

STATE OF MICHIGAN
COURT OF APPEALS

TONY POWELL, a/k/a MICHAEL TATE,

Plaintiff-Appellee,

v

DOD VUSHAJ,

Defendant-Appellant.

UNPUBLISHED

September 23, 2008

No. 274587

Wayne Circuit Court

LC No. 04-420763-NI

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

In this negligence action, defendant appeals as of right from a judgment in favor of plaintiff.¹ We affirm in part, vacate in part, and remand.

I. Serious Impairment of Body Function and Serious Permanent Disfigurement

Defendant first alleges that the trial court erred in denying his motion for directed verdict regarding the serious impairment of body function claim and further erred in granting plaintiff's motion for directed verdict regarding the serious permanent disfigurement claim. We disagree. A trial court's ruling regarding a motion for a directed verdict is reviewed de novo. *Elezovic v Ford Motor Co*, 472 Mich 408, 418; 697 NW2d 851 (2005). When reviewing the trial court's decision, the evidence and all legitimate inferences are examined in the light most favorable to the nonmoving party. *Id.* This Court reviews the evidence presented up to the time of the motion and resolves any conflict in the evidence in favor of the nonmoving party to determine if a question of fact is presented. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). "A directed verdict is appropriately granted only when no factual questions exist on which reasonable jurors could differ." *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001). The threshold for granting a directed verdict is high, but not meant to be insurmountable. *Hord v Environmental Research Institute of Michigan (After Remand)*, 463 Mich 399, 410; 617 NW2d 543 (2000).

¹ Plaintiff suffered injuries when the motorcycle on which he was riding collided with a van driven by defendant.

In the no-fault automobile insurance act, MCL 500.31031 *et seq.*, tort liability for noneconomic losses is permitted when the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1); *Hardy v Oakland Co*, 461 Mich 561, 565; 607 NW2d 718 (2000). A serious impairment of body function is defined in the no-fault act as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7). The issue of whether a plaintiff has suffered a serious impairment of body function is a question of law to be decided by the trial court, unless there is a material factual dispute concerning the nature and extent of the person’s injuries. MCL 500.3135(2)(a); *Kriener v Fischer*, 471 Mich 109, 120; 683 NW2d 611 (2004).

A multi-step analysis was developed by the Michigan Supreme Court for trial courts to utilize to determine whether a plaintiff, alleging a serious impairment of body function, meets the statutory threshold for third-party tort recovery. *Kreiner, supra* at 131. First, the trial court must “determine that there is no factual dispute concerning the nature and extent of the person’s injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function.” *Id.* at 131-132. If the court so concludes, then it may decide the issue as a matter of law and continue to the next step. *Id.* at 132. Next, it must determine if an important body function has been impaired and, if so, whether the impairment was objectively manifested. *Id.* Finally, if the impairment of an important body function was objectively manifested, the court must decide whether the impairment affected the plaintiff’s general ability to lead a normal life. *Id.* at 132-133.

For an impairment of an important body function to be objectively manifested, there must be a medically identifiable injury or condition which has a physical basis, *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002), and the injury must be capable of objective verification by qualified medical personnel, either as visually apparent or as detectable by medical testing, *Netter v Bowman*, 272 Mich App 289, 296; 725 NW2d 353 (2006). To determine whether the course of a plaintiff’s normal life has been affected, a court should engage in a multifaceted inquiry, “comparing the plaintiff’s life before and after the accident as well as the significance of any affected aspects on the course of plaintiff’s overall life.” *Kreiner, supra* at 132-133. The following nonexhaustive list of objective factors may be considered in evaluating this question: (a) the nature and extent of the impairment; (b) the type and length of treatment required; (c) the duration of the impairment; (d) the extent of any residual impairment; and (e) the prognosis for eventual recovery. *Id.* at 133. “While an injury need not be permanent, it must be of sufficient duration to affect the course of a plaintiff’s life.” *Id.* at 135.²

² As an initial matter, we note that the ability to review this case was hampered by the fact that defendant failed to present the full record on appeal and make a complete record in the trial court. The appellant has the duty to file with the trial court the full transcription of testimony and other proceedings because appellate review is limited, and this Court does not consider evidence offered by the parties for which there is no record support. *Band v Livonia Assoc*, 176 Mich App 95, 103-104; 439 NW2d 285 (1989). For example, although defendant asserts that plaintiff’s treating doctor, Dr. Zingas, essentially cleared him from any future injuries or
(continued...)

