STATE OF MICHIGAN

COURT OF APPEALS

MELISSA TUCK,

Plaintiff-Appellee,

v

WARREN CONSOLIDATED. SCHOOLS,

Defendant-Appellant.

UNPUBLISHED
September 28, 2001

No. 219450
Macomb Circuit Court
LC No. 94-005982-NO

Before: McDonald, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals by right from a jury-trial-based judgment awarding plaintiff three million dollars in this automobile negligence action. We affirm.

This case arose from a bus accident in September 1993. During trial, plaintiff, who is confined to a wheelchair, alleged that defendant negligently failed to install locking devices to secure her wheelchair while she was a passenger on defendant's bus. Plaintiff theorized that her injuries, a closed head injury and resulting seizure condition, were caused when she violently struck her head after her wheelchair became loose during a bus ride. Defendant maintained that any injuries sustained during the bus accident were minor and that plaintiff's seizure condition was caused by cerebral palsy, which she has had since birth, or a brain injury sustained during a 1989 surgery.

On appeal, defendant first argues that the trial court erred in precluding admission of plaintiff's 1991 medical malpractice complaint, related to the 1989 surgery, in which plaintiff alleged a seizure condition as one of her injuries. We review a trial court's decision to exclude evidence for an abuse of discretion. *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 200; 555 NW2d 733 (1996). An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). Moreover, an evidentiary error is not a basis for reversal unless "it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). See also MCR 2.613(A) ("[a]n error in the admission or the exclusion of evidence . . . is not ground . . . for setting aside a verdict . . . unless refusal to take this action appears to the court inconsistent with substantial justice").

We cannot say that the trial court abused its discretion in precluding admission of the complaint. Indeed, although the complaint was relevant to issues raised at trial, it bore a substantial risk of unfair prejudice. See MRE 403. As noted in *Zeeland Farm Services, supra* at 201, a risk of unfair prejudice can arise from the danger that marginally probative evidence will be given undue or preemptive weight by the jury such that an inequity would result if the proponent were allowed to use the evidence. The 1991 complaint did not indicate that plaintiff suffered from grand mal seizures, as argued at trial in the instant case. Rather, "a seizure condition" was one of numerous ailments listed in the 1991 complaint.[1] Under MCR 2.111, a party may "allege two or more statements of fact in the alternative when in doubt about which of the statements is true" and may "state as many separate claims" as she has. MCR 2.111(A)(2). Given the requirements of MCR 2.111, we conclude that there was a legitimate risk that the jury might be unduly influenced by plaintiff's 1991 complaint. Moreover, as discussed *infra*, defendant had, and was allowed to use, less prejudicial means of supporting its position that plaintiff previously suffered from a seizure condition. See *Zeeland Farm Services, supra* at 201. Accordingly, no abuse of discretion occurred.

Even if the trial court *had* abused its discretion in precluding the evidence, the error was harmless, because defendant amply advanced its position through other evidence. Defendant admitted, without objection, plaintiff's medical records, which indicated that she may have had a seizure condition or seizure-related characteristics after the 1989 surgery. Further, defendant's experts, one of whom treated plaintiff after the 1989 surgery, testified that plaintiff had a seizure condition before the 1993 accident. Accordingly, any error in precluding the 1991 complaint from trial does not require reversal. See MCR 2.613(A) and *Lukity, supra* at 495-496.

Next, defendant argues that the trial court abused its discretion in precluding admission of the terms of the settlement reached in plaintiff's prior lawsuit related to the 1989 surgery. Defendant contends that "[t]he prior settlement should have been admitted so that the jury could have fairly determined the portion of [plaintiff's] damages allegedly caused by the present [defendant]." We disagree.

Michigan law prohibits double recovery for the same injury. *Great Northern Packaging, Inc v General Tire & Rubber Co*, 154 Mich App 777, 781; 399 NW2d 408 (1986). In order to ascertain whether a double recovery has occurred, we determine what injury is sought to be compensated. *Chicilo v Marshall*, 185 Mich App 68, 70-71; 460 NW2d 231 (1990). "[T]he nature of the conduct causing the injury and the label attached to the plaintiff's claims are of little relevance." *Id.*

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[1] The complaint stated that

> your Plaintiff herein has suffered pain, suffering, disability and mental anguish and will in the future suffer pain, suffering, disability and mental anguish, to wit: permanently. Such injuries/damages would include, but not be limited to, neurogenic bladder, loss or decreased spincter [sic] muscle (tone), speech, ability to transfer, blurred vision, seizure condition and decreased incognitive abilities.

A review of the instant record demonstrates that the settlement from the 1989 medical malpractice case and the damage award received in the instant case did not compensate for an identical injury. See *Great Northern Tire, supra* at 781. The two incidents occurred four years apart. Further, the prior complaint and relevant medical records reference a surgery and a generalized seizure condition, or certain attributes that may be characteristic of seizure activity. There was no documentation that plaintiff actually suffered grand mal seizures and no evidence that she was prescribed any anti-seizure medication before 1993. By contrast, plaintiff's instant lawsuit sought compensation for a bus accident and for grand mal seizures that were described as severe, debilitating, and injurious. There was evidence that plaintiff had suffered over one hundred seizures since the accident and was prescribed anti-seizure/convulsion medication in November 1993. In addition, and significantly, the trial court instructed the jury that it should apportion damages between any preexisting condition and current injuries. No abuse of discretion occurred.

Next, defendant argues that plaintiff's counsel made improper remarks during closing and rebuttal arguments and thereby denied defendant a fair and impartial trial. However, defendant did not object at trial to the comments it now condemns. Where claims of attorney misconduct are not preserved, we review the claims to determine whether counsel's comments evidenced a deliberate course of conduct aimed at preventing the opposing party from obtaining a fair trial and whether the comments "may have caused the result or played too large a part and may have denied the party a fair trial." *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103, 111-112; 330 NW2d 638 (1982). However, if an unpreserved error could have been cured readily by an objection and a curative instruction, reversal is inappropriate. *Id*. at 105.

Defendant claims that plaintiff's counsel's comments improperly caused the jury to award plaintiff economic damages, even though only noneconomic damages were available in the action, because counsel referenced a "babysitting fee" that could apply to plaintiff for the rest of her life. However, counsel's reference to possible economic damages could have been cured easily by an objection and a curative instruction. See *id.* Moreover, we note that the trial court properly instructed the jury regarding the damages available, limiting them to noneconomic categories.[2] Reversal is inappropriate.[3]

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[2] Defendant conceded in its motion for a new trial that "the jury was instructed to award compensation only for pain and suffering, not money damages for future economic losses."

[3] We reject defendant's attempt to use a juror's statement to support its claim that the jurors improperly awarded economic damages in this case. First, as noted above, any prejudice resulting from the "babysitting" comment of plaintiff's counsel could have been cured by an objection and a curative instruction. Moreover, it is well established that a jury's verdict may not be impeached by juror testimony or affidavits after the jury has been polled and discharged. *Consumers Power Co v Allegan State Bank*, 388 Mich 568, 573; 202 NW2d 295 (1972); *Hoffman v Monroe Public Schools*, 96 Mich App 256, 261; 292 NW2d 542 (1980). Testimony and affidavits by the jury members may only be used to challenge the verdict with regard to extraneous issues, like undue influence, or to correct clerical errors in the verdict. *Hoffman v Spartan Stores, Inc*, 197 Mich App 289, 293; 494 NW2d 811 (1992). Errors caused by a jury's

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Defendant also claims that plaintiff's counsel, in order to inflame the jury, improperly alleged that plaintiff and her family could not afford to buy two electric wheelchairs. We disagree that any impropriety occurred. Indeed, in making the challenged statement, counsel was simply responding to a contention by defendant that plaintiff may have owned two different electric wheelchairs and somehow used the existence of two different wheelchairs to her advantage at trial. In response to defendant's contention, plaintiff's counsel stated, "Are we to believe that they bought two ten thousand dollar machines in a couple years? What sense would that make?" Contrary to defendant's assertions, counsel did not state that plaintiff and her family could not afford to buy two electric wheelchairs; he simply noted the improbability that anyone would buy two of the same, expensive chairs in a short span of time. Counsel's comment did not evidence a studied purpose to inflame or prejudice the jury or deflect the jury's attention from the issues involved. See *Reetz, supra* at 111-112.

Finally, defendant claims that several of plaintiff's counsel's remarks were designed to inflame the jury by indicating that defense witnesses were engaged in conspiracy and perjury to cover up defendant's negligence. We disagree. Counsel's comments were based on the evidence introduced and the arguments made by defendant. We find no studied purpose to inflame or prejudice the jury or deflect the jury's attention from the issues involved. *Id*. Contrary to defendant's assertions, plaintiff's counsel's comments do not equate with the egregious, reversal-requiring conduct of the attorney in *Badalamenti v William Beaumont Hospital*, 237 Mich App 278, 289-292; 602 NW2d 854 (1999).

Finally, defendant argues that it is entitled to remittitur or at least to a new trial on damages. We review a trial court's decision denying remittitur for an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 533-534; 443 NW2d 354 (1989). We give deference to the trial court's superior position to decide the motion because of its ability to "view the evidence and evaluate the credibility of the witnesses." *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997). "[I]f the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation for the injury sustained, the award should not be disturbed." *Frohman v Detroit*, 181 Mich App 400, 415; 450 NW2d 59 (1989); see also MCR 2.611(E)(1). In evaluating a request for remittitur, a trial court should consider a number of factors, including whether the jury's verdict was induced by bias, prejudice, or mistake; whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and whether the verdict is comparable to awards in similar cases. *Palenkas, supra* at 532.

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"misunderstanding of the instructions, the verdict form, or faulty reasoning are inherent in the verdict and not susceptible to postdischarge challenge." *PUT v FKI Industries, Inc*, 222 Mich App 565, 569; 564 NW2d 184 (1997). We "will not reward counsel's postdischarge inquiries regarding the internal thought processes of the jurors." *Hoffman, supra* at 291.

We find no evidence that the properly-instructed jury was improperly swayed. Although the verdict was high, the trial court did not abuse its discretion in determining that the amount was not greater than the highest amount the evidence could support. See MCR 2.611(E)(1). There is no absolute standard by which to measure pain and suffering, and no trier of fact can value it with certainty. *Precopio v Detroit*, 415 Mich 457, 464-465, 470-471; 330 NW2d 802 (1982); *Peterson v Dep't of Transportation*, 154 Mich App 790, 799; 399 NW2d 414 (1986). Although the issue was disputed, plaintiff presented expert testimony that she suffered from a closed head injury, which caused a severe seizure condition that is permanent and life-threatening and that kills brain cells with each episode. An expert witness noted plaintiff's isolation, dependence, and inability to care for herself and testified that the seizure condition, which, according to one witness, has resulted in over one hundred seizures since the accident, caused great changes in plaintiff's personality, mood, thinking, and behavior.

Defendant offers several cases where the award was lower than the award in this case. However, our Supreme Court has cautioned against using past awards for analogous injuries as the determinative factor in determining whether damages are excessive, noting that analogous cases are only one factor to be considered. *Precopio*, *supra* at 471-472; see also *Michigan Dep't of Civil Rights ex rel Johnson v Silver Dollar Cafe*, 441 Mich 110, 130; 490 NW2d 337 (1992) (Boyle, J.). Further, the cases offered by defendant are factually distinguishable from the instant case. See *Precopio, supra* at 472. The trial court did not abuse its discretion in denying defendant's request for remittitur or a new trial on damages.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter

McDonald, J. did not participate.