,

Defendant-Appellee.

UNPUBLISHED
September 4, 1998

No. 202120
Oakland Circuit Court
LC No. 95-502435-NO

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from the denial of her motion for judgment notwithstanding the verdict or, in the alternative, additur or partial new trial on damages. We affirm in part, reverse in part, and remand for further proceedings.

On December 8, 1994, plaintiff parked her car at defendant's premises, North Park Towers in Southfield, on her way to work at Sandy's North Park Salon. While walking toward the building, plaintiff slipped on the sidewalk and fractured her ankle. Conflicting testimony was presented regarding whether the sidewalk had been cleared of ice and snow at the time of the accident. An orthopedic surgeon placed plaintiff's ankle in a cast for six weeks, after which the surgeon recommended that plaintiff wear a compression stocking to inhibit swelling and that she seek physical therapy. Conflicting evidence was presented regarding whether plaintiff wore the compression stocking, but undisputed testimony indicated that plaintiff did not attend physical therapy.

I

Plaintiff first argues that the trial court erred in failing to grant her motion for additur. Plaintiff argues that the jury's award of no damages for pain and suffering, in light of there being no dispute that she fractured her ankle, was so clearly and grossly inadequate and contrary to the great weight of evidence so as to shock the judicial conscience.

Contrary to plaintiff's contention, this issue is not decided under the "shock the judicial conscience" standard. Rather, a trial court's decision regarding a motion for additur is reviewed for an abuse of discretion. *Joerger v Gordon Food Service, Inc.*, 224 Mich App 167, 172; 568 NW2d 365 (1997); *Settingington v Pontiac General Hosp.*, 223 Mich App 594, 608; 568 NW2d 93 (1997); *Arnold v Darczy*, 208 Mich App 638, 639; 528 NW2d 199 (1995). The proper consideration when reviewing a grant or denial of additur is whether the jury award is supported by the evidence. *Settingington, supra*, p 608. The trial court's inquiry is limited to objective consideration regarding the evidence adduced and the conduct of the trial. *Id.*

A jury is free to accept or reject a plaintiff's testimony regarding damages. *Joerger, supra*, p 172. However, the verdict is inadequate if the jury ignored uncontroverted damages. *Burtka v Allied Integrated Diagnostic Services, Inc.*, 175 Mich App 777, 780; 438 NW2d 342 (1989). In this case, the jury found defendant negligent and returned a verdict awarding plaintiff \$2,500 in lost wages and medical expenses. The jury did not award plaintiff any damages for past or future pain and suffering.

Here, medical testimony established that plaintiff suffered a fracture on the outside portion of her right ankle and a soft tissue injury to the inside of her ankle. Plaintiff's ankle was placed in a cast and plaintiff was medically required to be non-weight bearing because of the swelling. Plaintiff was also prescribed pain medication because of the pain and swelling. Plaintiff was wearing a cast from the date of the injury (December 8, 1994) until it was removed on January 23, 1995. Further, one of plaintiff's treating physicians testified that when plaintiff was seen in mid-March, she had never been completely free of pain and swelling, and that these symptoms were consistent with her original injury. Plaintiff also testified as to the pain and how it affected her everyday life.

Although evidence was admitted that could support a finding that plaintiff failed to mitigate her physical suffering by failing to follow her physicians' recommendations that she attend physical therapy, this evidence could not serve to entirely negate a finding of physical pain and suffering at the time of the initial ankle fracture. The evidence was uncontroverted concerning plaintiff's initial injury and the pain and swelling that she incurred, and that such injury was the result of slipping and falling on defendant's sidewalk. While the jury could have rejected a claim for *future* noneconomic damages due to plaintiff's failure to mitigate, where the evidence was uncontroverted regarding the initial injury and the pain and suffering incurred, the jury's award of no past pain and suffering damages is clearly inadequate. See, e.g., *Arnold, supra*, p 640 (the trial court did not abuse its discretion in granting additur where the evidence was uncontroverted as to the plaintiff's scarring and lingering swelling and such uncontroverted evidence was ignored by the jury).

Accordingly, the trial court abused its discretion in denying plaintiff's motion for additur or motion for new trial on the issue of pain and suffering damages because the evidence was uncontroverted as to plaintiff's pain and suffering as a result of her ankle fracture. We remand to the trial court for it to compute additur with respect to plaintiff's pain and suffering damages in accordance with MCR 2.611(E)(1), or, if defendant does not consent to the judgment as found by the trial court, to grant a new trial regarding the issue of pain and suffering damages only. MCR 2.611(A)(1)(d).