Review of the verdict form reveals that there was no submission to the jury of a special verdict form to delineate the two claims raised by plaintiff. That is, defendant did not present a special verdict form to the jury to separate an award of damages for serious impairment as opposed to damages for the disfigurement from the scarring. See MCR 2.514(A) (allowing for use of special verdict forms). Thus, even if defendant succeeded in his challenge to the proofs of each claim, it is unknown if the damage award should be altered because defendant did not ask the jury to apportion damages for each injury. A special verdict form that directs the jury to address discrete damage issues assists the deliberative process as well as the task of judicial review. See *Peisner v Detroit Free Press*, 421 Mich 125, 135-136; 364 NW2d 600 (1984). A defendant may waive an issue by failing to object to the verdict form and failing to request an instruction apportioning fault. See *Dedes v Asch*, 233 Mich App 329, 334-335; 590 NW2d 605 (1998), rev'd on other grounds 469 Mich 487 (2003).

In *Zdrojewski v Murphy*, 254 Mich App 50, 53; 657 NW2d 721 (2002), the plaintiff was referred to the defendant doctor for treatment of a cancerous thyroid tumor. During surgery, it was discovered that the tumor was adhering to the plaintiff's recurrent laryngeal nerve, and that nerve also was removed. Thereafter, complications arose, and a second surgery repaired a perforation to the plaintiff's esophagus. After the surgery, the plaintiff had difficulty breathing, eating, and swallowing. After the plaintiff was admitted to a second hospital, she apparently learned that the nerve had been removed. The plaintiff filed a negligence claim based on three different theories: (1) the defendants allowed the plaintiff's esophagus to be perforated during surgery; (2) the defendants failed to preserve her laryngeal nerve; and (3) the defendant Murphy failed to timely dictate his operative report to advise her of the removal of the nerve before her discharge from the hospital. *Id.* at 53-55.

When the defendants challenged the denial of the motion for directed verdict on appeal, this Court held:

Although the trial court erred in denying the motion for a directed verdict, reversal is required only if allowing the verdict to stand would be inconsistent with substantial justice. MCR 2.613(A).

(...continued)

surgeries, the transcript of Dr. Zingas was not contained in the lower court record. Thus, we cannot verify whether a contradiction existed. Moreover, the visual demonstration of the scars received by plaintiff was an in-court identification. Although the trial court was not a video courtroom, defendant made no effort to preserve the in-court demonstration for appellate review. That is, digital photographs of the in-person demonstration were not taken. Although there apparently were photographs taken at deposition, those photographs were not admitted in the record in the trial court. Thus, although defendant attaches photographs of plaintiff as exhibit b to his brief on appeal, this constitutes an improper expansion of the record on appeal. See MCR 7.210(A)(1); *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002). There is a glare on the photograph of plaintiff's face, and it was taken from distance. Consequently, we cannot determine whether the photograph is an accurate reflection of the viewing presented to the jury.

In this case, the jury returned a general verdict finding that defendants were negligent and that plaintiff's injuries were caused by this negligence. There were no specific findings by the jury regarding how defendants were negligent or how the negligence caused plaintiff's injuries. However, there was sufficient evidence from which the jury could reasonably conclude that defendants were negligent on the basis of plaintiff's alternate theories regarding the severed recurrent laryngeal nerve or the perforated esophagus. Moreover, it is clear from the fact that the jury awarded substantial future damages that the jury found for plaintiff on one or both of those theories, the delayed reporting error clearly having no long-term effect. We also note that after the denial of the motion for a directed verdict, defendants did not request a more detailed verdict form by which the extent of the jury's reliance on the delayed reporting theory would have been clearly registered. In the absence of such a detailed verdict, we cannot conclude that defendants have been denied substantial justice. [*Id.* at 64-65.]

In this case, because defendant did not ask the jury to apportion damages between the theories of serious impairment and permanent disfigurement, defendant cannot demonstrate a denial of substantial justice.

Despite the procedural deficiencies and based on the standard of review, the trial court did not err in denying defendant's motion for directed verdict of the serious impairment claim. Reviewing the evidence at the time of the motion and resolving all conflicts in the evidence in favor of the nonmoving party, *Thomas, supra*, plaintiff had an objectively manifested injury. Specifically, he was hospitalized for a broken leg and toe, and the injuries required surgical repair. Plaintiff was not ambulatory for approximately two weeks (between his time in the hospital and release home) and was not weight bearing for approximately two months. Defendant does not dispute that walking is an important body function. Plaintiff did not work during this time period and, when he eventually returned to work, the nature of his tasks changed. Also altered, plaintiff's activity level because the surgical rod placement limited plaintiff from running and jumping and playing with his children.

Defendant cites to the fact that plaintiff did not receive medical treatment since June 2002. However, plaintiff testified that he was told what to do by his doctor and was advised that the failure to abide by his instructions would result in additional surgery. Case law provides that the injury need not be permanent, and there is nothing to indicate that a continuation of medical treatment is required for recovery of damages. *Kreiner, supra*. Therefore, the trial court did not err in denying the motion for directed verdict and allowing the jury to decide the issue.

Next, defendant asserts that the trial court erred in denying his motion for directed verdict of the permanent disfigurement claim and by granting plaintiff's motion. Defendant's principal challenge is premised on the fact that the large scars are not in a prominent or readily observable location on the body. Again, defendant waived review of this issue by failing to preserve the in-court identification and failing to preserve photographs of the scars in the lower court record. *Band v Livonia Assoc*, 176 Mich App 95, 103-104; 43 NW2d 285 (1989). However, the plain language of MCL 500.3135(1) provides: "A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement." The statute utilizes the term "permanent serious disfigurement." There

is no requirement in the statute that the permanent serious disfigurement be visible. Furthermore, there is no climate restriction on visibility. That is, the jury was not required to measure the damages for the scar to the knee to spring/summer months when plaintiff would wear shorts.

In *Kosack v Moore*, 144 Mich App 485, 491; 375 NW2d 742 (1985), this Court held that “[w]hether an injury amounts to a permanent serious disfigurement depends on its physical characteristics rather than its effect on the plaintiff’s ability to live a normal life.” The seriousness of a scar is not susceptible to being proved or disproved by medical expertise, but rather “is a matter of the common knowledge and experience of the trial bench in the first instance and, if the case goes to it, the jury.” *Nelson v Myers*, 146 Mich App 444, 446 n 2; 381 NW2d 407 (1985).

Disfigurement goes to the physical characteristics of an injury rather than the injury’s effect on the victim’s lifestyle. Ascertaining the seriousness of disfigurement may often require physical observation by the trial court. On the other hand, ascertaining an injury’s effect on important body functions will usually depend on verbal descriptions rather than demonstrative evidence. The appellate courts generally will be in as good a position as the trial court to judge, on these verbal descriptions, the extent of an impairment. In disfigurement cases based on physical observation, however, the appellate courts must grant great deference to the observations of the trial court on what is, in effect, a factual conclusion about the severity of an injury. The victims cannot be expected to parade their maladies through an appellate courtroom. The trial court is expected to make adequate findings on the record. GCR 1963, 517.1. It will describe the injuries and reach a legal conclusion on whether they meet the threshold. We will review the trial court’s determination, reversing only when the court has abused its discretion. [*Williams v Payne*, 131 Mich App 403, 411-412; 346 NW2d 564 (1984), overruled on other grounds *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986).]

In the present case, the trial court stated that plaintiff had pins, rods, and screws inserted into his leg and knee and a scar above his left eye. The surgical scar to the hip was described by the trial court as an inch wide with scars from stitches. The scar extended six inches in length, and there was a slight keloid and hyper-pigmentation. The surgical scar on the knee was an inch long, and there was also hyper-pigmentation. Based on the trial court’s description and the fact that the statute does not require a readily visible permanent disfigurement, we cannot conclude that the trial court’s decision to grant directed verdict in plaintiff’s favor was erroneous.

Defendant asserts that the trial court’s ruling should be reversed because there was no testimony addressing whether additional surgeries could minimize the scars. However, there is no indication that defense counsel questioned plaintiff or his doctor, Dr. Zingas, or if they were competent to attest to the subject matter. Further, there is no evidence that defendant deposed a plastic surgeon to examine the nature of plaintiff’s scars and whether they could be minimized. Moreover, plaintiff expressed concern that his leg continued to cause him problems and that he may have additional surgeries in the future because of the hardware (pins, rods, screws) placed in his body at such a young age. Therefore, it is unknown if a surgeon would have recommended treatment of the scars surgically if there was the potential for future surgery in the same location.

Additionally, defendant does not address plaintiff's testimony that his toe permanently sticks up and that he has no control over the toe, requiring him to purchase shoes two sizes bigger on one foot to account for this deformed toe. In light of the fact that the visual demonstration was not preserved in the record and defendant did not admit photographs as exhibits in the lower court record, the trial court's decision to grant a directed verdict was not error.

II. Evidentiary Challenges

A. Standard of Review

The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). "A court necessarily abuses its discretion when it 'admits evidence that is inadmissible as a matter of law.' However, any error in the admission or exclusion of evidence will not warrant appellate relief 'unless refusal to take this action appears ... inconsistent with substantial justice,' or affects 'a substantial right of the [opposing] party.'" *Id.* (Footnotes omitted.) An abuse of discretion standard acknowledges that "there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Accordingly, if the trial court selects one of multiple principled outcomes, an abuse of discretion has not occurred, and it is appropriate for the reviewing court to defer to the trial court's judgment. *Id.* In Michigan, this is the default abuse of discretion standard. *Id.*

B. Insurance References

Defendant first alleges that the questioning regarding insurance coverage and representation entitles him to a new trial. We disagree. Review of the record reveals that plaintiff's counsel inquired, "The woman that had hired you on behalf of the defendant is present here in court today; correct?" There was an objection to the question, and there is no evidence on the record that the question was answered. Although the objection was overruled, the next question posed by plaintiff's counsel related to the investigation of accidents by the defense expert. There is no indication that the isolated question without an apparent answer revealed that the woman in the back of the room was defendant's insurance adjuster and, in turn, caused the jury to conclude that defendant had insurance coverage while plaintiff did not have coverage. This claimed error is not substantiated by the record.

Next, defendant asserts that plaintiff's testimony regarding the availability of physical therapy warrants a new trial. However, defendant blanketly concludes that plaintiff was entitled to physical therapy through PIP benefits. In the trial court, any insurance policy, available benefits, and the benefits accepted were not admitted. Consequently, we cannot conclude that plaintiff's testimony was erroneous. Moreover, defendant fails to acknowledge that plaintiff's answer was in response to questioning by defense counsel. Counsel did not ask the trial court to strike the answer. Error may not be predicated upon a ruling that admits or excludes evidence unless a substantial right of the party is affected, and a timely objection or motion to strike appears on the record. MRE 103(a)(1). In light of the fact that defendant did not ask the trial court to strike the answer or seek a curative instruction, this issue does not provide defendant with a basis for a new trial.

C. Defendant's Intoxication

Defendant next submits that the trial court erred in ruling that plaintiff could inquire regarding defendant's intoxication. The trial court ruled that plaintiff could determine whether there was evidence that defendant was under the influence at the time of the collision. The decision did not constitute an abuse of discretion. *Maldonado, supra*. The resolution of this case was contingent upon the observance of traffic laws, the rate of speed, and the attention of each driver. Plaintiff theorized that defendant, focused on trying to locate a parking space, did not see plaintiff driving down the street. Consequently, it was alleged that defendant did not obey the stop sign and failed to yield the right of way to plaintiff. Defendant's theory of the case was that plaintiff was traveling far in excess of the speed limit and slammed into defendant's van. Any impairment by defendant was relevant, MRE 401, to aid the trier of fact in resolving questions of causation and liability.

D. Improper Admission of Defendant's Driving Record

Defendant asserts that plaintiff's counsel failed to abide by the parties' agreement to exclude evidence of the driving record. This issue is not preserved for appellate review because defendant did not object to the question. MRE 103(a)(1). Moreover, the questions posed to the accident reconstructionist regarding damage to defendant's van did not divulge evidence of defendant's driving record. Rather, the question asked involved whether the damage addressed by the accident reconstructionist was strictly based on the motorcycle accident or if a prior collision, not necessarily when defendant was driving, may have caused damage to the vehicle.

E. Exclusion of Defendant's Medical Expert

This claimed error is not preserved for appellate review. At a hearing regarding motions in limine, the trial court indicated that it was *inclined* to rule that the defense expert had to answer questions regarding income or the testimony would be excluded. Defense counsel responded that he was unsure if the expert would answer the question. However, at the commencement of trial, defendant never notified the trial court of the expert's response or seek an adjournment of trial to obtain a different expert. In light of the fact that the trial court made a conditional ruling and defendant never notified the court of the status, this issue is not preserved for appellate review. *Polkton Charter Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). The issue preservation requirements are designed to prevent a party from harboring error as an appellate parachute by "sandbagging" the circuit court. *Id.* at 95-96.

F. Exclusion of Plaintiff's Prior Felony Conviction

Defendant's argument regarding the prior conviction fails for the same reason. Defendant makes blanket assertions that the trial court erred in excluding the conviction, concluding that the trial court held that the conviction was outside the 10-year period and did not involve an element of theft or dishonesty. However, review of the record reveals that the parties never presented a copy of the conviction, its date, and the time served. Rather, the following question posed by defense counsel was objected to by plaintiff's counsel: "And I think your rationalization to this jury is you created – however you do that – Michael Tate because you don't want anybody to know about some felony conviction you had? What was the felony?" The jury was excused from the courtroom. When asked why defense counsel sought admission,

he merely stated, “I wouldn’t have brought it up. It’s explanation for this other event.” In our view, it is unclear to what counsel was referring. Perhaps, it meant that defense counsel was not really concerned with the felony conviction, but addressed it because it was the underlying reason for obtaining the false identification.

On appeal, defendant contends that plaintiff “opened the door.” However, plaintiff raised the issue to explain why he had an identification card in a false name. The issue of the nature of the conviction was not specifically raised by plaintiff. Moreover, the actual felony conviction itself seems to be irrelevant. Defendant questioned plaintiff regarding the fact that he obtained a false identification, used the false identification, was convicted of using a false identification, and continued to use the false identification even after convicted. Thus, defendant was able to establish through that questioning that plaintiff had engaged in misconduct.

Moreover, when discussing the false identification, defendant stated that in plaintiff’s deposition he pleaded the Fifth Amendment to avoid having to disclose how he obtained the false identification. During trial, defense counsel told plaintiff that he would probably want to plead the Fifth Amendment again, and plaintiff responded affirmatively. Consequently, the trial court told defense counsel that he could not comment on the exercise of the Fifth Amendment right if he knew the witness would exercise it, and the parties would have to research the issue to resolve the error. However, ultimately, the parties decided to avoid the issue and not provide a curative instruction. Under the circumstances, this issue is without merit. Defendant did not raise a sufficient legal basis for overcoming plaintiff’s objection and now on appeal asserts that the door was opened, an objection that was not raised below. Defendant cannot challenge an issue on one basis in the trial court and raise a different basis on appeal. See MRE 103.

G. Improper Closing Argument

The next challenge involves closing argument. “When reviewing claims of improper conduct by a party’s lawyer, this Court must first determine whether the lawyer’s action was error and, if so, whether the error requires reversal. A lawyer’s comments will usually not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial or where counsel’s remarks were such as to deflect the jury’s attention from the issues involved and had a controlling influence on the verdict. ... However, even if not preserved, this Court will review the issue to determine whether defense counsel’s comments ‘may have caused the result or played too large a part and may have denied the party a fair trial.’” *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 191-192; 600 NW2d 129 (1999) (Internal citations omitted.). During closing argument, a party is entitled to argue reasonable inferences from the evidence. *In re Miller*, 182 Mich App 70, 77; 451 NW2d 576 (1990).

Defendant first asserts that it was improper for plaintiff’s counsel to submit that a witness to the accident disclosed plaintiff’s real name. There were ten to fifteen individuals on the scene, and plaintiff testified that he knew Marvin Sanford, who was issued a citation for failing to leave the scene. It is entirely possible that more than one individual knew plaintiff’s real name, but the police never preserved the names or addresses of any bystanders. In any event, counsel is entitled to argue reasonable inferences from the evidence, *Miller, supra*, and it was reasonable to infer that since someone was present on the scene who knew plaintiff, his true identity may have been disclosed. Furthermore, we cannot conclude that this unpreserved issue played a large part

in the verdict or denied defendant a fair trial. The trial court instructed the jury that statements of counsel were not evidence.

H. Two Closing Arguments

With regard to the issue of “two” closing arguments, this challenge is without merit. At the commencement of closing argument, the attorney specifically advised the trial court that one of plaintiff’s attorneys would handle closing and the other would handle the rebuttal. Defendant never objected. This issue is not preserved for appellate review. Moreover, plaintiff did not give two closing arguments, but responded to defendant’s closing with a theme that defendant did not “see what was there to be seen or hear what was there to be heard.” Further, the trial court provided instructions to the jury that closing arguments are not evidence. Therefore, it is unclear what substantial harm would have occurred in light of this instruction.

III. Great Weight of the Evidence, JNOV, and New Trial³

“When a party claims that a jury verdict is against the great weight of the evidence, this Court may overturn the verdict only when it is manifestly against the clear weight of the evidence. The jury’s verdict should not be set aside if there is competent evidence to support it.” *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003) (Internal citation omitted.). “[I]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent.” *Lagalo v Allied Corp*, 457 Mich 278, 282; 577 NW2d 462 (1998), quoting *Granger v Fruehauf Corp*, 429 Mich 1, 7; 412 NW2d 199 (1987). The fundamental rule is that courts must make every attempt to harmonize a jury’s verdict. *Id.* “Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside.” *Id.*

“When reviewing a trial court’s denial of a motion for JNOV, this Court examines the evidence and all legitimate inferences arising from the evidence in the light most favorable to the nonmoving party. A motion for JNOV should be granted only if there was insufficient evidence presented to create a jury-triable issue. This Court reviews a trial court’s decision with regard to a motion for a new trial for an abuse of discretion.” *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 18-19; 684 NW2d 391 (2004) (Internal citations omitted.).

Based on the record available and the manner in which the trial was conducted, defendant is not entitled to the relief requested. Review of the transcripts reveals that the parties presented diametrically opposed versions of events. However, when diametrically opposed versions of events are presented, the resolution of credibility rests with the trier of fact. *People v Lemmon*,

³ In the brief on appeal, defendant alleged that the trial court erred in failing to provide an assured clear distance instruction and a special instruction regarding serious impairment. Defendant’s Brief, pp 24-27. However, this issue is not contained in the statement of questions presented. Defendant’s Brief, pp vi-vii. An issue not raised in the statement of questions presented is waived on appeal. *English v Blue Cross Blue Shield*, 263 Mich App 449, 459; 688 NW2d 523 (2004). Consequently, we do not address it.

456 Mich 625, 646-647; 576 NW2d 129 (1998). Plaintiff's theory of the case was that he was just "cruising" down Warren Avenue in no rush to get home. He further testified that he was not wearing clothing designed to travel at high rates of speed. He was merely wearing gym shorts and a tank top. His helmet was more of a "show" helmet, in that it did not cover his entire face, thereby allowing rocks and other items to be kicked up from the roadway. Thus, although plaintiff did not have a specific recollection of his speed, his clothing, motorcycle gear, and his lack of time constraints caused him to believe that he was not speeding.

Although plaintiff had no recollection of the accident, two individuals testified that they were eyewitnesses to the accident. Cobb, an employee of the car wash, and Bennett, a patron of a local barbershop, were in the vicinity. Both men testified that the motorcycle was loud and could be heard traveling down the road. Bennett testified that defendant yielded and paused in the street, and this effectively caused the accident. Cobb also opined that defendant did not see the motorcycle until it was too late. Plaintiff's theory was that defendant was distracted by trying to locate the home where he was to perform plumbing work and did not yield the right of way to defendant.

To the contrary, defendant asserted that plaintiff was traveling far in excess of the 30 mph speed limit and brought forward an accident reconstructionist who determined that plaintiff was traveling between 80 and 88 mph. Similarly, he provided the testimony of a police officer who could recall the accident because of the length of the skid mark, that being the longest he had ever seen. However, the trier of fact may have concluded that the defense theory was inconsistent with the evidence as a whole. For example, the police officer testified that he did not locate any eyewitnesses to the event. Yet, his police report indicated that he issued a citation to Sanford for refusing to leave the scene. Additionally, even defendant himself testified that there was a group of 10 to 15 people across the street in the direction in which he was headed. Even though the police officer marveled at the length of the skid mark, he did not detect the smell of burnt rubber.

Moreover, the accident reconstruction expert opined that the skid was 250 feet and that a motorcycle could remain standing in an upright position in a straight line for that distance if the front wheel did not lock up. However, even though this expert was retained within days of the accident, he visited the scene two weeks later even though he knew that skid marks fade with time. Moreover, he could not attest that the skid mark that he measured was from the accident in question. It seems nonsensical that the expert would examine the damaged van first in light of the fact that he knew that the skid mark would fade with time. Thus, the jury could accept all, part, or none of this expert testimony. ("A jury is entitled to believe, all, part, or none of a witness's testimony." *Brown v Pointer*, 41 Mich App 539, 552; 200 NW2d 756 (1972), rev'd on other grounds 390 Mich 346; 212 NW2d 201 (1973).)

Furthermore, it should be noted that defense counsel repeatedly inferred that plaintiff had conspired with the "eyewitnesses" and belittled them in the process. Defense counsel commented on the fact that Cobb was a high school dropout who worked at a car wash and was working on an album. The trial court had to advise defense counsel to avoid commenting on or characterizing the witnesses' testimony. Thus, although defense counsel asserted that the trial court's rulings caused a substantial injustice in the verdict, it is equally as plausible that the jury merely found plaintiff's witnesses to be credible, despite the attempt by defense counsel to attack their credibility.

Defendant also asserts that the jury verdict was inconsistent because it found plaintiff to be 30% negligent. Defendant concludes that, to be negligent, plaintiff had to be speeding, and therefore, plaintiff yielded the right of way to defendant because he was speeding. Therefore, the verdict was inconsistent and against the great weight of the evidence. However, defendant had the opportunity to submit a special verdict form and chose not to do so. Therefore, it is speculative to conclude that the verdict was inconsistent. For example, one witness testified that plaintiff was traveling in the second lane, but the accident occurred in the curb lane. Arguably, the jury may have found plaintiff to be negligent for failing to depart from the second lane or enter the left turn lane to avoid the collision. The testimony at trial also indicated that plaintiff honked his horn or waved to the employees at the car wash. The jury could have concluded that plaintiff was negligent by failing to observe the road conditions and other traffic when he was focused on showing off his bike to employees of a business located on the side of the road. In light of the fact that defendant failed to submit questions to the jury in a special verdict form regarding plaintiff's traffic or speed violations, we cannot conclude that defendant's position has merit.

IV. Remittitur

A new trial or amendment to the judgment may be granted where excessive or inadequate damages appear to have been influenced by passion or prejudice. MCR 2.611(A)(1)(c). Moreover, if the trial court finds that the only error in the trial was the inadequacy or excessiveness of the verdict, a motion for new trial may be denied, conditioned upon the nonmoving party's consent to the additur or remittitur. MCR 2.611(E)(1). The determination, whether the jury award is supported by the evidence, is based on objective considerations relating to the actual conduct of the trial or to the evidence adduced. *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989). We consider the evidence in the light most favorable to the nonmoving party 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). When reviewing the decision on remittitur, the appellate court must give due deference to the trial judge who presided over the entire trial, personally observed the evidence and witnesses, and had the unique opportunity to evaluate the jury's reaction to the witnesses and evidence. *Palenkas, supra* at 534. The trial judge is in "the best position to determine whether the jury's verdict was motivated by such impermissible considerations as passion, bias, or anger." *Id.* "Intangible emotions like prejudice, bias, and anger are often undetectable in a written record, and it is for this precise reason that we defer to the trial court's judgment." *Id.* at 536.

Based on the standard of review and the limited briefing by defendant, the trial court's denial of this motion was not an abuse of discretion. Defendant does not cite legal authority regarding the measure of noneconomic damages. Case law provides that "Awards for personal injury damages, particularly pain and suffering, rest within the sound discretion of the trier of fact, and there is no absolute standard for the measurement of such damages." *Meek v MDOT*, 240 Mich App 105, 122; 610 NW2d 250 (2000), overruled on other grounds *Grimes v MDOT*, 475 Mich 72; 715 NW2d 275 (2006). "An appellate court reviewing a personal injury award should decide each case on its own facts, although analogous cases may be one factor considered." *Id.* Personal injury awards, particularly awards for pain and suffering, rest within the sound discretion of the trier of fact because there is no absolute standard by which to measure such awards. *Precopio v Detroit*, 415 Mich 457, 464-465; 330 NW2d 802 (1982). "Such deference in part reflects recognition that the trier of fact observes live testimony, while an

appellate court reviews a printed record. In a case tried to a jury, such deference may further reflect a reliance on the communal judgment of the members of the jury in awarding monetary compensation for such imponderables as pain and suffering.” *Id.* at 465. “An appellate court reviewing a personal-injury award should decide each case by its own facts ... When the court looks to comparable awards, we do not attempt to set a schedule for recovery in personal injury cases, for we recognize that one person’s experience of pain differs from another’s, and we recognize that the proofs in particular cases may reasonably justify an award beyond the high side of the range of awards in appellate cases.” *Id.* at 472.

The trial court asked defense counsel what he thought the damage award should have been, and he opined \$35,000. However, he failed to present any factors or law to determine how he arrived at that conclusion. Based on the deferential standard and the injuries sustained, the denial of the remittitur motion was not an abuse of discretion. The trial court’s decision was within the range of principled outcomes. Plaintiff struck the side of a van. As a result of the accident, he suffered a crushed toe and broken femur. The broken femur was not merely reset and placed into a cast. Rather, plaintiff had surgery from his hip to his knee to insert a rod into his leg. Plaintiff can no longer run or jump and this hampered his ability to play sports and with his children. He had to purchase shoes of different sizes because the toe was crushed and no longer has any mobility. Plaintiff’s sleep was also impacted because the placement of the screws in his knee prevents him from stacking his legs one on top of the other. Plaintiff was immobile for approximately two weeks and of limited mobility for many months. Under these circumstances, the trial court’s decision was not an abuse of discretion.

V. Case Evaluation Sanctions

The trial court erred in awarding case evaluation sanctions because an evaluation never occurred in this case. Although plaintiff asserted that the parties intended to be bound by the case evaluation from the first case filing, a written order to that effect was never filed. Courts speak through their written orders. *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977) (“The rule is well established that courts speak through their judgments and decrees, not their oral statements or written opinions. Generally, a judgment or order is reduced to written form, as was contemplated in this case; until reduced to writing and signed, the judgment did not become effective and the parties remained married.”) Because there was no written order evidencing an intent to be bound by the first case evaluation, we vacate the trial court’s award of case evaluation sanctions. In light of this holding, defendant’s challenge to comparative fault in calculating case evaluation sanctions is moot.⁴

⁴ To the extent that defendant submits that all aspects of the judgment must be reduced, we disagree. MCL 600.6306 and MCR 2.403, the case evaluation rule, govern two different events. Once the judgment is calculated, MCR 2.403 is then examined to determine the propriety of sanctions.

Affirmed in part and vacated in part. We remand for entry of a judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood