STATE OF MICHIGAN

COURT OF APPEALS

MOLLY PIETILA,

Plaintiff-Appellant,

v

KENT WISOTZKE,

Defendant-Appellee.

UNPUBLISHED
September 29, 2016

No. 321652
Marquette Circuit Court
LC No. 12-050021-NI

Before: MARKEY, P.J., and STEPHENS and RIORDAN, JJ.

RIORDAN, J. (*dissenting*).

I respectfully dissent.

Plaintiff appeals as of right the judgment entered in her favor in the amount of $14,439.97 on the basis that the trial court erred when it denied a new trial and/or additur with respect to noneconomic damages. I would affirm.

This case arises following a collision between two skiers on Marquette Mountain. The evidence established that plaintiff was following the assistant coach of her high school ski team down a run called Rocket while defendant was skiing down a run called Snowfield. Just before the collision, plaintiff skied around the corner of Rocket at approximately 35 miles per hour toward Chairlift 2, and defendant skied very fast around the corner of Snowfield toward the ski lodge. They were both headed toward each other when the collision occurred, and there was testimony that defendant's helmet may have made contact with plaintiff's face. Both skiers were knocked unconscious. Multiple witnesses heard a loud noise when the two skiers collided; however, neither plaintiff nor defendant had any clear recollection of the collision or the events leading up to it.

Defendant sustained a severe concussion and broke two bones in his right hand. Plaintiff sustained multiple facial fractures that required several surgeries to repair, one of which lasted six or seven hours. In addition, plaintiff's eye socket was shattered, her jaw and nose were broken, her sinuses were smashed, and her knee and hand were broken. However, the only long-term problems that resulted from plaintiff's injuries included a loss of the ability to smell, a decreased ability to taste food, some vision issues that persisted despite eye surgery, and some clicking and limited mobility in plaintiff's jaw. At trial, defendant contested liability, but he did not challenge the nature or extent of plaintiff's injuries. The parties stipulated that plaintiff's past medical expenses were $28,879.93.

The jury found that defendant was 50% negligent, that plaintiff was injured, and that defendant's negligence was a proximate cause of plaintiff's injuries. The jury also found that plaintiff was 50% negligent and that her negligence was a proximate cause of her injuries. However, the jury found that plaintiff's total amount of damages—including damages for "fright, shock, embarrassment, humiliation, mortification, pain and suffering, loss of social pleasures and enjoyment, disability and/or disfigurement up to the present time"—was $0. Likewise, the jury awarded no damages for future noneconomic losses and no damages for plaintiff's past medical expenses.

Plaintiff moved for a new trial, either limited to damages or on all issues, and/or additur. Plaintiff argued that she was entitled to a new trial pursuant to MCR 2.611(A)(1)(c), (d), and (e) because the jury's "verdict appeared to have been influenced by passion or prejudice, the verdict was clearly and grossly inadequate, and the verdict was against the great weight of the evidence or contrary to law." She argued that she was entitled to additur pursuant to MCR 2.611(E)(1) because the verdict was inadequate as to her economic and noneconomic losses.

The court held a hearing on plaintiff's motion and later entered an order denying plaintiff's motion for a new trial, denying plaintiff's request for additur with regard to noneconomic damages, and granting plaintiff's request for additur with regard to economic damages, i.e., out-of-pocket medical expenses. The trial court determined that it should consider each category of damages separately and provided the following reasoning for denying plaintiff's motion for a new trial or additur with regard to noneconomic damages:

> [T]here were a number of factors brought out during the trial that the jury can decide their significance, and I think certainly there's evidence that this plaintiff was very young. She's had an excellent recovery. She has a fairly normal lifestyle. There was evidence offered about her relatively normal activity, and so forth. And there's nothing that requires the jury, as far as I look at the evidence as a whole, for them to issue an award of the noneconomic pain and suffering type damages.

However, the court found that the jury's failure to award economic damages was against the great weight of the evidence—but not due to passion or prejudice—in light of the parties' stipulation that plaintiff incurred $28,879.93 in out-of-pocket medical expenses, such that the verdict was inadequate. Thus, pursuant to MCR 2.611(E)(1), the trial court denied plaintiff's motion for new trial on the condition that defendant consent in writing within 14 days to the entry of a judgment in the amount of $14,439.97 as damages for plaintiff's medical expenses. Defendant consented, and plaintiff has not raised a challenge the trial court's grant of additur with regard to the out-of-pocket medical expenses.[1] Thus, the only question on appeal is

[1] Plaintiff asserts in her brief on appeal that it is impossible to reconcile the jury's verdict awarding no economic damages in light of the parties' stipulation that plaintiff incurred $28,879.93 in past medical expenses, and argues that a new trial limited to damages is warranted. However, plaintiff expressly acknowledges that "additur is a route which the court can certainly entertain," and she provides no argument contesting the trial court's grant of additur with regard

whether the jury's failure to award noneconomic damages (1) appears to have been influenced by passion or prejudice, (2) was clearly or grossly inadequate, or (3) was against the great weight of the evidence or contrary to law. See MCR 2.611(A) (listing grounds for a new trial).

I agree with the majority that there was evidence at trial that would have supported an award of damages for past noneconomic damages. However, there also was significant testimony about plaintiff's remarkable recovery. Plaintiff's facial reconstructive surgery was successful, and her facial appearance after the surgery is very similar to her appearance before the accident. Further, plaintiff was under a general anesthetic when her surgeries occurred, and she was on pain medication in the hospital. The jury could have concluded that there was no need to compensate plaintiff for her pain because it was treated medically. In addition, plaintiff testified that before and after the accident she was able to pursue a modeling career. She was also able to return to competitive skiing with her high school ski team the school year after the accident, which indicates, at a minimum, that her vision issues improved greatly. Plaintiff also testified that her eye issues were not going to stop her from living her normal life.

Based on these facts, the jury may have discredited plaintiff's testimony regarding pain and suffering, or determined that her pain and suffering was minimal or not worthy of compensation. See *Palenkas v Beaumont Hosp*, 432 Mich 527, 556; 443 NW2d 354 (1989) ("When a jury verdict is based in part upon pain and suffering, a trial court must balance all of the factors involved against the general principle that *there is no absolute mathematical formula or standard* by which pain and suffering can be measured; thus, *the amount allowed for pain and suffering must ordinarily rest in the sound judgment of the jury*." [Emphasis added.]). Likewise, the question of credibility, and the weight of the trial testimony, is generally for the fact-finder to decide, *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008), and the jury's prerogative to disbelieve testimony—including uncontroverted testimony—is well established. *Kelly*, 465 Mich at 39; *Guerrero*, 280 Mich App at 669.

Therefore, given the evidence in the record that supports the jury's verdict, and the jury's unique role in determining plaintiff's credibility and the weight of the evidence, *Ellsworth*, 236 Mich App at 194, plaintiff fails to demonstrate that the verdict not awarding noneconomic damages was clearly or grossly inadequate under MCR 2.611(A)(1)(d), or against the great weight of the evidence under MCR 2.611(A)(1)(e). Moreover, as the majority correctly recognizes, plaintiff identifies no evidence of passion or prejudice apart from the verdict, and there simply is no indication in the record that the jury's verdict was actually influenced by passion or prejudice, such that a new trial was justified under MCR 2.611(A)(1)(c). See *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 688-689; 607 NW2d 123 (1999) ("A trial court may consider whether a verdict was induced by bias or prejudice; however, its inquiry must be limited to objective considerations relating to the actual conduct at trial or the evidence adduced. The trial judge, who experienced the trial, is generally in the best position to determine whether the jury's verdict was motivated by such impermissible considerations as passion, bias, or anger." [Citations Omitted.]).

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to her out-of-pocket medical expenses. Thus, I understand plaintiff's appeal as only contesting the trial court's decision as to noneconomic damages.

As the plaintiff has not shown that the trial court abused its discretion when it denied plaintiff's motion for a new trial or additur on the issue of noneconomic damages, I would affirm and allow the jury's determination to stand. *Setterington*, 223 Mich App at 608.

/s/ Michael J. Riordan