II

Next, plaintiff argues that the trial court erred in permitting the testimony of defendant's insurance adjuster and in limiting plaintiff's cross-examination regarding the adjuster's alleged bias.

Plaintiff testified that after the accident, several of her bills, including her medical bills, were referred to collection. Although she eventually testified that defendant paid most of the medical bills, plaintiff implied that defendant had failed to pay some and was tardy in paying others. In addition, plaintiff testified that she did not attend physical therapy because she could not afford it, and that defendant would not pay for it in a way that would have allowed her to attend.

Defendant's insurance adjuster rebutted plaintiff's testimony regarding her medical bills and ability to attend physical therapy. The adjuster testified that all the medical bills plaintiff submitted within a year of the accident were paid. She further testified that the insurance policy in effect would have paid for plaintiff's participation in physical therapy for up to one year after the accident. Moreover, the adjuster testified that although she had requested the medical bills and records from plaintiff, plaintiff did not provide the information needed to process those claims, the information instead coming, eventually, directly from plaintiff's treating physician. This evidence indicates that it was through no fault of defendant's that plaintiff's medical bills were sent to collection.

The adjuster testified that it was her job to determine, and pay for, the medical expenses plaintiff incurred as the result of her accident. At no time did she specifically identify her employer, defendant's insurance company, or even mention the word insurance. Plaintiff argues that she should have been allowed to elicit testimony on cross-examination regarding the adjuster's specific job title and the identity of her employer. However, under these facts, questions regarding the specific identity of the witness' employer had no bearing on her bias or credibility. Further, MCL 500.3030; MSA 24.13030 forbids reference to available insurance coverage by any party. If the sole purpose of interjecting the subject of insurance is to inflame the passions of the jury so as to increase the size of the verdict, it is error requiring reversal. *Cogo v Moore*, 119 Mich App 747, 755; 327 NW2d 345 (1982), citing *Felice v Weinman*, 372 Mich 278; 126 NW2d 107 (1964); *Cacavas v Bennett*, 37 Mich App 599, 604; 194 NW2d 924 (1972). Here, there was no reason to inform the jury of the involvement in this case of an insurance company other than to alert the jury that defendant had insurance coverage, which might in turn have encouraged the jury to increase its award to plaintiff. Because this is precisely the reason for the policy against mentioning insurance at trials, the trial court did not abuse its discretion by sustaining defendant's objection to questions that would have specifically brought the existence of an insurance company in this situation to light.

Plaintiff also argues that because defense counsel made statements and elicited testimony regarding the limits of defendant's insurance coverage for medical expenses, and that this in turn may have misled the jury regarding the extent of defendant's liability coverage, plaintiff should have been allowed to elicit testimony from the adjuster clarifying the nature of her work. However, plaintiff has shown no correlation between limits on medical coverage and the availability of general liability coverage for purposes of justifying bringing the existence of liability insurance to the jury's attention in contravention of policy discussed above strongly disfavoring introduction of such evidence. For these

reasons, we find no abuse of discretion in the trial court's limiting of plaintiff's cross-examination of the adjuster.

III

Plaintiff additionally argues that the trial court erred in permitting certain other proceedings before the court, concerning civil settlements and criminal pleas, to take place while the jury was present but counsel was not. However, plaintiff raised no objection in this regard through the course of the trial and thus did not preserve this issue for appellate review. See *Providence Hosp v Nat'l Labor Union Health & Welfare Fund*, 162 Mich App 191, 194; 412 NW2d 690 (1987). Had plaintiff objected, a curative instruction, if necessary, could have been given, and the trial court may have then prevented the jury from observing parts of any further unrelated proceedings. Further, because plaintiff alleges no specific prejudice that may have resulted from the jury's incidental glimpse of fragments of other proceedings, other than speculating that the racial identity of two divorce litigants with that of plaintiff may have placed plaintiff in an unfavorable light before the jury which included no members of that race, plaintiff's argument has no merit.

IV

Plaintiff raises three additional issues in the argument section of her appellate brief, two concerning jury instructions and one concerning the trial court's treatment of plaintiff's counsel. However, we are not obliged to consider these issues because they were not included in plaintiff's statement of questions presented as required by MCR 7.212(C)(5). *Joerger, supra*, p 172. In addition, plaintiff did not object to the jury instructions in the proceedings below, thus failing to preserve issues regarding the instructions for appellate review. MCR 2.516(C). Further, our review of the record persuades us that all three of these additional claims of error do not require reversal.

Affirmed in part, reversed in part, and remanded to the trial court to determine additur, or, alternatively, to grant a new trial regarding the issue of pain and suffering damages only. Jurisdiction is not retained.

/s/ Kathleen Jansen