

STATE OF MICHIGAN
COURT OF APPEALS

ERIC BRAVERMAN, Conservator of the Estate
of JAMALL DUFFEY, a Minor,

UNPUBLISHED
January 31, 2008

Plaintiff-Appellee/Cross-Appellant,

v

No. 274165
Wayne Circuit Court
LC No. 04-404393-NI

KASIEM PIERCE and AMTECH LIGHTING
SERVICES,

Defendants-Appellants/Cross-
Appellees,

and

CITY OF DETROIT,

Defendant.

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

In this automobile negligence action, defendants appeal as of right the trial court's order granting plaintiff's motion for additur and amending a judgment previously entered in favor of plaintiff following a jury trial. Plaintiff cross-appeals from this same order. Because we conclude that the basis for the trial court's decision to grant additur, i.e., that the jury misunderstood the effect of inflation on its award of future damages, is not supported by evidence produced at trial, we reverse and remand.

I. Basic Facts and Procedural History

The facts underlying and relevant to this appeal are not in dispute. While attempting to cross a busy intersection in June 2003, Jamall Duffey was struck by a vehicle owned by defendant Amtech Lighting Services (Amtech) and being driven by its employee, defendant Kasiem Pierce. It was not disputed that cognitive and attentional deficits already suffered by Duffey, who was ten years old at the time of the accident, were exacerbated as a result of the accident. The primary issues at trial were thus the extent of, and fault for, these increased deficits. At trial, both parties presented evidence concerning the circumstances of the accident. Through his witnesses, plaintiff generally asserted that Duffey was struck by Pierce while

rightfully attempting to cross the intersection. The witnesses who testified on behalf of defendants, however, asserted that Pierce had the right of way and that Duffey abruptly ran out in front of him from behind a parked truck. At the close of trial, the jury found Duffey to be thirty percent at fault for his injuries and awarded him \$300,000 in past non-economic damages and \$30,000 per year for each of the years 2006 through 2056 in future non-economic damages. The parties subsequently agreed to entry of a judgment, reduced to present value and accounting for interest and comparative fault, in the amount of nearly \$760,000.

Plaintiff thereafter moved for additur or a new trial pursuant to MCR 2.116(A)(1)(c) and (d) on the ground that the jury's verdict was inadequate. In support of his motion plaintiff asserted, among other things, that the jury failed to account for inflation by awarding future non-economic damages in the unwavering amount of \$30,000 per year, and that additur should be granted or a new trial limited to the issue of damages should be held.

The motion was heard by the trial court in conjunction with a motion by defendants for case evaluation sanctions pursuant to MCR 2.403(O). At the hearing, defendants argued that they were entitled to the imposition of sanctions in the form of costs and attorney fees because they had improved their position at case evaluation by more than ten percent. The trial court, however, first addressed plaintiff's motion, indicating that it was "absolutely persuaded" that additur should be granted because the jury did not understand the effect of inflation on its award of future damages and thus rendered a verdict in an amount less than it intended. Thus, the trial court ordered that the judgment be amended by increasing the jury's award of future non-economic damages at the rate of five percent for each year of the award. Indicating that its decision to grant additur may well render defendants' motion for costs and attorney fees moot, the court thereafter declined to rule on that matter until entry of a final order amending the judgment for additur.

When the parties later reconvened to discuss entry of an order granting additur and amending the judgment to award Duffey more than \$1,309,000 in present value cash and interest, the trial court declined to condition its grant of additur on defendants' written consent. The court thus struck from the proposed order the language agreed by the parties to be required by MCR 2.611(E) before entering the order. The court further ruled that "the issue of costs and attorney's fees based on the case evaluation acceptance rejection is moot because . . . the judgment with . . . additur is proper." These appeals followed.

II. Analysis

A. Additur

Defendants first argue that the trial court erred in granting additur. Specifically, defendants assert that the reason cited by the trial court for having granted such relief, i.e., that

the jury misunderstood the effect of inflation on its award of future damages, is an improper basis on which to grant additur and, further, is not supported by the evidence at trial.¹ We agree.

