STATE OF MICHIGAN

COURT OF APPEALS

JASON ALAN SNELL,

Plaintiff-Appellant,

v

JAMES JEWELL and UNGER ENTERPRISES, INC., d/b/a EMPTY KEG PARTY STORE and EMPTY KEG,

Defendants-Appellees,

and

MCBRIDES AVALON BAR, INC., and SNEAKS, INC.,

Defendants.

UNPUBLISHED
August 30, 2002

No. 223789
Isabella Circuit Court
LC No. 97-010475-NS

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

In this personal injury case, plaintiff Jason Snell appeals as of right from a jury verdict against defendant James Jewell and the jury's finding of no liability against defendant Unger Enterprises Inc., d/b/a Empty Keg Party Store (Empty Keg). We affirm.

I. Facts and Procedural History

This case arises out of an automobile accident in which plaintiff suffered severe injuries. In his complaint, plaintiff alleged that on the night of November 22-23, 1996, James Jewell was driving a car while intoxicated and collided with plaintiff's car. Plaintiff further alleged that defendants McBride's Avalon Bar, Inc. (Avalon Bar), and Sneaks, Inc., d/b/a Bar One (Bar One), were liable for serving Jewell alcohol while he was visibly intoxicated. Thereafter, plaintiff amended his complaint to include defendant Empty Keg Party Store, and alleged that, on the night of the collision, employees of the store sold alcohol to Jewell when he was visibly intoxicated.

At trial, Jewell testified that, after drinking five or six beers and sharing two marijuana "joints," he bought a twenty-two-ounce can of beer and a pint of schnapps at Empty Keg. Thereafter, Jewell walked to a friends' house, consumed the alcohol he bought, drank two more beers and smoked two more joints. Jewell then returned to Empty Keg and bought a forty-ounce beer and a fifth of schnapps.[1] Jewell returned to his friends' house and continued to drink alcohol and smoke marijuana. Jewell further testified that, at approximately 9:30 p.m., he walked to Empty Keg again and bought a fifth of whiskey. Within the next thirty minutes, Jewell drank two shots of whiskey and three more cans of beer. Jewell then left his friends' house and continued to drink at Bar One and Avalon Bar. Defendant later stole a car and ultimately collided with plaintiff's vehicle and pushed plaintiff's vehicle into a tree.

Bar One and Avalon Bar settled with plaintiff shortly before trial. Following the close of proofs, the jury returned a verdict in plaintiff's favor and allocated eighty percent fault to Jewell, twenty percent fault to Sneaks/Bar One, and allocated no fault to the remaining defendants, including Empty Keg.

II. Analysis

A. Motion for JNOV or New Trial

Plaintiff argues that the trial court erred by denying his motion for JNOV or new trial because the great weight of the evidence showed that Jewell was visibly intoxicated when he bought alcohol at Empty Keg.

We review a trial court's decision on a motion for JNOV de novo. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). "The grant or denial of a motion for new trial on the ground that the verdict is against the great weight of the evidence rests within the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless a clear abuse is shown. *Bosak v Hutchinson*, 422 Mich 712, 737; 375 NW2d 333 (1985). "An abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). The question before this Court is not whether it would have decided the great-weight challenge as the trial court did, but whether the trial court's ruling on the motion was an abuse of discretion. *Arrington v Detroit Osteopathic Hospital Corp (On Remand)*, 196 Mich App 544, 564; 493 NW2d 492 (1992).

While plaintiff points to evidence showing that Jewell was visibly intoxicated when he made at least the last of his three visits to Empty Keg, evidence also showed that Jewell was not visibly intoxicated. As defendant emphasizes, Jewell was an experienced drinker who had food in his stomach before visiting Empty Keg on the night of the collision. Further, Jewell's friends testified that Jewell was not visibly intoxicated when he left their house for his third trip to Empty Keg. Kevin Unger, who appears to have served Jewell that day, testified that he served no visibly intoxicated persons that night.

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[1] Jewell testified that, while he consumed all the beer he described, he drank about half of the schnapps he bought.

Furthermore, plaintiff's expert toxicologist, John Paul Bederka, conceded that Jewell was not visibly intoxicated upon his first visit to Empty Keg, offered no opinion concerning whether Jewell should have been visibly intoxicated on his second visit, and did not rule out that Jewell may have presented himself on the third visit without exhibiting clearly visible signs of intoxication. Moreover, defendant's toxicologist, Dr. Werner Spitz, opined that Jewell should not have been visibly intoxicated at 10:00 p.m. on the night in question which, according to Jewell, was after his final visit to Empty Keg.

It is well-settled that a jury is free to disbelieve the evidence favorable to one party, and to believe evidence favorable to the other. See *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996). It is not this Court's task to decide between two plausible alternative interpretations of the evidence, but rather to decide whether there was a reasonable evidentiary basis for the trial court's decision to accept the jury's verdict. *Ellsworth, supra*, 236 Mich App at 194. The evidence that Jewell was an experienced drinker who had eaten a meal that night, along with the testimony from Kevin Unger, Dr. Spitz, and Jewell's friends, supported the jury's conclusion that Jewell was not visibly intoxicated when purchasing alcohol from Empty Keg, despite other evidence that could have supported the opposite conclusion. Accordingly, the trial court did not err in denying plaintiff's motion for JNOV and did not abuse its discretion in denying his motion for new trial.

B. Jury Award

Defendant contends that the jury's award of $260,853.58 in damages was inadequate in light of the great weight of the evidence.

A jury is free to accept or reject a plaintiff's testimony regarding damages. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 172; 568 NW2d 365 (1997). 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 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 other proofs, the trial court stands in the best position to consider the merits of a motion to adjust the jury's award of damages. See *Palenkas v Beaumont Hospital*, 432 Mich 527, 533-534; 443 NW2d 354 (1989).

Plaintiff points to evidence that suggests he suffered severe injury to his brain, leaving him with serious, and continuing, mental and physical disabilities. Again, however, other evidence clearly supports the damage award.

Marvin DeVries, Ph.D., testified about the amount plaintiff would have earned had he not been injured, and what his future accident-related expenses might be. However, on cross-examination, defendant elicited testimony that Dr. DeVries' calculations had not made allowance for plaintiff's ordinary living expenses, and that he had assumed that plaintiff would need assisted living for the rest of his life. Further, defendant elicited testimony from plaintiff's neurology expert, Dr. John Visser, that he found that plaintiff is alert, is in possession of a normal fund of information, and lacks problems with language functioning. The expert further testified that plaintiff does not need work restrictions other than to avoid injury in case of a seizure, and that plaintiff does not need attendant or supervisory care. Defense counsel also elicited testimony from another expert, Dr. Robert Kreitsch, that plaintiff is no longer using a

cane to walk, and does not need special assistance to climb stairs. Dr. Kreitsch agreed that plaintiff probably would not need attendant care in the future. The expert further reported that plaintiff had achieved independence in basic activities, "including even mobility about the community."

The defense also offered testimony from expert Dr. John Baker, a clinical neuro-psychologist, who testified that, although plaintiff suffered a "severe brain injury" from which he retained "clear deficits in verbal memory and in motor skills with his left hand," plaintiff had otherwise "primarily recovered." Dr. Baker also testified that plaintiff's "executive functions" tested average to superior and that plaintiff "did fine" and scored "in the normal range" when tested for reading, spelling, and writing. Dr. Baker opined that plaintiff needed "some specific assistance," but that independent living would be possible in six months to a year. This evidence clearly supports the jury's damage award and, therefore, the trial court did not err in denying plaintiff's motion for JNOV or new trial.[2]

C. Evidence of Prior Sales to Jewell

Plaintiff next asserts that the trial court erred by denying the admission of evidence that Jewell had purchased liquor from Empty Keg on prior occasions while he was visibly intoxicated.

Plaintiff argues that the trial court reversed itself when it ruled, pursuant to *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994), that plaintiff could elicit evidence concerning whether Jewell was a regular customer of Empty Keg, and later ruled that evidence of Jewell's state of intoxication on earlier visits was not admissible. However, the record shows that the earlier ruling addressed only the question whether Unger should have recognized Jewell as a regular customer and the later ruling addressed whether Empty Keg had served Jewell on earlier occasions while he was visibly intoxicated. The former evidence was admissible, the latter evidence was not. See *Hilliker v Farr,* 149 Mich 444, 449; 112 NW 1116 (1907).[3]

Contrary to plaintiff's assertion, defense counsel did not attempt to rely on the responsible-business-practices defense despite his prior waiver of that defense. Plaintiff maintains that defense counsel re-asserted the defense by eliciting testimony from Unger that he did not sell alcohol to any visibly intoxicated person on the night in question. We agree with the trial court's conclusion that this brief exchange was not enough to "open the door" to allow

[2] In his reply brief, plaintiff argues for the first time that defendant improperly emphasized in closing argument that plaintiff did not appear and personally participate in the trial. Because this unpreserved attorney misconduct argument was not included within the statement of the issues in the brief on appeal, we will not address it. *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995); MCR 7.212(C)(5).

[3] Plaintiff asserts that *Hilliker* is distinguishable because it addressed evidence of sales to third parties, while this case involved prior sales to a defendant. However, this is a distinction without a difference. Either way, such evidence would suggest nothing other than that because Empty Keg had illegally sold alcohol in the past it probably did so on the occasion in question, in violation of MRE 404(b)(1).

further evidence of prior sales to Jewell while he was visibly intoxicated. Moreover, defense counsel did not elicit testimony from Unger concerning general store policies on serving intoxicated persons or his own procedures in the months before the collision.[4] The trial court did not abuse its discretion in ruling that defense counsel's tenuous reference to this issue fell short of opening the door to rebuttal of the responsible-business-practices defense.[5]

Finally, we need not reach the merits of plaintiff's claim that the trial court erred by instructing the jury to allocate fault among the parties under the tort reform act. As is clear from the jury's allocation of no fault to Empty Keg, the jury found that that Empty Keg employees did not contribute to this incident by selling alcohol to Jewell while he was visibly intoxicated. "An issue is moot if an event has occurred that renders it impossible for the court, if it should decide in favor of the party, to grant relief." *Michigan Nat Bank v St Paul Fire & Marine Ins Co*, 223 Mich App 19, 21; 566 NW2d 7 (1997). In essence, the jury found no cause of action against Empty Keg. This conclusion, which we affirm above, renders this issue moot. Moreover, were we to find that the trial court erred in instructing the jury to allocate a percentage of fault to each defendant the jury found liable, any alleged error was clearly harmless; a defendant cannot be held severally liable and share the burden of a jury award if, as here, the jury found no liability on the part of that defendant.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski

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[4] We also reject plaintiff's claim that the trial court incorrectly ruled that plaintiff actually injected the business-practices defense into evidence. Clearly, however, the record reflects that plaintiff's counsel crossed this line when he elicited testimony from Unger that he never served visibly intoxicated people "on any day."

[5] It remains the rule that "an abuse of discretion will be found when the decision is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *Kurtz v Faygo Beverages, Inc*, 466 Mich 186, 193; 644 NW2d 710 (2001), quoting *Spalding v Spalding*, 355 Mich 382, 384-385; 94 NW2d 810 (1959) (citation omitted).