STATE OF MICHIGAN

COURT OF APPEALS

ROGER MANN,

Plaintiff-Appellee/Cross-Appellant,

V

SHUSTERIC ENTERPRISES, INC., d/b/a SPEEDBOAT BAR & GRILL,

Defendant-Appellant/Cross-Appellee,

and

BADGER MUTUAL INSURANCE COMPANY,

Defendant.

UNPUBLISHED
November 30, 2001

No. 210920
Wayne Circuit Court
LC No. 96-618088-NO

ON REHEARING

Before: Kelly, P.J., and White and Wilder, JJ.

PER CURIAM.

Plaintiff brought this premises liability action against defendant for injuries he sustained as a result of a slip and fall in the parking lot of defendant's bar. Over defendant's objection, the jury was instructed on both the general duties a possessor of land owes an invitee, SJI2nd 19.03,[1]

[1] SJI2d 19.03 provides:

> A possessor of [land/premises/ a place of business] has a duty to maintain the [land/premises/place of business] in a reasonably safe condition.
>
> A possessor has a duty to exercise ordinary care to protect an invitee from unreasonable risks of injury that were known to the possessor or that should have been known in the exercise of ordinary care.
>
> *(A possessor must warn the invitee of dangers that are known or that should have been known to the possessor unless those dangers are open and obvious. However, a possessor must warn an invitee of an open and obvious danger if the

and the more specific duty owed an invitee regarding the accumulation of snow and ice, SJI2nd 19.05.[2] The jury returned a verdict in plaintiff's favor, finding plaintiff fifty percent comparatively negligent. The jury awarded plaintiff $90,291.10 in economic damages to date, future economic damages of $136,671.43, and no damages for non-economic losses, either past or future. The trial court allowed for a set-off against the award of past economic damages in the amount paid by collateral sources, pursuant to MCL 600.6303; MSA 27A.6303, but, because the jury verdict form did not elicit the requisite information, did not allow a collateral source set-off against future economic damages awarded. Defendant appeals as of right, alleging instructional error and error in calculating damages. Plaintiff cross-appeals the trial court's denial of his motion for additur or a new trial on the issue of damages, arguing that the jury's failure to award non-economic damages was against the great weight of the evidence. We affirm in part, reverse in part, and remand.

I

The trial court instructed the jury in pertinent part:

It was the duty of the plaintiff in connection with this occurrence to use ordinary care for his own safety.

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possessor should expect that an invitee will not discover the danger or will not protect [himself/herself] against it.)

**(A possessor has a duty to inspect [land/premises/ a place of business] to discover possible dangerous conditions of which the possessor does not know if a reasonable person would have inspected under the circumstances.)

Note on Use

* This paragraph is to be used in cases involving a claim of failure to warn.

**This paragraph is to be used in cases involving a claim of failure to inspect.

This instruction should be accompanied by the definition of negligence in SJI2d 10.02.

[2] SJI2d 19.05 provides:

It was the duty of [defendant] to take reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to [plaintiff].

The Note on Use following the instruction states that "[t]his instruction should be used where applicable instead of the more general SJI2d 19.03 Duty of Possessor of Land, Premises, or Place of Business to Invitee."

A possessor of land or premises or a place of business, in this case the defendant, has a duty to maintain the land or premises or place of business in a reasonably safe condition. [19.03]

A possessor has a duty to exercise ordinary care to protect an invitee from unreasonable risks of injury that were known to the possess [sic] or that should have been known in the exercise of ordinary care. [19.03]

It was the duty of the defendant, Shusteric Enterprises, Inc., to take reasonable measures within a reasonable period of time after an accumulation of snow and ice to diminish the hazard of injury to plaintiff, Roger Mann. [19.05]

A possessor must warn the invitee of dangers that are known or that should have been known to the possessor unless those dangers are open and obvious. However, a possessor must warn an invitee of an open and obvious danger if the possessor should expect that an invitee will not discover the danger or will not protect himself against it. [19.03]

* * *

The total amount of damages that the plaintiff would otherwise be entitled to recover shall be reduced by the percentage of plaintiff's negligence which contributed as a proximate cause to his injury or property damage – I'm sorry. To his injury, if any. This is known as comparative negligence.

It has been claimed that Roger Mann, plaintiff, had been drinking alcoholic beverages. According to the law, one who voluntarily impairs his or her abilities by drinking is held to the same standard of care as a person whose abilities have not been impaired by drinking.

It is for you to decide whether Roger Mann's conduct was in fact affected by drinking and whether, as a result, he failed to exercise the care of a reasonably careful person under the circumstances which you find existed in this case.

II

Plaintiff argued at trial that, having served plaintiff the alcohol he consumed, defendant was aware of plaintiff's inebriated condition, and therefore, should have appreciated the need to warn him of the dangerous conditions in the parking lot. Defendant argues that plaintiff impermissibly encroached on the dramshop act by relying upon defendant's service of alcohol as a basis for imposing a duty to warn plaintiff and for imposing liability, and that because plaintiff's case focused on the bar's service of alcohol, plaintiff's claim is barred by the exclusive remedy provision of the dramshop act. We disagree the defendant.

Whether a statutory scheme preempts the common law on a subject is a matter of legislative intent. *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987). "The dramshop act provides an exclusive statutory remedy against liquor licensees for selling

alcohol to minors or visibly intoxicated persons." *Green v Wilson*, 455 Mich 342, 353; 565 NW2d 813 (1997); MCL 436.22(11); MSA 18.993(11). However, "liquor licensees remain liable for breach of independent common-law duties." *Millross, supra* at 186. "[T]he dramshop act does not abrogate or control actions arising out of unlawful or negligent conduct of a tavern owner other than selling, giving away, or furnishing of intoxicants, provided the unlawful or negligent conduct is recognized as a lawful basis for a cause of action in the common law." *Id*. at 187-188.

"[T]he common-law duty of a liquor establishment to maintain a safe place of business for its customers is the same duty any business owes to those it invites upon its premises. The dramshop act was not intended to affect that duty." *Manuel v Weitzman*, 386 Mich 157, 163; 191 NW2d 474 (1971), overruled in part on other grounds *Brewer v Payless Stations, Inc*, 412 Mich 673; 316 NW2d 702 (1982). The purpose of the dramshop act "was to fill a void in the law, not to remove the well-recognized duty of a tavern keeper to exercise due care for the welfare and safety of invited patrons." *Id*.

The instant case is a premises liability action, and the conduct at issue is defendant's failure to take measures to reduce the risk of harm created by the condition of its parking lot. Defendant's service of alcohol was implicated only as it related to defendant's knowledge of plaintiff's condition as relevant to whether defendant's conduct in failing to inspect or clear the parking lot and failing to warn plaintiff was reasonable. As such, plaintiff's claim is not preempted by the dramshop act.

III

Defendant next argues that the trial court erred in instructing the jury with both SJI2d 19.03 (duty of possessor of premises to business invitee) and 19.05 (duty of possessor of premises to business invitee regarding natural accumulation of ice and snow), when it should only have given 19.05.

We review claims of instructional error for abuse of discretion. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997). This Court reviews jury instructions in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Id*. "The trial court does not commit error requiring reversal if, on balance, the parties' theories and the applicable law were presented to the jury adequately and fairly." *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997). However, if the court gave conflicting instructions, one of which was erroneous, the jury is presumed to have followed the erroneous instruction. *Sudul v Hamtramck*, 221 Mich App 455, 461; 562 NW2d 478 (1997). We conclude that the instructions were not conflicting or inconsistent, and that under the circumstances presented here, the parties' theories and the applicable law were presented to the jury adequately and fairly.

"[T]he existence of a legal duty is a question of law for the court to decide." *Anderson v Wiegand*, 223 Mich App 549, 554; 567 NW2d 452 (1997). "A possessor of land has a duty to exercise reasonable care for the protection of an invitee. Further, it is the duty of a possessor of land to take reasonable measures within a reasonable period after an accumulation of snow and

ice to diminish the hazard of injury to an invitee." *Id*. at 553-554. Michigan law recognizes, however, that "the possessor of land is not an absolute insurer of the safety of an invitee." *Id*.; see also *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500; 418 NW2d 381 (1988).

The parties cite no authority, and we have found none, in which the jury was instructed with both SJI2d 19.03 and 19.05, or in which there was objection to the giving of both instructions. Both SJI2d 19.03 and 19.05 were new instructions when added in 1982. The *Comment* to SJI2d 19.03 cites cases including *Riddle v McLouth Steel Products Corp,* 440 Mich 85; 485 NW2d 676 (1992), which is discussed *infra.*

The *Note on Use* following SJI2d 19.05 states, without elaboration, that 19.05 "should be used where applicable instead of the more general SJI2d 19.03." The *Comment* following the instruction cites *Quinlivan v Great Atlantic & Pacific Tea Co,* 395 Mich 244; 235 NW2d 732 (1975).

The plaintiff in *Quinlivan,* brought suit after he slipped and fell in the defendant's snow-covered and icy parking lot. The *Quinlivan* Court overruled authority that stated that the natural accumulation rule applied in an invitor-invitee context:

> While the invitor is not an absolute insurer of the safety of the invitee, the invitor has a duty to exercise reasonable care to diminish the hazards of ice and snow accumulation. The general description of the duty owed appearing in the Restatement is a helpful exposition of the duty described in *Torma* [*v Montgomery Ward & Co,* 336 Mich 468; 58 NW2d 149 (1953)]. As such duty pertains to ice and snow accumulations, *it will require that reasonable measures be taken within a reasonable time after an accumulation of ice and snow to diminish the hazard of injury to the invitee. The conduct of the invitee will often be relevant in the context of contributory negligence.* [*Quinlivan, supra* at 261. Emphasis added.]

In *Beals v Walker,* 416 Mich 469; 331 NW2d 700 (1982), the plaintiff, while working for his employer on a roof, slipped and fell, and then slid down the roof, which was coated with a sheet of clear ice. The plaintiff appealed the jury verdict of no cause of action, and the defendant cross-appealed, arguing that his motion for directed verdict should have been granted. This Court affirmed on the basis of the issues raised in the defendant's cross-appeal, concluding that the trial court erred in denying the defendant's motion for a directed verdict. The Supreme Court reversed, noting:

> The defendant, as a business invitor, owed the plaintiff, as a business invitee, the duty
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> > "of maintaining its premises in a reasonably safe condition and of exercising due care to prevent and to obviate the existence of a situation, known to it or that should have been known, that might result in injury." *Torma v Montgomery Ward & Co,* 336 Mich 468, 476; 58 NW2d 149 (1953).

> The Court of Appeals majority reasoned that "to the extent that the icy condition was *obvious*, due to the temperature, climate, and time of year, defendant cannot be held to have a *duty to warn plaintiff of such a condition*". *Beals*, p 226. *This conclusion is directly contrary to this Court's decision in Quinlivan v Great Atlantic & Pacific Tea Co, Inc***,** 395 Mich 244; 235 NW2d 732 (1975). Of course, a roof is not a parking lot, but *the reasonableness of the defendant's conduct under these circumstances is a matter for the jury*, not the Court of Appeals. [*Beals*, 416 Mich at 480-481. Emphasis added.]

The comment after SJI2d 19.03 cites *Riddle, supra*, among other cases. The Supreme Court in *Riddle, supra*, addressed a premises owner's duty to warn invitees of known and obvious dangers and whether the trial court correctly instructed the jury pursuant to 19.03 that a premises owner must warn an invitee of known or obvious dangers. The plaintiff in *Riddle* slipped and fell on oil in one of the defendant's plants. The plaintiff and a co-worker who was with him at the time of the fall testified that they did not realize the area through which they walked contained oil, and that they had seen one of the defendant's employees cleaning the area earlier that day. The *Riddle* Court summarized a number of cases addressing a premises owner's duty to warn, including *Quinlivan, supra*:

> It is well settled in Michigan that a premises owner must maintain his or her property in a reasonably safe condition and has a duty to exercise due care to protect invitees from conditions that might result in injury. *Beals v Walker*, 416 Mich 469, 480; 331 NW2d 700 (1982); *Torma v Montgomery Ward & Co*, 336 Mich 468, 476; 58 NW2d 149 (1953).
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> > However, a premises owner's duty to warn extends to hidden or latent defects. *Samuelson v Cleveland Iron Mining Co*, 49 Mich 164; 13 NW 499 (1882). The rationale underlying this rule is that liability for injuries resulting from defectively maintained premises should rest upon the one who is in control or possession of the premises and, thus is best able to prevent the injury. See *Nezworski v Mazanec*, 301 Mich 43, 56; 2 NW2d 912 (1942); *Smith v Peninsular Car Works*, 60 Mich 501, 504; 27 NW 662 (1886).
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> . . . in *Nezworski v Mazanec, supra*, the plaintiff sued for injuries sustained when she descended a darkened stairway on the defendant's premises. This Court expressed the rule simply: "If there were hidden dangers in connection with the doorway, platform, stairway, and alley, it was [the premises owner's]duty to give warning thereof." *Id.* at 61. Thus, if the dangers are known or obvious to the invitee, no absolute duty to warn exists, and the invitee cannot recover on that theory.
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> * * *

In *Quinlivan* [*supra*], we . . . adopted the revised § 343 [of 2 Restatement Torts, 2d] and subsections (b) and (c), which further define a premises owner's duty to invitees. 2 Restatement Torts, 2d, § 343 reads in full:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger.

Quinlivan overruled existing case law which held that a premises owner owed no duty to a business invitee regarding obvious hazards arising from natural accumulations of ice and snow. We held that '[a]s such duty pertains to ice and snow accumulations, it will require that reasonable measures be taken . . . . " *Quinlivan* at 261.

Finally, in *Williams v Cunningham Drug Stores, Inc,* 429 Mich 495, 500; 418 NW2d 381 (1988), this Court held that a premises owner is not an insurer of the safety of invitees. Moreover, we held that a possessor of land does not owe a duty to protect his invitees where conditions arise from which an unreasonable risk cannot be anticipated or of dangers that are so obvious and apparent that an invitee may be expected to discover them himself. *Id.* . . . .

Further, we noted the standard outlined in 2 Restatement Torts, 2d, § 343A, *whereby the invitee's knowledge of dangerous conditions may be properly considered in determining a premises owners liability. Williams, supra* at 500, n 12. 2 Restatement Torts, 2d, § 343A(1) provides:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

Our conclusions in these Michigan cases correctly define the law regarding a premises owner's duty of care to invitees.

III

The Court of Appeals incorrectly determined that the "no duty to warn of open and obvious danger" rule is inconsistent with comparative negligence and should be abolished. . . .

> The threshold issue of the duty of care in negligence actions must be decided by the trial court as a matter of law. In other words, the court determines the circumstances that must exist in order for a defendant's duty to arise. . . .
>
> Moreover, the "no duty to warn of open and obvious danger" rule is a defensive doctrine that attacks the duty element that a plaintiff must establish in a prima facie negligence case. A negligence action may only be maintained if a legal duty exists which requires the defendant to conform to a particular standard of conduct in order to protect others against unreasonable risks of harm. If the plaintiff is a business invitee, the premises owner has a duty to exercise due care to protect the invitee from dangerous condition. *Beals, supra.* However, *where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee. Williams, supra.*
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> *Once a defendant's legal duty is established, the reasonableness of the defendant's conduct under that standard is generally a question for the jury. . . .*
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> . . . . If the conditions are known or obvious to the invitee, the premises owner may nonetheless be required to exercise reasonable care to protect the invitee from the danger. *Quinlivan, supra* at 260-261. What constitutes reasonable care under the circumstances must be determined from the facts of the case. While *the jury may conclude that the duty to exercise due care requires the premises owner to warn of a dangerous condition,* there is no absolute duty to warn invitees of known or obvious dangers.
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> Conversely, comparative negligence is an affirmative defense. . . . [*Riddle, supra* at 90-98. Emphasis added.]

Although the Note on Use following SJI2nd 19.05 states that it should be used where applicable *instead of* the more general SJI2d 19.03,[3] we conclude that, in light of the authority as summarized by the Supreme Court in *Riddle,* the instructions are not inconsistent and the trial court's reading both instructions under the circumstances of this case does not warrant reversal.

As defendant's appellate brief acknowledges, the "reasonable measures" obligation in SJI2nd 19.05 may be satisfied by giving the invitee an appropriate warning or doing any of the other things set forth in SJI2d 19.03. SJI2nd 19.03 provides, as the Court stated in *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611-612; 537 NW2d 185 (1995), that an invitor may be required to warn an invitee of even open and obvious dangers, if the invitor has reason to know that the invitee may be unable to protect himself from such dangers.

> There are, however, cases in which the possessor of land can and should anticipate that the dangerous condition will cause physical harm to the invitee

[3] We have found nothing explaining this admonition.

> notwithstanding its known or obvious danger. In such cases the possessor is not relieved of the duty of reasonable care which he owes to the invitee for his protection. This duty may require him to *warn* the invitee, or to take other reasonable steps to protect him, against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.
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> *Such reason to expect harm to the visitor from known or obvious dangers may arise, for example, where the possessor has reason to expect that the invitee's attention may be distracted, so that he will not discover what is obvious, or will forget what he has discovered, or fail to protect himself against it.* Such reason may also arise where the possessor has reason to expect that the invitee will proceed to encounter the known or obvious danger because to a reasonable man in his position the advantages of doing so would outweigh the apparent risk. *In such cases the fact that the danger is known, or is obvious, is important in determining whether the invitee is to be charged with contributory negligence, or assumption of risk. . . . It is not, however, conclusive in determining the duty of the possessor, or whether he has acted reasonably under the circumstances.* 2 Restatement Torts, 2d, § 343A, comment f, p 220 (emphasis added). [*Bertrand*, *supra*, 449 Mich 611-612 (emphasis added).]

Under the circumstances presented here, we reject defendant's argument that plaintiff's awareness of the dangerous conditions of necessity relieved defendant of its duty to warn plaintiff. The general rule is that an owner or possessor of land does not have an absolute duty to warn an invitee against open and obvious dangers. *Bertrand*, *supra*, at 613-614. Here the court's instructions clearly left the question whether a warning was required under the circumstances to the jury.

We also find unpersuasive defendant's argument that the jury should not have been instructed on defendant's duty to warn because plaintiff's voluntary intoxication did not affect the standard of care to which he was held. Defendant's duty and plaintiff's comparative negligence are independent inquiries that should be addressed separately. *Hottman v Hottman*, 226 Mich App 171, 176-177; 572 NW2d 259 (1997). "Duty exists because the relationship between the parties gives rise to a legal obligation." *Bertrand*, *supra*, 449 Mich 614. Plaintiff's intoxication may be relevant in the context of comparative negligence. Comparative negligence "does not vitiate defendant's duty to take reasonable care for the safety of his invitees." *Hottman*, *supra*, 226 Mich 177.

We reject defendant's argument that the reading of both the instructions would confuse the jury "because it was told reasonable efforts to diminish the hazard within a reasonable time, to be insufficient, as a matter of law, and find itself compelled to find in favor of plaintiff because the specific act of warning the plaintiff had not occurred." The jury was clearly left with the task of determining whether a warning was necessary under the circumstances. Moreover, after a thorough review of the entire record, we are left with the firm conviction that the jury determined that plaintiff was well aware of the danger presented and failed to exercise ordinary care for his own safety, and that defendant's negligence consisted of defendant's unreasonable

failure to take any measures at all to diminish the hazard of injury from the snow, although the danger was apparent and a reasonable time in which to take reasonable measures had elapsed. Given the testimony and arguments in this case, we find it highly unlikely that the jury found that defendant did not fail to take reasonable measures within a reasonable time, but nevertheless should have warned plaintiff because of a duty separate from the duty to take reasonable measures within a reasonable time to diminish the hazard.

We conclude that the trial court's instructions adequately and fairly stated the law and that reversal is not required.

IV

Defendant next claims that the trial court incorrectly applied the collateral source rule in adjusting the jury award.

"[T]he application of the collateral source rule is dictated by MCL 600.6306; MSA 27A.6306." *Haberkorn v Chrysler Corp*, 210 Mich App 354, 377; 533 NW2d 373 (1995). "Statutory interpretation is a legal issue, which this Court reviews de novo." *Heinz v Chicago Road Inv Co*, 216 Mich App 289, 295; 549 NW2d 47 (1996).

The parties stipulated shortly before trial to the value of plaintiff's past pension benefits ($14,734.50), past Social Security benefits ($13,905.00), future pension benefits payable from September 1997 to February 2004, when plaintiff would turn sixty-five ($117,876.00), and future Social Security benefits from September 1997 to February 2004 ($92,568.00). The trial court offset past collateral source benefits against past economic damages awarded but refused defendant's request to aggregate past and future collateral source benefits paid and payable and offset the total against the total of past and future economic damages awarded.

Defendant argues that the total amount of economic loss damages, past and future, should have been reduced by the total stipulated amount of plaintiff's collateral source benefits. Defendant argues that the trial court erred, first, in separating the collateral sources into "paid" and "payable," and second, in refusing to reduce the verdict by the amount of payable collateral source benefits. We disagree with both arguments.

A

MCL 600.6306; MSA 27A.6306[4] provides for judgment to be entered according to classifications of past and future economic damages, as reduced by collateral sources paid and

[4] MCL 600.6306; MSA 27A.6306 provided in pertinent part when plaintiff filed his complaint (March 26, 1996):

> (1) After a verdict rendered by a trier of fact in favor of a plaintiff, an order of judgment shall be entered by the court. The order of judgment shall be entered against each defendant . . . in the following order and in the following judgment amounts:

payable. The statute necessarily requires that collateral source benefits paid are to be set-off against past economic damages, and future collateral source benefits payable are to be set-off against future economic damages. The statute provides that it is only the portion of the judgment that has been paid or is payable by a collateral source that is entitled to set-off. We find no error with the trial court's treatment of this issue.

B

We also disagree that the trial court erroneously disallowed any set-off against future economic damages for future collateral source benefits payable. MCL 600.6305(1)(b)(i) and (ii); MSA 27A.6305(1)(b)(i) and (ii)[5] require the jury to allocate future economic damages between

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> (a) All past economic damages, less collateral source payments as provided for in section 6303.
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> (b) All past noneconomic damages.
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> (c) All future economic damages, less medical and other health care costs, and less collateral source payments determined to be collectible under section 6303(5) reduced to gross present cash value.
>
> (d) All future medical and other health care costs reduced to gross present cash value.
>
> (e) All future noneconomic damages reduced to gross present cash value.
>
> (f) All taxable and allowable costs, including interest as permitted by section 6013 or 6455 on the judgment amounts.
>
> (2) As used in this section, "gross present cash value" means the total amount of future damages reduced to present value at a rate of 5% per year for each year in which those damages accrue, as found by the trier of fact pursuant to section 6305(1)(b).
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> * * *

[5] MCL 600.6305(1); MSA 27A.6305(1) provides in pertinent part:

> (1) Any verdict or judgment rendered by a trier of fact in a personal injury action subject to this chapter shall include specific findings of the following:
>
> (a) any past economic and noneconomic damages.
>
> (b) Any future damages and the periods over which they will accrue, on an annual basis, for each of the following types of future damages:

"medical and other costs of health care" and "lost wages or earnings or lost earning capacity and other economic loss" when calculating future damages. In this case, the parties agreed to use a jury verdict form that did not specify the portion of future damages that was allocated to each purpose, and did not break down future damages on a year-by-year basis. Because the jury's award of future economic damages was only a fraction of the amount to which the parties stipulated based on the assumption that plaintiff would work until age sixty-five, an assumption disputed by defendant, and because the total figure was not broken down in any fashion, it is impossible to determine to what extent the damages awarded correspond with the collateral source benefits payable. Defendant so acknowledges, but argues that under such circumstances, the total amount must be deducted. In other words, defendant asserts that because the only figures stipulated to were the values assuming plaintiff worked to sixty-five, the entire amount of collateral benefits payable to plaintiff until age sixty-five should be subtracted, even though the jury apparently agreed with defendant that plaintiff would not have worked continuously until age sixty-five.

We conclude that the trial court did not err in refusing a set-off against future collateral source benefits payable under these circumstances. Defendant's reliance upon *Heinz*, *supra*, is misplaced. In *Heinz*, *supra*, unlike here, the jury's verdict reflected apportionment between medical expenses and lost wages. It was the lump sum of the worker's compensation redemption that was not so apportioned. This Court held that the trial court was incorrect to deny any set-off on that basis. In the instant case, however, it is the jury's verdict that does not reflect apportionment between medical and health care expenses, and lost wages and earning capacity. Also, the jury form did not comport with the statute in that it failed to specify the break down of damages on an annual basis. It is unknown what portion of the award for future economic damages represents wage replacement, as to which the social security and pension benefits would be a collateral source, and what portion, if any, represents anticipated medical or health costs. It is also unknown whether the jury concluded that plaintiff would have worked only a few more years were it not for the accident and awarded lost wages for a few years, or whether the jury concluded that plaintiff would work intermittently, with repeated leaves of absence, until age 65, consistent with his work history, and thus awarded a series of intermittent payments. Contrary to defendant's argument, the lack of necessary information is not due to the limited stipulations offered by plaintiff, but to the verdict form not eliciting the required information in compliance with the statute. Because defendant stipulated to the form, it cannot now be heard to complain that the court, faced with the predicament that the jury verdict form provided inadequate information to implement the deductions contemplated by the statute, declined to grant defendant a windfall by deducting the entire amount of collateral source benefits payable until age sixty-five. See *Weiss v Hodge (After Remand)*, 223 Mich App 620, 635-636; 567 NW2d 468 (1997).

(i) Medical and other costs of health care.

(ii) Lost wages or earnings or lost earning capacity and other economic loss.

(iii) Noneconomic loss.

V

Finally, defendant claims that the trial court failed to offset the $5,000 payment by codefendant Badger Mutual Insurance Company, which was dismissed from this action. Although defendant did not bring this stipulation to the court's attention when the adjustments were made on the record after the verdict was received, the parties had stipulated shortly before trial that defendant would be entitled to a $5,000 set-off based upon this payment. On remand, the trial court shall deduct this amount as a collateral source from the past economic damages awarded.

VI

On cross-appeal, plaintiff claims that the trial court improperly denied his motion for additur, or in the alternative, a new trial on damages.

This Court reviews the trial court's decision to grant or deny additur for abuse of discretion. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997), citing *Arnold v Darczy*, 208 Mich App 638, 639; 528 NW2d 199 (1995). In determining whether additur is appropriate, the proper consideration is whether the jury award was supported by the evidence. *Id*., citing *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989). "Additionally, trial courts have discretion in granting a new trial, and appellate courts will not interfere absent a palpable abuse of discretion." *Setterington*, *supra*, 223 Mich App 608.

The verdict form in the instant case provided for amounts of non-economic damages, past and future. The jury denied all non-economic damages. In our initial opinion in this case we relied on the statement in *Lagalo v Allied Corp*, 233 Mich App 514, 523; 592 NW2d 786 (1999), that "Michigan law recognizes that a damages award that ignores uncontroverted evidence that a plaintiff had pain and suffering as a result of the defendant's conduct is inadequate," and reversed the trial court's denial of additur. After our initial decision, and while defendant's motion for rehearing was pending, the Supreme Court decided *Kelly v Builders Square*, 465 Mich 29; 632 NW2d 912 (2001), in which the Court concluded that the trial court in that case abused its discretion in granting additur. The majority stated:

> *Weller* [*v Mancha*, 353 Mich 189; 91 NW2d 352 (1958)], *Fordon* [*v Bender*, 363 Mich 124; 108 NW2d 896 (1961)], and *Mosley* [*v Dati*, 363 Mich 690; 110 NW2d 637 (1961),] did not create a legal rule mandating pain and suffering damages whenever a jury finds negligence and awards medical expenses. Rather, those decisions analyzed the great weight of the evidence on the facts presented. Subsequent cases have emphasized the deference traditionally accorded to a jury's assessment of damages in accordance with the principles discussed in *Brown* [*v Arnold*, 303 Mich 616; 6 NW2d 914 (1942)]. See, e.g., *A'eno v Lowry*, 367 Mich 657; 116 NW2d 730 (1962); *Moore v Spangler*, 401 Mich 360; 258 NW2d 34 (1977).

B. CODIFICATION OF BASES FOR GRANTING A NEW TRIAL

> The grounds for granting a new trial, including a verdict contrary to the great weight of the evidence, are now codified at MCR 2.611(A)(1). The court rule provides the only bases upon which a jury verdict may be set aside. Thus, *Weller, Fordon,* and *Mosley* are no longer relevant. A jury's award of medical expenses that does not include damages for pain and suffering does not entitle a plaintiff to a new trial unless the movant proves one of the grounds articulated in the court rule.
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> We reject, in any event, the principle that a jury behaves inconsistently when it awards medial expenses, but nothing for pain and suffering. Plaintiff had the burden to prove each element of her case, including every item of claimed damages. Medical expenses and pain and suffering are distinct categories of damages. Each category may have a distinct evidentiary basis. For example, a claimant's own testimony about her subjective experiences is generally offered to prove pain and suffering. When a jury believes that a plaintiff has suffered an injury and incurred medical expenses, it may still assess separately any distinct proofs regarding pain and suffering.
>
> In short, the jury is free to credit or discredit any testimony. It may evaluate the evidence on pain and suffering differently from the proof of other damages. No legal principle requires the jury to award one item of damages merely because it has awarded another item. [*Kelly, supra* at 38-39.]

In the instant case, plaintiff indeed argues that the failure to award damages for pain and suffering was against the great weight of the evidence. In our initial opinion, we said "[a]lthough the jury was certainly free to discount the value of the pain and suffering, and the effects of the injury on plaintiff's life, in light of the evidence of plaintiff's other maladies and his alcoholism, it was not free to completely ignore the entire category of non-economic damages where the evidence was uncontroverted that such damages were present." Our decision in this regard was influenced by our earlier quoted proposition from *Lagalo, supra*. The *Lagalo* Court, however, based its conclusion in this regard on *Weller, supra, Fordon, supra,* and a Court of Appeals case. We read the Supreme Court's recent decision in *Kelly, supra,* as rejecting the *Lagalo* Court's interpretation of those cases. In short, contrary to *Lagalo, Kelly* holds that a jury can ignore an entire class of damages such as pain and suffering, even when it has concluded that the defendant was negligent and that that negligence proximately caused the plaintiff to suffer a particular medical condition requiring surgery. In such a case, the jury has not behaved inconsistently; the jury may separately assess the plaintiff's subjective testimony regarding pain and suffering.

Had *Kelly* been decided before our initial opinion, we would not have concluded, based on *Lagalo,* that the trial court abused its discretion in denying plaintiff's motion for new trial or additur. On rehearing, we affirm the denial of this motion.

Affirmed, but remanded for modification of the judgment to reflect the $5000 credit. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Helene N. White
/s/ Kurtis T. Wilder