

STATE OF MICHIGAN
COURT OF APPEALS

ADEL SAGMANI,

Plaintiff/Counter-Defendant-
Appellee,

v

AZIZ HAILO and MAZEN HAILO,

Defendants/Counter-Plaintiffs-
Appellants.

UNPUBLISHED
February 10, 2004

No. 243731
Oakland Circuit Court
LC No. 00-020534-NO

SILVANA HAILO,

Plaintiff-Appellant,

v

ADEL SAGMANI,

Defendant-Appellee.

No. 247263
Oakland Circuit Court
LC No. 00-025173-NO

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

In Docket No. 243731, defendants Aziz and Mazen Hailo (the Hailos) appeal as of right a judgment for plaintiff Adel Sagamani. In Docket No. 247263, plaintiff Silvana Hailo, Aziz Hailo's daughter and Mazen Hailo's, appeals by leave granted the order granting defendant Sagamani's motion for a directed verdict. These cases were consolidated by order of this Court. *Sagmani v Hailo*, unpublished order of the Court of Appeals, entered June 9, 2003 (Docket No. 243731); *Hailo v Sagmani*, unpublished order of the Court of Appeals, entered June 9, 2003 (Docket No. 247263). We affirm in part, reverse in part, and remand.

I. Facts and Procedure

Sagmani met Silvana the first day he arrived in the United States in 1983 after moving from Iraq. In 1989 or 1990, according to Chaldean custom, he asked Silvana's parents if he could marry her, despite never having dated her. Silvana's parents told Sagmani that she was not

interested. However, Sagmani testified that, in 1998, Silvana's behavior, such as calling him and hanging up or honking her car horn at him from the parking lot of his apartment, led him to believe that she was interested in him. Sagmani sent flowers to Silvana, repeatedly called her on the phone just to hear her voice on the answering machine, and sat in his car in Silvana's office parking lot. Sagmani admitted that he and Silvana never exchanged words. On January 22, 1999, Silvana called the police because Sagmani was sitting in a car in her office parking lot.

On January 31, 1999, Sagmani attended a wedding with a friend. Sagmani testified that, as he was leaving, Aziz confronted him, pushed him, and punched him in the mouth. Mazen then punched Sagmani in the nose. Sagmani fell to the ground and Mazen kicked him in the chest. When Sagmani tried to get up, Mazen kicked him in the knee. Sagmani did not fight back, but repeatedly pleaded for them to talk with him about the matter. In contrast to Sagmani's account of the incident, the Hailos testified that Aziz approached Sagmani after Sagmani elbowed his wife. When Sagmani pushed Aziz, Mazen approached to see what was happening. Sagmani pushed and slapped Mazen. In response, Mazen pushed and slapped Sagmani back. According to the Hailos, the incident ended at that. Sagmani's total medical bills for treatment relating to the incident were approximately \$26,727. On January 28, 2000, Sagmani filed a complaint against the Hailos, alleging assault and battery.

Silvana testified that, on February 15, 2000, when she was on her way home from work, Sagmani pulled his car close to her car and drove her car into the median. Sagmani denied this. Silvana filed a six-count complaint against Sagmani, but the trial court granted Sagmani's motion for summary disposition regarding all of the claims except for Silvana's assault claim.

The two cases were tried together in a consolidated trial. After the parties rested, Sagmani moved for a directed verdict in regard to Silvana's assault claim on the ground that Silvana had admitted at trial that she did not want any money damages and had therefore failed to prove the damages element of her claim. The trial court agreed and granted Sagmani's motion for a directed verdict. The jury found the Hailos liable for the assault and battery and awarded Sagmani \$125,000 in present damages, but nothing for future damages. The Hailos moved for judgment notwithstanding the verdict (JNOV), a new trial, or remittitur, but the trial court denied the motion.

II. Analysis

A. Docket No. 243731

The Hailos argue that the trial court should have granted their motion for JNOV, a new trial, or remittitur. We review de novo a trial court's decision regarding a motion for JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). We review a trial court's ruling with regard to a motion for a new trial for abuse of discretion. *Id.* at 261. We similarly review a trial court's decision regarding a motion for remittitur for an abuse of discretion. *Henry v Detroit*, 234 Mich App 405, 415; 594 NW2d 107 (1999).

1. Great Weight of the Evidence

The Hailos argue that the trial court erred in denying their motion for JNOV and abused its discretion in denying their motion for a new trial because the verdict was against the great

weight of the evidence. The Hailos argue that no reasonable juror could have believed Sagmani's delusional and discrepant testimony. "In reviewing a decision regarding a motion for JNOV, this Court must view the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party. If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand." *Morinelli, supra* at 260-261 (citation omitted). The credibility of witnesses is a matter within the province of the jury. *Johnson v Corbet*, 423 Mich 304, 314; 377 NW2d 713 (1985); *Farm Bureau Mut Ins Co v Wood*, 165 Mich App 9, 18; 418 NW2d 408 (1987). A new trial may be granted if the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). In deciding a motion for a new trial based on the great weight of the evidence, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. *Id.* "Substantial deference is given to the trial court's conclusion that the verdict was not against the great weight of the evidence." *Id.*

Here, Sagmani testified that as he was leaving a wedding, Aziz pushed him and punched him in the mouth without provocation. Mazen then punched Sagmani in the nose. Sagmani fell to the ground and Mazen kicked him in the chest. When Sagmani tried to get up, Mazen kicked him in the knee. Sagmani's friend, who accompanied Sagmani to the wedding, corroborated Sagmani's testimony. Given this evidence, reasonable jurors could have concluded that the Hailos were liable for assault and battery. Additionally, the trial court could have concluded that the overwhelming weight of the evidence did not favor the Hailos. Therefore, the trial court did not err in denying defendants' motion for JNOV and did not abuse its discretion in denying defendants' motion for a new trial based on the great weight of the evidence.

2. Witness Exclusion

Next, the Hailos argue that the trial court abused its discretion in denying their motion for a new trial, because the trial court improperly precluded certain witnesses from testifying. The trial court may grant a new trial when there was an "[i]rregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial," or when an error of law occurred in the proceedings that materially affected the substantial rights of the moving party. MCR 2.611(A)(1)(a) and (A)(1)(g).

During trial, Sagmani objected when the Hailos attempted to call two police officers to rebut Sagmani's credibility. One of these officers was not included on the witness list. The trial court sustained Sagmani's objections, ruling that one officer could not testify because he was not on the witness list and was not a rebuttal witness, and the other officer's testimony would be irrelevant because she had no knowledge of the assault at issue. The trial court may order that any witness not included on the witness list will be prohibited from testifying at trial unless good cause is shown. MCR 2.401(I)(2). It is within the trial court's discretion to exclude an undisclosed witness. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90; 618 NW2d 66 (2000).

The Hailos argue that there was good cause to permit the undisclosed officer to testify, because his testimony would have shown that Sagmani lied to the police and was therefore relevant to attack Sagmani's credibility. The Hailos argue that the other officer's testimony was also relevant because she would similarly testify that Sagmani lied to the police. However, the officers' testimony would have had no bearing on Sagmani's claims of assault and battery

against the Hailos, because the officers had no knowledge of the beating incident. Although the officers could have testified that Sagmani had lied to the police on one occasion, this testimony would have been cumulative because Sagmani had already admitted at trial that he had lied to police on that particular occasion. Therefore, the trial court did not abuse its discretion in excluding the officers from testifying at trial.

3. Attorney Misconduct

Next, the Hailos argue that the trial court abused its discretion in denying their motion for a new trial, because Sagmani's counsel made improper and prejudicial comments and elicited testimony that improperly tainted the jury verdict. In particular, the Hailos argue that Sagmani's attorney improperly commented on the Hailos' financial status and national origin. The trial court may grant a new trial when there is misconduct of the prevailing party that materially affected the substantial rights of the moving party. MCR 2.611(A)(1)(b).

When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [*Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982).]

“ ‘While a lawyer is expected to advocate his client's cause vigorously, “parties are entitled to a fair trial on the merit of the case, uninfluenced by appeals to passion or prejudice.” ’ ” *Badalamenti v William Beaumont Hosp—Troy*, 237 Mich App 278, 292; 602 NW2d 854 (1999), quoting *Wayne Co Bd of Rd Comm's v GLS LeasCo, Inc*, 394 Mich 126, 131; 229 NW2d 797 (1975), quoting *Layton v Cregan & Mallory Co, Inc*, 269 Mich 574, 583; 257 NW 888 (1934).

(a). The Parties' Financial Status

Here, Sagmani's counsel made multiple comments that Silvana was wealthy and that her family, the Hailos, had money. Counsel also pointed out that, in contrast to Silvana, Sagmani was a poor potato chip salesman. Even isolated comments referencing a party's financial status are improper, even if not always incurable or error requiring reversal. *Reetz, supra* at 111. When the theme is constantly repeated so that the error becomes indelibly impressed on the juror's consciousness, the error becomes incurable and requires reversal. *Id.* Although one instance of misconduct may not constitute prejudicial error, many improper remarks, in the aggregate, may prove so prejudicial to warrant a new trial. *GLS LeasCo, Inc, supra* at 131.

We agree with the trial court that the references to the Hailos' financial status did not rise to the egregious level of misconduct that was present in *Badalamenti, supra*. Here, although

Sagmani's counsel made several remarks regarding the disparity in wealth between the parties, it does not appear that she sought to divert the jurors' attention from the merits of the case by inflaming their passions. See *id.* at 292. The comments were not pervasive throughout the five-day trial, but were mostly part of Sagmani's closing arguments. Counsel for the Hailos did not object to the comments made by Sagmani's counsel. Furthermore, any prejudice was cured by the trial court's instruction to the jurors that the attorneys' statements are not evidence and that sympathy should not influence their decision. Therefore, we conclude that the remarks regarding the parties' financial situations did not cause the result or play so large a part that they denied the Hailos a fair trial. *Reetz, supra* at 103.

(b). Comments Regarding the Hailos' National Origin

Sagmani's attorney made several comments during trial that alluded to the Hailo's national origin.¹ "It is reversible error to deny the opposing party a fair trial by making irrelevant and inflammatory ethnic allusions." *George v Travelers Indemnity Co*, 81 Mich App 106, 114; 265 NW2d 59 (1978). When ethnic allusions are made at trial, this Court must look at whether the statements were relevant to the issues, and if not, whether they were calculated to arouse prejudice. *Id.*

Here, the record is replete with references to Chaldean culture, as well as questioning about the culture in Iraq. Some of the questions were made for the purpose of discovering the customary dating and relationship practices of Chaldeans to determine whether Sagmani's behavior toward Silvana was out of the ordinary in that culture. Although these questions and comments were mostly irrelevant to the assault charges in these cases, *both* parties' attorneys focused on these questions regarding the parties' Chaldean culture. Given this background, we cannot conclude that Sagmani's counsel's comments aroused the prejudice of the jury after they had already sat through five days of trial replete with testimony regarding the parties' shared national origin. Further, the trial court cured any prejudice by instructing the jury that its decision should not be influenced by the parties' national origins. Therefore, we conclude that Sagmani's attorney's comments regarding the Hailos' national origin were not so prejudicial that defendants were denied a fair trial. The trial court did not abuse its discretion in denying the Hailos' motion for a new trial based on attorney misconduct.

4. Damages Award

¹ The Hailos argue that the following two statements by Sagmani's attorney were improper:

(1) "Well, this case is all about taking the law into your own hands. I submit to you that this is a country of law, this is not a country of outlaws. When we have differences in America, we go to the police."

(2) "I told you when I met with you the first time that this is a country of laws. You heard some testimony on the stand about they are from Iraq, he is from Iraq, this and that. We are all here, we are all here in America and we abide by the American law."

Finally, the Hailos argue that the jury's award of \$125,000 to Sagmani was excessive in light of the evidence, and was based on punitive damages and attorney fees, which are not recoverable in Michigan. A new trial may be granted on the basis of an excessive verdict if the verdict was obtained by improper methods, was the result of sympathy or prejudice, or if it was clearly or grossly excessive. MCR 2.611(A)(1)(c) and (d). If the trial court finds that the only error in the trial is the excessiveness of the verdict, it may deny the motion for a new trial on the condition that the nonmoving party consent to remittitur to the highest amount the evidence will support. MCR 2.611(E)(1). "In determining a motion for remittitur, the trial court must decide whether the jury award was supported by the evidence." *Henry, supra* at 414.

Although the trial court should consider a number of factors, such as whether the verdict was induced by bias or prejudice, the trial court's inquiry is limited to objective considerations related to the actual conduct of the trial court or the evidence presented. This Court considers the evidence in the light most favorable to the plaintiff when reviewing the trial court's exercise of discretion regarding remittitur. [*Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003) (citations omitted).]

The Hailos argue that Sagmani's actions after the assault and his doctors' treatment of his injuries show that Sagmani did not suffer \$125,000 in damages. The Hailos further argue that Sagmani injected the issues of punitive damages and attorney fees into the trial, both of which are not recoverable in Michigan. The Hailos are correct that, in the absence of a statutory provision providing otherwise, punitive damages are not recoverable in Michigan. See *Rafferty v Markovitz*, 461 Mich 265, 270-271; 602 NW2d 367 (1999). Likewise, attorney fees are not generally recoverable in the absence of a statute or court rule that expressly authorizes the award. See *id.* at 270.

Here, Sagmani's attorney elicited testimony from Sagmani that he desired \$50,000 in punitive damages and that "the law allows for that." Sagmani also testified that he had incurred \$50,000 in attorney fees and that he was requesting that amount in damages. Counsel for the Hailos did not object to this testimony. Sagmani's counsel did not ask for punitive damages or attorney fees in his closing argument. Furthermore, the trial court instructed the jury that any award of present damages was to be based on the nature and extent of injuries, physical disabilities or limitations due to the injuries, physical pain and suffering, mental anguish, fright and shock, embarrassment, humiliation, mortification, and expenses caused by the injuries. The trial court never told the jury that they had the power to award punitive damages or attorney fees. Additionally, the verdict form stated nothing about punitive damages or attorney fees. The jury entered a general verdict for \$125,000 in present damages. Despite Sagmani's testimony that he was requesting punitive damages and attorney fees, there is no indication that the jury improperly awarded Sagmani anything other than compensatory damages.

We also conclude that the \$125,000 award was supported by the evidence. Assuming that all of Sagmani's claimed injuries were related to the assault, Sagmani testified that the total amount of his medical bills was approximately \$26,727. Additionally, Sagmani testified that he experienced chest, nose, jaw, knee, finger, neck, and arm pain resulting from the battery. Doctors verified that, after the assault, Sagmani suffered from a broken nose, a chest wall contusion, two chipped teeth, a dead nerve in one of his teeth, an injury to the temporomandibular joint in his jaw, fluid build-up in his finger, and a pinched nerve in his neck.

As the trier of fact, the jury has the authority to measure damages for pain and suffering. *Kelly v Builders Square, Inc.*, 465 Mich 29, 34; 632 NW2d 912 (2001). Courts should not substitute their judgment for that of the jury unless the verdict shocks the conscience or has been secured by improper means, prejudice, or sympathy. *Id.* at 36, citing *Brown v Arnold*, 303 Mich 616, 628; 6 NW2d 914 (1942). Here, the verdict was within the range of the evidence and we will not substitute our judgment for that of the jury regarding the proper amount of damages.

B. Docket No. 247263

Silvana's sole issue on appeal is that the trial court erred in granting Sagmani's motion for a directed verdict because the evidence presented was sufficient to support Silvana's claim for money damages. We agree. We review de novo a trial court's ruling on a motion for a directed verdict. *Graves v Warner Bros.*, 253 Mich App 486, 491; 656 NW2d 195 (2002).

In reviewing a trial court's decision on a motion for a directed verdict, an appellate court is to examine the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted. [*Clark v Kmart Corp.*, 465 Mich 416, 418-419; 634 NW2d 347 (2001), on remand 249 Mich App 141; 640 NW2d 892 (2002) (citations omitted).]

Here, Silvana testified that Sagmani drove up next to her and ran her car into the median.² She testified that she was "terrified and crying and shaking" after the accident. She testified that Sagmani "has stolen my life, my identity, my sense of security, my social life, definitely my financial life, everything. I'm not the same person." She also testified that she had anxiety attacks and could not drive or work. However, when asked about damages at trial, Silvana testified that she did not want any money and just wanted Sagmani to leave her alone. But she also testified that she wanted mental damages and that Sagmani should have to pay her or society for what he had put her through.

The trial court stated that it granted Sagmani's motion for a directed verdict regarding Silvana's assault claim because Silvana testified that "she didn't want any money as far as the defendant Mr. Sagmani is concerned." The trial court erroneously focused on the concept of remuneration for damages rather than the issue whether defendant's conduct caused plaintiff damage. It is true that damages is one of the elements of an action arising out of a tortious injury. *Lumley v Bd of Regents for the Univ of Michigan*, 215 Mich App 125, 130; 544 NW2d 692 (1996). However, there was clearly evidence that Silvana was mentally injured by the alleged assault. Mental distress and anguish can constitute actual damages in tort cases. *Phinney v Perlmutter*, 222 Mich App 513, 532; 564 NW2d 532 (1997). While Silvana testified that her suit against Sagmani was motivated by a desire to deter him rather than to obtain money, this did not amount to testifying that she had suffered no damages as a result of Sagmani's actions.

² Despite Sagmani's contention to the contrary, there was evidence supporting a finding that it was he, and not somebody else, who assaulted Silvana.

Furthermore, Silvana clarified during her testimony that she *was* seeking monetary compensation for her damages from Sagmani. Viewing the evidence in a light most favorable to Silvana, a jury could reasonably conclude that Silvana suffered damages as a result of Sagmani's actions. Therefore, we conclude that the trial court erred in granting Sagmani's motion for a directed verdict in regard to Silvana's assault claim.

III. Conclusion

We affirm the judgment for Sagmani in Docket No. 243731, and reverse and remand for a new trial in Docket No. 247263.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra