STATE OF MICHIGAN

COURT OF APPEALS

JANEL CALKA, Plaintiff-Appellant,	UNPUBLISHED January 20, 2004
v	No. 242075 Oakland Circuit Court
ROGER-BUD, INC., d/b/a RASCAL'S LOUNGE, Defendant-Appellant.	LC No. 01-028790 NI

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

Plaintiff Janel Calka appeals as of right the entry of a judgment for no cause of action in this dramshop action and the trial court's order awarding defendant Rascal's Lounge case-evaluation sanctions pursuant to MCR 2.403(O). We affirm.

I

On February 12, 2000, at approximately 8:13 p.m., plaintiff was driving northbound on Pontiac Trail in South Lyon, Michigan, when her vehicle was struck by Paul Robak as he pulled onto the roadway from a parking lot. The accident occurred outside defendant Rascal's Lounge. Blood tests indicated that Robak had a blood alcohol level, two hours after the accident, of .33. Ultimately, Robak was criminally charged with operating under the influence of liquor, third offense (OUIL III), MCL 257.625, driving while license suspended (DWLS), MCL 257.904, and using improper license plates on his vehicle.

Plaintiff initiated the present civil action against Robak and the present defendant, Rascal's Lounge, for injuries sustained in the motor vehicle accident.[1] Plaintiff contended that

[1] Paul Robak is not a party to this appeal. Robak failed to appear and answer the complaint; consequently, a default judgment in the amount of $50,000 was entered against him. Robak did participate in this litigation as a witness, appearing for both deposition and trial. At the time of the civil trial, Robak was incarcerated in the Oakland County jail awaiting trial on the OUIL III and other charges arising from the motor vehicle accident.

defendant Rascal's Lounge was responsible under the dramshop provisions of MCL 436.1801[2] for having served Robak alcohol while in a visibly intoxicated condition. The statute provides a cause of action for an individual who suffers damage or personal injury by a visibly intoxicated person against the retail licensee that furnished the alcohol to the intoxicated person "if the unlawful sale is proven to be a proximate cause of the damage, injury, or death." MCL 436.1801(2).

Following a four-day trial, the jury rendered a verdict of no cause of action. Defendant moved for case-evaluation sanctions, and the trial court subsequently awarded defendant $14,500 in attorney fees and $3,750 in costs. Plaintiff now appeals.

II

Plaintiff first argues that the verdict of the jury was against the great weight of the evidence and, therefore, the trial court erred in denying her motion for a new trial. This Court reviews a trial court's decision on a motion for new trial for an abuse of discretion. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000). Substantial deference is given to the trial court's determination that the jury's verdict was not against the great weight of the evidence. *Id*. An appellate court may overturn a jury's verdict based on the great weight of the evidence "only when it was manifestly against the clear weight of the evidence." *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999), quoting *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1996). "The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it." *Ellsworth, supra* at 194. "This Court gives deference to the trial court's unique ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice." *Id*.

The central issue at trial concerned whether defendant Rascal's Lounge served alcohol to Paul Robak prior to the accident while he was visibly intoxicated. Significant in this regard is the fact that at the time of the accident, Paul Robak resided at a motel (the Country Meadows Inn) located next door to Rascal's Lounge. Defendant's parking lot connected to the motel, thus permitting ingress and egress from the motel by way of defendant's highway entrance.

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[2] MCL 436.1801 governs the tort liability of liquor licensees resulting from the furnishing of alcohol to minors or visibly intoxicated persons and provides, in part:

> (2) A retail licensee shall not directly, individually, or by a clerk, agent, or servant, sell, furnish, or give alcoholic liquor to a minor except as otherwise provided in this act. A retail licensee shall not directly or indirectly, individually or by a clerk, agent, or servant sell, furnish, or give alcoholic liquor to a person who is visibly intoxicated. [MCL 436.1801(2).]

At deposition and trial, Paul Robak denied leaving Rascal's Lounge immediately prior to the accident. Instead, Robak maintained that he was coming from his residence at the motel when the accident occurred. Robak indicated that on the day in question, he went to Rascal's Lounge in the afternoon, approximately five or six hours before the accident, consumed a hamburger and two or three beers, and then returned to his motel room. Robak specifically denied consuming any alcohol, i.e., take-out beer from Rascal's Lounge, at his home after leaving the bar and before the accident. He testified that when the accident occurred, he was driving out of the parking lot of his residence to go to a local store to procure beer, cigarettes, and food. Robak acknowledged being at Rascal's Lounge on the evening before the accident, from approximately 6:00 p.m. until close at 2:00 a.m. He consumed approximately twenty-four beers. Robak testified that defendant's staff did not cut him off from drinking that evening. Testimony was admitted that Robak had consumed considerable amounts of alcohol on a regular basis for the past twenty years, drinking an average of six beers per day during the work week and as many as twelve to eighteen or twenty-four beers on the weekend.

At trial, police sergeant Sean Hoydic, the first police officer at the accident scene, testified regarding the visible signs of intoxication displayed by Robak at the accident scene and opined, through accident reconstruction, that Robak's vehicle entered the roadway from defendant's parking lot:

> [T]here's a small island you can see right here, that you can't drive across, and on either side of that island there's an exit. This one is very wide over here, and also services the hotel, or motel I should say, which is to the north. And this one here to the south is somewhat narrower and services Rascals [sic] Bar. That's where we determined that Mr. Robak left from.

On cross-examination, Hoydic was questioned about the proximity of parking lots between defendant and the neighboring motel:

> *Q.* (*Counsel for defendant*) [C]ouldn't a vehicle have crossed from the Country Meadows Inn through the southern exit without having to – it doesn't appear that there's any obstruction between Country Meadows Inn and Rascals [sic] Lounge.
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> *A.* (Sgt. *Hoydic*) He could have. I guess my question would be, why would he?
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> *Q.* But you admit, he could have done that?
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> *A.* It's possible.
>
> *Q.* And since the parking lots are connected there, it's possible he could have driven directly from Country Meadows Inn and out the south exit?
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> *A.* It's possible, yes.

Hoydic further testified regarding the statements made by Robak at the scene of the accident:

Q. (*Counsel for plaintiff*) Did you ask Mr. Robak if he had been drinking that evening?

A. (*Sgt. Hoydic*) Yes, I did.

Q. And what was his response?

A. That he had been drinking and that – at first when I spoke to him in the car, prior to moving him out of the car, he said that he had five or six beers. And then when I saw his level of intoxication when we were walking him, literally from the car to the parking lot, I asked him again because I couldn't believe the five to six beers. Five to six beers doesn't generally get somebody that intoxicated where they can't walk. So I asked him again, if you had anything more than five to six beers, be honest with me. Then he said, no, five or six beers in there, and he pointed to Rascals [sic].

On cross-examination, it was noted that Hoydic indicated in his police report that Robak had consumed five to six beers but omitted any reference to Rascal's Lounge as the location of Robak's beer consumption. Hoydic did, however, specify Rascal's Lounge in his request for a search warrant as the location of Robak's consumption of beer.

The manager of Rascal's Lounge testified that those staff members working on the date of the accident informed him that Robak was in the bar from around noon to 2:00 p.m., consumed a hamburger and two to three beers and did not return to the bar for the remainder of the day. The manager stated that he arrived at Rascal's Lounge at approximately 7:00 p.m. on the day of the accident and did not observe Robak in the bar.

Defendant's bartender testified that Robak never parked at the bar. The bartender testified that on the date of the accident, Robak came into the bar around 12:30 p.m. and appeared to have come from work. The bartender indicated Robak did not appear intoxicated and showed no signs of having been drinking. She further testified that Robak consumed two beers and a hamburger while at Rascal's Lounge and took "chili and four beers to go." The bartender testified that Robak left the bar around 2:00 p.m. or 2:30 p.m., and did not return on her shift, which ended around 7:00 p.m. She also testified she returned to the bar that evening around 8:00 p.m. and did not observe Robak in the bar.

Another employee of Rascal's Lounge testified she arrived at the bar around 7:00 p.m. and did not observe Robak in the lounge from the time of her arrival to the time of the accident. The employee denied serving Robak twenty-four beers the previous evening in the bar stating, "He may have had 24 if he had them over in his room next door."

On appeal, plaintiff now asserts that the great weight of the evidence establishes that defendant Rascal's Lounge served Robak while visibly intoxicated. Plaintiff argues that defendant's employees all testified that Robak was served intoxicating liquor while at Rascal's Lounge on the date of the accident and that Robak told a police officer at the accident scene that he had consumed five to six beers at Rascal's Lounge prior to the accident, and twenty-four beers at that location the evening before. Plaintiff maintains that it was improper for the jury to

ignore uncontroverted evidence and to speculate, as encouraged by defense counsel, regarding the location of Robak's alcohol consumption prior to the accident, given that there was no evidence or basis in the trial court record that Robak consumed alcohol at any location other than Rascal's Lounge prior to the accident. Plaintiff thus contends that the trial court erred in denying plaintiff's motion for a new trial.

However, we conclude that plaintiff's argument fails to withstand scrutiny of the testimony and facts presented at trial. Robak made contradictory statements involving the amount of alcohol he ingested, where he ingested the alcohol and the time of his consumption. While highly intoxicated at the accident scene, upon questioning by police, Robak stated he consumed five or six beers. Upon further inquiry by police, Robak pointed toward defendant Rascal's Lounge as the location of his alcohol consumption. Later Robak testified in deposition that he had not been in defendant Rascal's Lounge immediately prior to the accident and had only consumed two or three beers at that location five or six hours prior to the accident. At best, based on Robak's testimony, the evidence relied on by plaintiff to establish her claim was inconsistent.

Further, all employees of Rascal's Lounge consistently testified that the amount of alcohol consumed at that location by Robak was two or three beers at least five to six hours before the accident. Defendant's employees all denied the presence of Robak in the bar for the five to six hour period prior to the accident. Therefore, it was not unreasonable for the jury to conclude that Robak, given his acknowledged history of alcoholism and the testimony presented, had consumed alcohol throughout the afternoon while at another location.

Moreover, the testimony of the expert witnesses did not provide plaintiff with the requisite proof that Rascal's Lounge must have served Robak while in a visibly intoxicated condition. Both experts agreed, based on extrapolation of the blood alcohol level determined two hours subsequent to the accident, that Robak's blood alcohol level at the time of the accident must have been .37. Plaintiff's expert testified he relied on the police report for his assumption that Robak had consumed five to six beers immediately prior to the accident. On cross-examination, plaintiff's expert acknowledged there was no means to ascertain either the location or time of Robak's alcohol consumption immediately prior to the accident.

When presented with assumptions regarding Robak's alcohol consumption for the twenty-four hour period immediately prior to the accident, testimony of the expert witnesses did not vary significantly. When asked to assume the accuracy of Robak's testimony that his consumption of alcohol was limited to two or three beers at Rascal's Lounge at least five hours prior to the accident, both experts opined that Robak would have had to consume sufficient quantities of alcohol over the previous twenty-four hour period to have attained a blood alcohol level of .5 to evidence a blood alcohol level of .33 two hours subsequent to the accident. Both experts acknowledged that a blood alcohol level of .5 was fatal, let alone incredible. However, plaintiff relies on this scenario to support her theory that defendant Rascal's Lounge must have served Robak while visibly intoxicated and to explain Robak's testimony that he had not consumed more than two or three beers immediately prior to the accident. Even accepting this version of events as accurate, plaintiff's own expert opined that Robak would have had to consume twice the amount of alcohol over the prior twenty-four hour period that Robak testified to ingesting.

This explanation for Robak's .33 blood alcohol level subsequent to the accident was questionable, even from the perspective of the experts, who opined that attaining a blood alcohol level of .50 would be fatal. Further, defendant's expert called such an explanation into question by calculating the rate of "burn off" for Robak presuming his consumption of twenty-four beers between 6:00 p.m. the evening before the accident to 2:00 a.m. of the day on the accident and two to three beers between noon and 2:30 p.m. on the accident day. Using this analysis, defendant's expert estimated Robak's blood alcohol level at 2:00 a.m. on the date of the accident as being .32. When Robak returned to defendant Rascal's Lounge at noon that same day, defendant's expert estimated he would have a blood alcohol level of approximately .08. At this level and given Robak's history of alcoholism, defendant's expert opined Robak would not demonstrate visible signs of intoxication. Following consumption of two or three additional beers, defendant's expert estimated Robak's blood alcohol level as being .12 when he left defendant Rascal's Lounge at 2:30 p.m. on the date of the accident. Again, defendant's expert opined that Robak would not display signs of visible intoxication at this level.

Based on a review of the testimony and evidence presented to the jury, it was not unreasonable for the jury to determine that defendant Rascal's Lounge had not served Robak while visibly intoxicated or immediately prior to the accident. The only testimony suggesting immediate prior consumption of alcohol by Robak prior to the accident was his own statement to police at the accident scene. Given the high level of intoxication of Robak at the scene, it was not unreasonable for the jury to give greater credibility to Robak's later and more sober deposition testimony that he had consumed only two or three beers at defendant Rascal's Lounge five or six hours prior to the accident as this coincided with the testimony of three other witnesses. The testimony of the experts did not bolster plaintiff's claim. Based on the extrapolations performed by the expert witnesses, it was difficult to believe that Robak could have consumed such significant quantities of alcohol in the twenty-four hour period prior to the accident, and survived, to have a blood alcohol level of .33 after the accident. The only reasonable conclusion was that Robak did consume alcohol immediately prior to the accident. However, there was no evidence that Robak consumed that alcohol while at defendant Rascal's Lounge.

A jury's verdict should not be set aside if there is competent evidence to support it. *Ellsworth, supra* at 194. The trial court correctly determined the issues in this case that involved credibility were properly left to the jury as factfinders. *Id*. Based on a review of the record, we conclude that the verdict was not against the great weight of the evidence and that the trial court did not abuse its discretion in denying plaintiff a new trial.

In a related argument, plaintiff also contends the statement by defense counsel during closing argument, suggesting the jury speculate regarding the location and amount of consumption of alcohol by Robak immediately prior to the accident, constituted error requiring reversal. However, plaintiff did not object to the statement at trial. Accordingly, we review the comment to determine if it "may have caused the result or played too large a part and may have denied the party a fair trial." *Ellsworth, supra* at 192. When viewing the comments in context of the entire closing argument, defense counsel was arguing the evidence and drawing reasonable inferences from the testimony. *In re Miller*, 182 Mich App 70, 77; 451 NW2d 576 (1990). The major issues in this case involved when Robak drank alcohol and the location of that consumption prior to the accident. As noted by defense counsel during closing argument, Robak

testified to his drinking of alcohol at home. Defense counsel merely argued alternative theories to explain Robak's level of intoxication at the time of the accident based on testimony of witnesses. Further, plaintiff has not demonstrated that this one comment during closing arguments influenced the jury's verdict or denied her a fair trial. *Ellsworth, supra*. Consequently, the comment was not inappropriate and did not constitute error requiring reversal.

III

Plaintiff next challenges the trial court's award of case-evaluation sanctions to defendant and the amount awarded. We review de novo a trial court's decision to grant or deny a motion for case-evaluation sanctions. *Cheron, Inc v Don Jones, Inc*, 244 Mich App 212, 218; 625 NW2d 93 (2000). A trial court's decision regarding the amount of an award of such sanctions is reviewed for an abuse of discretion. *Elia v Hazen*, 242 Mich App 374, 377; 619 NW2d 1 (2000).

Plaintiff received a default judgment against Robak in the amount of $50,000 on April 25, 2001. On October 25, 2001, plaintiff's claim against defendant Rascal's Lounge was submitted for case evaluation pursuant to MCR 2.403[3] and received an evaluation of $37,500. Both parties rejected the case evaluation. Due to the prior entry of a default judgment, Robak was not included in the case evaluation. On March 25, 2002, the trial court entered a judgment of no cause of action in favor of defendant Rascal's Lounge following conclusion of a jury trial. Defendant sought case-evaluation sanctions pursuant to MCR 2.403(O)(1) on the basis of the judgment of no cause of action, contending that it achieved a more favorable determination than it would have received through the jointly rejected case evaluation.

Plaintiff now argues that the aggregate amount of the liability awarded to plaintiff against both defendants was $50,000 and that this amount is sufficiently favorable to plaintiff, exceeding the case evaluation figure of $37,500 by more than ten percent, to preclude an award of case-evaluation sanctions. Plaintiff maintains that the trial court incorrectly interpreted her argument

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[3] MCR 2.403 provides in pertinent part:

> (1) If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the case evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.
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> (2) For purposes of this rule, "verdict" means:
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> (a) a jury verdict,
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> (b) a judgment by the court after a nonjury trial,
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> (c) a judgment entered as a result of a ruling on a motion after rejection of the case evaluation.

against the imposition of mediation sanctions as falling under the purview of MCR 2.403(O)(2)(c); rather, MCR 2.403(O)(2)(b) is applicable because the default judgment received against Robak was "a judgment by the court after a nonjury trial" due to the determination of damages by the trial court.[4]

However, plaintiff ignores the plain meaning of the language of MCR 2.403(O)(2)(b). When applying MCR 2.403(O)(2), this Court "has consistently rejected attempts to expand or read additional meaning into the rule that is not expressly stated." *Jerico Construction, Inc v Quadrants, Inc*, 257 Mich App 22, 30; 666 NW2d 310 (2003). This is consistent with the rule of statutory construction which mandates language that is unambiguous be enforced in accordance with its plain meaning. *Marketos v American Employers Ins Co*, 465 Mich 407, 413; 633 NW2d 371 (2001). Clearly, "MCR 2.403(O)(2) provides that only three things qualify as verdicts for the purpose of this rule: '(a) a jury verdict, (b) a judgment by the court after a nonjury trial, and (c) a judgment entered as a result of a ruling on a motion filed after mediation.'" *Jerico, supra* at 31.

In addition, it would appear logically inappropriate to include the default judgment award against Robak as part of an "aggregate" verdict. The default judgment was entered against Robak months prior to the case evaluation. Robak was not included in the case evaluation process. Hence, the award of $37,500 that was rejected by the parties only determined the liability between plaintiff and defendant Rascal's Lounge. Plaintiff further argues it is unfair to penalize her through the award of case-evaluation sanctions to defendant Rascal's Lounge for properly following the requisites of MCR 2.603 regarding the entry of a default judgment. Plaintiff ignores that the default judgment was entered pursuant to the filing of a motion and would therefore only qualify as a "verdict" pursuant to MCR 2.403(O)(2)(c) had it occurred subsequent to the rejection of the case evaluation.

Plaintiff also contests the amount awarded in sanctions by the trial court. Defendant sought reimbursement of attorney fees in the amount of $15,739.50 and costs in the amount of $6,665.60, for a total award in sanctions of $22,405.10. The trial court awarded defendant Rascal's Lounge $14,500 in attorney fees and $3,750 in costs.

We conclude that plaintiff's arguments in this regard are without merit. The trial court engaged in a discussion within its opinion and order indicating "defendant's request for $22,405.10 is reasonable," and further elucidated the factors it considered in the award of attorney fees. The court nonetheless reduced both the fees and costs awarded. Despite the absence of a detailed explanation by the court regarding the specific costs and amounts included in the award, the court did not abuse its discretion in setting the total amount of the award. Clearly, certain costs were not included given the discrepancy in the actual amount awarded when compared to the costs requested.

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[4] Robak did not appear for the hearing on the motion for entry of default judgment. Plaintiff argues the court's determination of damages, for inclusion in the default judgment, was the result of a nonjury trial.

Plaintiff's further contention that defendant did not comply with the requirements of MCR 2.625(F)(2)[5] is without merit because the trial court signed the judgment in this matter as required by MCR 2.625(F)(1)[6]. As such, defendant was not required to file a bill of costs pursuant to MCR 2.625(G).[7] MCR 2.625(F), (G); *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 428-429; 552 NW2d 466 (1996).

Finally, plaintiff asserts the court erred in failing to hold an evidentiary hearing to determine the award of attorney fees. Again, plaintiff's argument is without merit. MCR 2.403(O)(6)(b) is clear in its language that the determination of the reasonableness of the attorney fees is within the discretion of the trial judge. The court clearly stated the factors it considered in its opinion and order. It is not necessary for the court to detail its findings "relative to each specific factor considered." *J C Building, supra* at 430. In this case, the court properly reviewed the requisite factors in making its determination regarding the award of attorney fees. As such, plaintiff has failed to demonstrate an abuse of the trial court's discretion.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Jessica R. Cooper

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[5] MCR 2.625(F)(2) states, in relevant part: "When costs are to be taxed by the clerk, the party entitled to costs must present to the clerk . . . (a) a bill of costs conforming to subrule (G), (b) a copy of the bill of costs for each other party, and (c) a list of the names and addresses of the attorneys for each party or of parties not represented by attorneys."

[6] MCR 2.625(F)(1) states: "Costs may be taxed by the court on signing the judgment, or may be taxed by the clerk as provided in this subrule."

[7] MCR 2.625(G) states in relevant part: "(1) Each item claimed in the bill of costs, except fees of officers for services rendered, must be specified particularly. (2) The bill of costs must be verified and must contain a statement that (a) each item of cost or disbursement claimed is correct and has been necessarily incurred in the action, and (b) the services for which fees have been charged were actually performed."