A trial court's decision regarding the grant or denial of additur is accorded deference and will not be reversed on appeal absent an abuse of discretion. *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997); see also MCL 600.6098(4). Although a trial court may grant a new trial whenever a party's substantial rights have been materially affected, such as where the jury's verdict is clearly or grossly inadequate, see MCR 2.611(A)(1)(c) and (d), where the only error found by the court is the inadequacy of the verdict, the court may deny a motion for new trial on condition that the non-moving party consents to additur in the lowest amount supported by the evidence, MCR 2.611(E).² In doing so, however, the court must limit its inquiry to objective considerations of the evidence and conduct of the trial, because the primary consideration in deciding a motion for additur is whether the jury award is supported by the evidence. See *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989) (“[t]he only consideration *expressly* authorized by MCR 2.611(E)(1) . . . is whether the jury award is supported by the evidence”).

Here, the trial court considered neither the evidence nor the conduct of the trial. Rather, the court concluded on the basis of the jury verdict form that the jury failed to understand the effect of inflation on an award of future damages and, as a result, awarded future non-economic damages in an amount less than it intended. The trial court's failure to limit its considerations to the evidence and conduct at trial itself arguably renders its decision an abuse of discretion. See *Bynum v ESAB Group, Inc*, 467 Mich 280, 283; 651 NW2d 383 (2002) (a trial court's misapplication of the law in reaching its decision may constitute an abuse of discretion); see also *Stepp v Dep't of Natural Resources*, 157 Mich App 774, 779; 404 NW2d 665 (1987) (finding that the trial court's misunderstanding of the legal basis for its ruling resulted in an abuse of discretion). More importantly, however, the basis for the trial court's grant of additur is simply not supported by the evidence.

¹ Defendants also argue that the trial court's grant of additur was intended to circumvent the statutory requirement that an award of future non-economic damages be reduced to “gross present cash value.” See MCL 600.6306(1)(c); see also MCL 600.6306(2) (defining “gross present cash value” as 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”). While it is clear that this was the effect of the trial court's ruling, which awarded additur at a rate of 5% per year for each year that the jury found that plaintiff would suffer future damages, the record simply does not support an intent on the part of the trial court to circumvent or otherwise nullify reduction of the award to present cash value. To the contrary, the court expressly recognized the statutory reduction requirement as a “concept” separate from that of ensuring that the judgment reflected the amount the jury truly intended to award.

² While defendants argue that the trial court failed to find that verdict was inadequate, we conclude that the court's conclusion that the jury intended to award an amount greater than it did equates to such a finding.

At trial, economist Michael Thompson testified on behalf of plaintiff regarding the concept of inflation and its effect on an award of future damages. Using a number of graphical aides, Thompson clearly and concisely explained to the jury that if it sought to award future damages and wished the purchasing power of that money to stay the same over the years, the award must be adjusted for inflation. Additionally, we note that the jury was expressly instructed by the trial court that it could consider the effect of inflation in determining the damages to be awarded for future losses, but that the amount to be awarded was within its “solemn judgment.” As recognized by the trial court at the hearing on the parties’ motion to enter the amended judgment, the jury could have awarded damages in the manner they did for a multitude of reasons.³ Under these circumstances, we conclude that the trial court’s finding that the jury did not understand the effect of inflation is speculative and, as explained, not supported by the evidence. Accordingly, the trial court abused discretion in granting additur on that ground.⁴

B. Case Evaluation Sanctions

Defendants also argue that the trial court erred in failing to grant their motion for case evaluation sanctions pursuant to MCR 2.403(O). Again, we agree.

Defendants moved for case evaluation sanctions pursuant to MCR 2.403(O) on the ground that both parties had rejected the case evaluation award of \$2,650,000 and that plaintiff failed to obtain a verdict more than ten percent greater than the award, while defendants in fact improved their position by more than that percentage. However, following its grant of additur, the trial court denied defendants’ motion as moot. “A trial court’s decision whether to grant case-evaluation sanctions under MCR 2.403(O) presents a question of law, which this Court reviews de novo.” *Campbell v Sullins*, 257 Mich App 179, 197; 667 NW2d 887 (2003).

MCR 2.403(O)(1) provides:

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

³ Specifically, the court stated:

Sometimes juries do things illogically, which in my view this jury did in relation to the future damages. And sometimes they say, give everybody a break. And . . . they could have said, well the kid was only 10 years old and we don’t know if he was running or not, but we’ll discount our verdict against him.

⁴ Because the basis on which the trial court found the verdict to be inadequate was improper, a new trial on that ground is also precluded. See MCR 2.611(A)(1); see also MCR 2.611(E). Accordingly, we need not address defendants assertion that it was entitled to reject additur and opt for a new trial. For this same reason, it is unnecessary for us to address plaintiff’s claim that the trial court erred in precluding him from inquiring into defendant Pierce’s employment history at trial, which we interpret as a request to address whether such testimony should be admitted in the event that this Court’s decision results in a new trial.

also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the case evaluation.

To determine whether a verdict is more favorable to a party for purposes of MCR 2.403(O)(1), the verdict must first be adjusted by adding to it assessable costs and interest. MCR 2.403(O)(3). Further, any award of future damages must be adjusted to present cash value. *Id.* After these adjustments, the verdict is considered more favorable to a plaintiff if it is more than ten percent above the evaluation and more favorable to the defendant if it is more than ten percent below the evaluation. *Id.*

Here, it is not disputed that after the required adjustments the verdict (both as rendered by the jury and as altered by the trial court's grant of additur) is less favorable to plaintiff, but more favorable to defendants, than the case evaluation award within the meaning of MCR 2.403(O)(1).⁵ Thus, given that both parties rejected the case evaluation award, defendants are, as a matter of law, entitled to case evaluation sanctions. *Great Lakes Gas Transmission Ltd Partnership v Markel*, 226 Mich App 127, 130; 573 NW2d 61 (1997) (applying the clear language of MCR 2.403(O)(1) and holding that the rule's "use of the word 'must' indicates that the award of costs is mandatory, not discretionary"). Consequently, regardless of whether additur was improperly granted, the trial court erred as a matter of law in failing to grant defendants' motion for sanctions pursuant to MCR 2.403(O).⁶

⁵ Indeed, the ten percent difference to be used in determining whether the verdicts were more or less favorable to the parties equates to only \$265,000, i.e., ten percent of the case evaluation award of \$2,650,000. The verdict as rendered by the jury and adjusted for costs, interest, and the present cash value of the award of future damages, approximately \$760,000, was nearly \$1,900,000 less than the case evaluation award—well within the range for requiring the imposition of sanctions pursuant to MCR 2.403(O). The \$1,341,000 difference between the \$1,309,000 verdict resulting from the trial court's grant of additur and the \$2,650,000 case evaluation award was also well within the range for requiring the imposition of sanctions pursuant to MCR 2.403(O). See MCR 2.403(O)(2) (providing that "a judgment entered as a result of a ruling on a motion after rejection of the case evaluation" is a "verdict" for purposes of MCR 2.403(O)).

⁶ We decline to address plaintiff's assertion that the question of sanctions is moot because neither of the individuals who have served as his conservator are liable to pay the sanctions. As already indicated, where the requirements for the imposition of sanctions pursuant MCR 2.403(O) have been met, imposition of sanctions is mandatory. *Great Lakes, supra*. Thus, whether an award of sanctions is legally or practically enforceable in this particular case is irrelevant. The only issue presented at this time is whether the trial court erred by denying defendants a judgment pursuant to MCR 2.403(O). The enforceability of that judgment is a distinctly separate question not ripe for decision by this Court.

Reversed and remanded for entry of a judgment reinstating the verdict as rendered by the jury and further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder