

STATE OF MICHIGAN
COURT OF APPEALS

WANDA SMITH,

UNPUBLISHED

Plaintiff-Appellant,

v

No. 202120

Oakland Circuit Court

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

LC No. 95-502435 NO

Defendant-Appellee.

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

O'CONNELL, J. (concurring in part and dissenting in part.)

I concur with Judge Jansen's analysis and disposition of Issues II, III, and IV. However, I respectfully dissent with respect to issue I.

A trial court's decision on 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). An abuse of discretion occurs where an unprejudiced person, considering the facts under which the trial court acted, would conclude that there was no justification for the court's decision. *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997). I find no abuse of discretion in the trial court's refusal to grant the motion for additur or partial new trial on damages.

"The proper consideration when reviewing a grant or denial of additur is whether the jury award is supported by the evidence." *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997); MCR 2.511(E)(1). A jury is free to accept or reject a plaintiff's testimony regarding damages. *Joerger, supra* at 172. In this area, a trial court is entitled to considerable deference on appeal; having had the opportunity to evaluate the jury's reaction to the witnesses and proofs, the trial court stands in the best position to consider the merits of a motion to adjust the jury's award of damages. *Palenkas v Beaumont Hospital*, 432 Mich 527, 533-534; 443 NW2d 354 (1989).

The jury found defendant negligent and returned a verdict awarding plaintiff \$2,500 in lost wages and medical expenses, but declined to award any damages for past or future pain and suffering.

This verdict need not be considered inconsistent. There is no legal requirement that a jury award damages simply because liability was found. *Joerger, supra* at 173. Indeed, before damages may be awarded, they must be proved. *Id.* Here, evidence was admitted that could support a finding that plaintiff failed to ease her physical suffering by failing to follow her physicians' recommendations that she attend physical therapy, for which defendant would have paid. The jury was properly instructed on the well-established duty of a person injured in tort to exercise ordinary care to mitigate damages. See *Domako v Rowe*, 184 Mich App 137, 149-150; 457 NW2d 107 (1990), *aff'd* 438 Mich 347; 475 NW2d 30 (1991). The jury could reasonably have concluded that plaintiff was not entitled to damages for pain and suffering because of her failure to mitigate her injuries. For the trial court to preserve the award of economic damages while calculating an additur covering pain and suffering would be to disregard the disfavored but real possibility that the jury's award ostensibly for economic damages only may by itself have covered the jury's assessment of *all* damages and defenses.¹

For the same reasons, a partial new trial on the issue of damages would be both gratuitous and unfair to defendant. Appellate courts disfavor such partial new trials in personal injury cases because "liability and damage issues are commonly interwoven." *Dooms v Stewart Bolling & Co*, 68 Mich App 5, 22-23; 241 NW2d 738 (1976). See also *Garrigan v LaSalle Coca-Cola Bottling Co*, 373 Mich 485, 489; 129 NW2d 897 (1964) (despite authorization within the court rules, partial new trials limited to the question of damages are disfavored). I would uphold the original jury verdict, but if in fact a new trial were warranted, I would remand the entire case for retrial.

/s/ Peter D. O'Connell

¹ Further, I observe that the judge who presided over this case is now retired, and thus may not be available to compute an additur in accord with the majority's command.