STATE OF MICHIGAN

COURT OF APPEALS

KENNEDY L. THOMAS,

Plaintiff-Appellee/Cross-Appellant,

and

ZURICH NA INSURANCE COMPANY,

Intervening Plaintiff-Appellee/Cross-Appellant,

v

BOBBY W. FERGUSON and FERGUSON ENTERPRISES, INC.,

Defendant-Appellants/Cross-Appellees,

and

ROSS G. PARKER,

Defendant.

UNPUBLISHED
December 27, 2012

No. 292445
Wayne Circuit Court
LC No. 05-529110-NO

Before: RONAYNE KRAUSE, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendants Bobby Ferguson ("Ferguson") and Ferguson Enterprises, Inc. ("Ferguson Enterprises"), appeal as of right from a judgment for plaintiff, following a jury trial, in this action for assault and battery and intentional infliction of emotional distress. Intervenor Zurich Insurance Company ("Zurich"), the worker's compensation insurance carrier for Ferguson Enterprises, cross-appeals, challenging the trial court's denial of its request for a statutory lien against plaintiff's recovery. Plaintiff also cross-appeals, challenging the trial court's reduction of the jury's verdict pursuant to its application of the collateral source rule and also challenging the trial court's order partially granting defendants' motion for remittitur. We affirm in part, reverse in part, and remand for further proceedings.

Plaintiff was employed as a laborer by defendant Ferguson Enterprises, a construction and demolition firm owned and operated by defendant Bobby Ferguson. In 2005, plaintiff filed this action for assault and battery and intentional infliction of emotional distress, alleging that in October 2004, defendant Ferguson assaulted him at the workplace with a gun, causing permanent and disabling injuries. In an independent criminal proceeding, Ferguson pleaded guilty to assault with intent to do great bodily harm, pursuant to a sentence agreement, arising out of the assault. Ferguson contended that he pleaded guilty to protect his family from hearing about an alleged affair he contended plaintiff was having with his wife. The instant case proceeded to a jury trial.

Plaintiff testified that he was summoned to the office by Ferguson, who accused plaintiff of having an affair with Ferguson's wife. According to plaintiff, Ferguson produced a gun, threatened to kill him, and repeatedly struck him on the head with the gun. Plaintiff claimed that he was able to run out of the office when he got the chance and drive himself to a hospital, where he remained for 12 days. Plaintiff presented medical testimony indicating that he sustained a serious head-trauma injury consistent with being struck on the head with a gun, and that the injury caused severe and permanent health issues, including continuing head pain, depression, memory problems, and problems with balance, rendering him disabled from returning to work. Ferguson does not contest that he struck plaintiff, but contends that he did not do so with a gun and was defending himself from plaintiff, who was a bodybuilder and who, according to Ferguson, attacked Ferguson first. Ferguson denied that he owned a gun, and he believed he used an ashtray. Ferguson also denied that plaintiff was seriously injured, and theorized that plaintiff misled or deceived doctors about his condition, and that any of plaintiff's current limitations were attributable to pre-existing conditions.

The jury found that Ferguson assaulted plaintiff, that Ferguson was not defending himself against an attack by plaintiff, and that plaintiff did not voluntarily engage in any fight with Ferguson. The jury found that both defendants were liable for assault and battery and intentional infliction of emotional distress. The jury awarded plaintiff total past and future damages of $2,611,720. Zurich, which had paid workers compensation benefits to plaintiff, was allowed to intervene to assert a statutory lien against plaintiff's recovery. The trial court later ruled that Zurich was not entitled to a statutory lien, but the court applied the collateral source rule to reduce the amount of plaintiff's damages against defendants by the amount of workers compensation benefits to which plaintiff was entitled to receive. The trial court entered a judgment reflecting its collateral source ruling and a reduction of future damages to present value, resulting in a total judgment for plaintiff of $1,010,752.00, plus prejudgment interest of $75,088.20. Defendants subsequently filed a motion for remittitur, which the trial court granted in part to eliminate the jury's award of $384,000 for future medical expenses. The trial court thereafter entered an amended judgment awarding plaintiff total damages and prejudgment interest of $860,167.20.

I. CUMULATIVE TESTIMONY

Defendants first argue that the trial court erred in denying their motion in limine to exclude cumulative expert medical testimony. A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158-159; 732 NW2d 472 (2007). Defendants also raised this issue in their motion for a new trial, which the trial court denied. The court's decision denying defendants' new trial motion is also reviewed

for an abuse of discretion. *Id.* at 158. An abuse of discretion occurs when the trial court's decision results in an outcome falling outside the range of principled outcomes. *Id.*

The trial court actually granted defendants' motion in limine in part to limit the parties to calling two expert witnesses in each specialty. That decision is consistent with MCL 600.2164, which provides, in relevant part:

> (2) No more than 3 experts shall be allowed to testify on either side as to the same issue in any given case, unless the court trying such case, in its discretion, permits an additional number of witnesses to testify as experts.
>
> (3) The provisions of this section shall not be applicable to witnesses testifying to the established facts, or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion.

Defendants argue that plaintiff was permitted to call more than two medical experts in certain specialty areas, but in fact, many of the medical doctors who testified were treating doctors who were called as fact witnesses, not to offer expert testimony. When ruling on defendants' motion in limine, the trial court indicated, consistent with MCL 600.2401(3), that its limitation on expert testimony would not prohibit plaintiff from calling fact witnesses. On appeal, defendants argue that plaintiff should not have been permitted to call Drs. Haranath Policherla, Bradley Klein, and Gerald Shiener, but Dr. Policherla was plaintiff's treating neurologist, Dr. Klein, a psychiatrist and neurologist, was a treating physician at the Rehabilitation Centers of Michigan, and Dr. Shiener saw plaintiff when plaintiff was hospitalized in October 2004 and provided a diagnosis of plaintiff's condition and he had also treated plaintiff in the past. Plaintiff only presented two neurology experts, Drs. John Blase and Carol Van Der Harst.

Because the trial court's pretrial ruling was consistent with MCL 600.2164 and the court properly endeavored to distinguish between fact witnesses and expert testimony, a distinction defendants do not address on appeal, we find no abuse of discretion.

II. TRIAL MANAGEMENT

Defendants next argue that they were prejudiced by the trial court's management of the trial, including an adjournment for one week, which defendants contend unnecessarily prolonged the trial and led to the dismissal of three jurors. Because defendants did not object to any delays below and, in particular, did not object to the one-week adjournment or to the dismissal of the jurors, this issue is unpreserved. Accordingly, to be entitled to relief, defendants must establish a plain error affecting their substantial rights. *Hilgendorf v St John Hosp & Med Ctr Corp*, 245 Mich App 670, 700; 630 NW2d 356 (2001).

Defendants again contend that the presentation of cumulative testimony unnecessarily prolonged the trial. As explained previously, however, defendants have not shown that plaintiff's presentation of testimony from medical witnesses in the same specialties constituted improper cumulative testimony. Defendants have also failed to establish that they were prejudiced by the one-week adjournment. Although defendants assert that the one-week adjournment led to the dismissal of three jurors, the trial court explained that it had seated extra jurors because of the anticipated length of the trial, and defendants do not dispute that a full jury

of six jurors, see MCR 2.511(B), was available to participate in deliberations. Further, defendants do not otherwise explain how they were prejudiced by the adjournment or the jurors' dismissal, neither of which were the subject of objections at trial. Accordingly, defendant have not demonstrated either a plain error, or shown that their substantial rights were affected.

III. PLAINTIFF'S EXPERT WITNESS

Defendants next argue that Dr. Van Der Harst was not qualified to offer expert testimony under MRE 702. Although defendants assert that they preserved this issue with an appropriate objection below, they have not provided a record citation for any such objection, either before or during trial. The record discloses that defendants objected to aspects of Dr. Van Der Harst's testimony, but they did not object to her qualifications to offer expert testimony under MRE 702. An objection on one ground is insufficient to preserve an appellate attack on a different ground. *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994). In any event, while review of unpreserved issues is limited to plain error affecting substantial rights, *Hilgendorf*, 245 Mich App at 700, we find no error, plain or otherwise.

Dr. Van Der Harst identified her field of practice as physical medicine and rehabilitation, which is a small specialty of medicine that she described as taking "care of things that hurt and don't work." Her specialty included background education in muscle, skeletal, and neurological disorders of the head, brain, spinal cord, nerves, muscles, and joints; caused by injuries, traumas, or illnesses. After diagnosing a condition, she established a treatment plan. Dr. Van Der Harst stated that she was board certified as a physiatrist and pain management specialist. She was also licensed as both a physician and surgeon, but did not practice in the area of surgery. She admitted that she did not practice in the area of neurology, but stated that she cared for neurological patients. She explained that while she considered neurological and psychiatric tests in evaluating patients, she referred patients to a board-certified neuropsychologist for proper testing and evaluation. The diagnosis and management of patients with problems similar to plaintiff's condition was within the field of physiatry.

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779, 782-783; 685 NW2d 391 (2004), the Court clarified that MRE 702 requires a trial court, in its role as gatekeeper, to ensure that each aspect of an expert witness's proffered testimony is reliable. Disagreements with an expert witness's interpretation of the facts involve the weight of the expert's testimony, not its admissibility. *Surman v Surman*, 277 Mich App 287, 309-310; 745 NW2d 802 (2007).

Because defendants did not object to Dr. Van Der Harst's qualifications to offer expert testimony, the trial court was not called upon to exercise its role as gatekeeper. But given Dr. Van Der Harst's testimony regarding her training, education, and background, the record indicates that she was qualified to provide expert testimony, including opinions on plaintiff's condition and prognosis, within her specialized area of medicine.

Defendants primarily argue that it was improper for Dr. Van Der Harst' to rely on the results of physical or mental tests of plaintiff performed by other doctors in the course of performing her own evaluation. Dr. Van Der Harst explained that because she is not a neurologist or a psychiatrist, she relied on board-certified professionals in those areas to perform those tests. She focused on how to establish a management program to address plaintiff's physical problems and pain that affected his ability to function. The mere fact that Dr. Van Der Harst was not a neurologist or psychiatrist does not mean that her testimony was not based on reliable facts or data. Her reliance on testing performed by other doctors who were board-certified in their specialties provides a basis for concluding that her evaluation was the product of reliable principles and methods. Moreover, there is no evidence that it was not common practice for a specialist in Dr. Van Der Harst's field to rely on testing performed by other specialists. Defendants inaccurately assert that Dr. Van Der Harst relied on the other doctors' opinions. Dr. Van Der Harst explained that she formed her own opinions after reviewing the test results obtained from other specialists.

The record shows that Dr. Van Der Harst had sufficient specialized knowledge, skill, experience, training, and education in physical medicine and rehabilitation to offer expert testimony in that field; and there is no indication that Dr. Van Der Harst's testimony was not otherwise admissible under MRE 702.

IV. ATTORNEY MISCONDUCT

Defendants next argue that misconduct by plaintiff's attorney denied them a fair trial. We disagree. This Court's role in reviewing claims of attorney misconduct at a jury trial is summarized in *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982), as follows:

> 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. [Footnotes omitted.]

In *Hunt v Freeman*, 217 Mich App 92, 95; 550 NW2d 817 (1996), this Court observed:

> An attorney's comments usually will not be cause for reversal unless they indicate a deliberate course of conduct aimed at preventing a fair and impartial trial. Reversal is required only where the prejudicial statements of an attorney reflect a studied purpose to inflame or prejudice a jury or deflect the jury's attention from the issues involved. [Citations omitted.]

Defendants argue that plaintiff's attorney engaged in misconduct by violating the trial court's pretrial ruling that prevented inquiry into Ferguson's criminal record. The trial court prohibited plaintiff from presenting evidence of Ferguson's prior criminal record, but stated that plaintiff could cross-examine Ferguson on the subject if he opened the door to such questioning.

Although plaintiff's counsel attempted to question Ferguson about prior conduct, including whether he had ever "taken a baseball bat to somebody," evidence of Ferguson's prior criminal record was never received because the trial court sustained defense objections before any such testimony was presented. On a separate occasion, plaintiff's counsel commented that he was not able to ask about baseball bats.

We agree with the trial court's statement when denying defendants' motion for a new trial on this issue that the conduct of plaintiff's counsel was not so "egregiously malicious . . . that [it] would require an overturning of the jury's determination." By sustaining defense objections, the trial court foreclosed any introduction of Ferguson's prior criminal history, thereby protecting defendants' rights. The record also supports the trial court's determination that the fleeting references to a "baseball bat" were not so egregious that they could not be cured by the trial court's repeated instructions that the statements of the attorneys were not evidence, particularly in the absence of any evidence of criminal conduct involving an assault with a baseball bat. Thus, defendants were not denied a fair trial.

V. DAMAGES

Defendants next argue that the trial court erred by denying in part their motion for remittitur. This Court reviews a trial court's decision on remittitur for an abuse of discretion. *Campbell v Dep't of Human Servs*, 286 Mich App 230, 243; 780 NW2d 586 (2009). "An abuse of discretion occurs when a court chooses an outcome that is outside the range of principled outcomes." *Heaton v Benton Constr Co*, 286 Mich App 528, 538; 780 NW2d 618 (2009).

The power of remittitur should be exercised with restraint. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 522; 780 NW2d 900 (2009). In reviewing motions for remittitur, courts must be careful not to usurp the jury's authority to decide what amount is necessary to compensate the plaintiff. *Freed v Salas*, 286 Mich App 300, 334; 780 NW2d 844 (2009).

> Thus, "appellate review of jury verdicts must be based on *objective* factors and firmly grounded in the record." Our Supreme Court has indicated that the factors that should be considered by this Court are: (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained; and (3) whether the amount actually awarded is comparable with awards in

> similar cases both within the state and in other jurisdictions. [*Id.* at 334 (citation omitted).]

This Court will defer to the trial court's decision because it is in the best position to determine whether the jury's verdict was motivated by impermissible factors and it was able to observe the witnesses and the jury's reactions to the witnesses and evidence. *Id*. at 335.

In *Heaton*, 286 Mich App at 538-539, this Court explained:

> Analysis of this issue must start with the principle that the adequacy of the amount of the damages is generally a matter for the jury to decide. *Kelly v Builders Square, Inc*, 465 Mich 29, 35; 632 NW2d 912 (2001). Moreover, a verdict should not be set aside merely because the method the jury used to compute damages cannot be determined. *Diamond* [*v Witherspoon*, 265 Mich App 673, 694; 696 NW2d 770 (2005)]. This Court must view the evidence in the light most favorable to the nonmoving party. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003). "A trial court's order of remittitur is governed by MCR 2.611(E)(1)." *Palenkas* [*v Beaumont Hosp*, 432 Mich 527, 531; 443 NW2d 354 (1989)]. Accordingly, remittitur is justified only "if the jury verdict is 'excessive,' i.e., if the amount awarded is greater than 'the highest amount the evidence will support.'" *Id*., quoting MCR 2.611(E)(1).

A party asserting a claim has the burden of proving his damages with reasonable certainty. *Unibar Maintenance Servs, Inc v Saigh*, 283 Mich App 609, 634; 769 NW2d 911 (2009). Although damages cannot be awarded on the basis of speculation or conjecture, damages are not speculative merely because they cannot be ascertained with mathematical precision. *Id*. It is sufficient if the plaintiff presents a reasonable basis for computing damages. *Id*. The certainty necessary to establish the amount of damages is less once the fact of damages has been established. *Id*.

Defendants argue that the jury's awards of $100,000 for past lost wages and medical expenses and $1,355,720 for future lost wages and lost earning capacity were not supported by the evidence because plaintiff's average annual salary with Ferguson Enterprises was only $12,344. Initially, defendants' argument ignores that the $100,000 award covered both past lost wages and past medical expenses. Plaintiff's expert testified that the combined value of plaintiff's past lost wages and past medical expenses was almost twice what the jury awarded. Because the jury's award of $100,000 is supported by that testimony, the trial court properly denied defendants' motion for remittitur with respect to that award.

The jury's award of $1,355,720 for future lost wages and lost earning capacity is also within the range of evidence presented at trial. Plaintiff's expert calculated that plaintiff actually sustained a loss of $1,849,151 as the amount attributable to future lost wages. Defendants essentially challenge plaintiff's expert's credibility and the weight of the evidence, which are for the jury, not the court, to resolve. *Unibar Maintenance*, 283 Mich App at 635. Defendants have not shown that the jury's awards of future lost wages and earning capacity, which were less than the amount recommended by plaintiff's expert, are excessive.

Defendants also argue that the jury improperly awarded plaintiff $12,000 a year from 2008 to 2040 for future medical expenses, but the trial court granted remittitur and vacated the award of future medical expenses in its entirety. As explained in section XI, *infra*, however, the trial court erred in vacating that award, which was supported by the evidence of plaintiff's continuing medical needs.

Defendants also argue that the jury improperly awarded $320,000 in exemplary damages, which defendants contend were awarded solely to punish defendants. We disagree. In *Unibar Maintenance*, 283 Mich App at 630-632, this Court explained:

> The purpose of exemplary damages is to make the injured party whole. *Hayes-Albion Corp v Kuberski*, 421 Mich 170, 187; 364 NW2d 609 (1984). Exemplary damages are recoverable only for intangible injuries or injuries to feelings, which are not quantifiable in monetary terms. *Ray v Detroit*, 67 Mich App 702, 704-705; 242 NW2d 494 (1976); *Ass'n Research & Dev Corp v CNA Financial Corp*, 123 Mich App 162, 171-172; 333 NW2d 206 (1983). "[W]here the grievance created is purely pecuniary in its nature, and is susceptible of a full and definite money compensation," exemplary damages are not permitted because the party may be made whole through monetary compensation. *Durfee v Newkirk*, 83 Mich 522, 526; 47 NW 351 (1890); *Hayes-Albion Corp*, *supra* at 187. "An award of exemplary damages is considered proper if it compensates a plaintiff for the 'humiliation, sense of outrage, and indignity' resulting from injuries 'maliciously, wilfully and wantonly' inflicted by the defendant." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 419; 295 NW2d 50 (1980) (citation omitted).
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> * * *
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> Further, in terms of producing sufficient evidence in support of exemplary damages, we note that "[i]t is not essential to present direct evidence of an injury to the plaintiff's feelings. Rather, the question is whether the injury to feelings and mental suffering are natural and proximate in view of the nature of the defendant's conduct." *McPeak v McPeak (On Remand)*, 233 Mich App 483, 490; 593 NW2d 180 (1999).

Defendants have not shown that the evidence did not support the award of $320,000 for exemplary damages, or that the award was improperly intended to punish defendants. The verdict form itself advised the jury that exemplary damages could be awarded only if it found that "Defendants willfully and wantonly inflicted injury" and that the purpose of the award was to "compensate Plaintiff for additional harm he suffered solely attributable to the egregiousness of Defendants' conduct." Given the evidence that plaintiff was willfully and maliciously beaten and humiliated by Ferguson, his employer, it is not inconceivable that the jury could find that plaintiff suffered additional injuries to his feelings that were not quantifiable in economic terms.

Defendants have also failed to show that the jury's awards of $100,000 for past "physical pain and suffering, fright, shock, depression, disability and emotional distress" and $11,000 each year from 2008 to 2040 for future "physical pain and suffering, depression, disability and

emotional distress" were excessive. The evidence showed that the head-trauma injuries received by plaintiff during the assault caused a variety of serious and apparently permanent health issues and conditions, including continuing physical pain, depression, difficulty with balance and walking, and memory problems. Although defendants contend that surveillance recordings showed that plaintiff was able to perform many chores and engage in social activities, there was evidence that he was unable to resume many of his previous activities. The jury's awards of $100,000 for past pain and suffering and $11,000 a year for future pain and suffering are not clearly excessive. Defendants' reliance on *Shaw v City of Ecorse*, 283 Mich App 1, 17-21; 770 NW2d 31 (2009), to argue that the jury's verdict is out of line with similar cases is misplaced because that case is significantly factually distinguishable. *Shaw* involved the firing of a police chief. It did not involve an intentional, physical assault that resulted in the array of continuing medical complications that plaintiff here has experienced.

For these reasons, the trial court did not abuse its discretion by denying in part defendants' motion for remittitur.

VI. GREAT WEIGHT OF THE EVIDENCE

Defendants next argue that the trial court erred in denying their motion for a new trial on the ground that the jury's verdict was contrary to the great weight of the evidence. We disagree.

As explained in *Allard v State Farm Ins Co*, 271 Mich App 394, 406-407; 722 NW2d 268 (2006):

> When a party challenges a jury's verdict as against the great weight of the evidence, this Court must give substantial deference to the judgment of the trier of fact. If there is any competent evidence to support the jury's verdict, we must defer our judgment regarding the credibility of the witnesses. The Michigan Supreme Court has repeatedly held that the jury's verdict must be upheld, "even if it is arguably inconsistent, '[i]f there is an interpretation of the evidence that provides a logical explanation for the findings of the jury.'" [Footnotes omitted.]

A trial court must not substitute its judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 518; 679 NW2d 106 (2004). If there is conflicting evidence, issues involving the credibility of witnesses and the weight to be given to expert testimony are for the jury to decide. *Dawe v Dr Reuven Bar-Levav & Assocs, PC (On Remand)*, 289 Mich App 380, 401; 808 NW2d 240 (2010). Defendants' arguments are essentially based on conflicting evidence and urging us to believe their proffered evidence over the evidence proffered by plaintiff. It is not our place to do so.

Defendants' argument that the evidence established that plaintiff and Ferguson were involved in, at most, a mutual affray is based only on Ferguson's testimony. Defendants contend that plaintiff's version of the events is implausible, but they rely on testimony provided by Ferguson's wife and Ferguson Enterprises's foreman, either of whom the jury could have reasonably chosen to find not totally credible. It is undisputed that shortly after leaving Ferguson's office, plaintiff was capable of functioning well enough to get to a hospital on his

own, and he was admitted to the hospital where he was diagnosed with severe head trauma. He remained hospitalized for 12 days because of his head injuries. Given the substantial medical testimony concerning plaintiff's head injury and his condition at the hospital, the jury's determination that plaintiff was severely injured in an assault by Ferguson is not against the great weight of the evidence.

Although defendants argue that surveillance recordings showed plaintiff participating in normal life activities, plaintiff never claimed to be a "vegetable." The recordings depicted plaintiff doing relatively light yard work, and doing it at a slow pace, and also depicted him using a cane when he did not have anything to hold onto. His activities were not inconsistent with the nature of his injuries. The fact that plaintiff is able to perform some common household tasks and run errands does not mean that he was physically or mentally able to continue to work. Plaintiff was employed as a construction laborer or mason at the time of his injury, and at the time he was also involved in body-building and personal training. The nature of his work required stamina and physical strength. None of the surveillance recordings showed plaintiff participating in activities that required similar strength or stamina. The surveillance recordings do not render the jury's verdict contrary to the great weight of the evidence.

Defendants' arguments regarding the nature of plaintiff's medical condition and physical limitations are based primarily on their own expert witnesses. Defendants acknowledge that plaintiff offered conflicting evidence in support of his claimed physical and mental impairments, but argue that their experts were more credible. Again, it was up to the jury to resolve the conflicting expert testimony. The trial court properly declined to substitute its judgment for that of the jury.

Finally, defendants assert that the evidence was unrefuted that plaintiff's current mental and emotional problems were attributable to pre-existing conditions, not the assault by Ferguson. Although there was evidence that plaintiff had some mental health problems and a learning disability before the assault, the evidence showed that plaintiff experienced an array of additional and more severe health problems after the assault, and medical testimony linked those health issues to the head-trauma injuries that plaintiff sustained during the assault. "A tortfeasor takes a victim as the tortfeasor finds the victim and will be held responsible for the full extent of the injury, even though a latent susceptibility of the victim renders the injury far more serious than reasonably could have been anticipated." *Wilkinson v Lee*, 463 Mich 388, 394-395; 617 NW2d 305 (2000). Further, although defendants claim that plaintiff concealed his pre-existing conditions from doctors, and deceived doctors by exaggerating or fabricating his symptoms, medical doctors testified that they did not observe any signs of malingering and several doctors testified regarding medical findings that they claimed were not possible to fake.

The trial court did not err in denying defendant's motion for a new trial based on the great weight of the evidence.

VII. JURY INSTRUCTIONS

Defendants next argue that they are entitled to a new trial because of errors in the jury instructions.

We review claims of instructional error in accordance with the following standards:

> We review de novo properly preserved instructional errors, *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002), and consider the jury instructions as a whole to determine whether they adequately present the theories of the parties and the applicable law. *Mull v Equitable Life Assurances Society of the United States*, 196 Mich App 411, 423; 493 NW2d 447 (1992), aff'd 444 Mich 508 (1994). "[A] verdict should not be set aside unless failure to do so would be inconsistent with substantial justice. Reversal is not warranted when an instructional error does not affect the outcome of the trial." *Jimkoski v Shupe*, 252 Mich App 1, 9; 763 NW2d 1 (2008). [*Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 626-627; 792 NW2d 344 (2010).]

Defendants first argue that the trial court erred by failing to give their proposed Special Instruction No. 4 regarding the elements of intentional infliction of emotional distress. Defendants argue that the instructions given failed to advise the jury that it was required to find that "the emotional distress was so severe that no reasonable man could be expected to endure it." However, neither this Court, nor the Supreme Court in *Roberts v Auto-Owners Ins Co*, 422 Mich 594; 374 NW2d 905 (1985), has required that particular phrase as part of the elements of intentional infliction of emotional distress. In *Roberts*, the Court identified the elements of the claim as (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress. *Id.*; see also *Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 321; 788 NW2d 679 (2010).

In *Roberts*, 422 Mich at 608-609, the Court cited the Restatement's comments and explained that "[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it." See also *Haverbush v Powelson*, 217 Mich App 228, 235; 551 NW2d 206 (1996). The phrase that defendants contend should have been included in the jury instructions is not actually part of the elements of the claim, but served only to explain the severe emotional distress element. As also explained in *Haverbush*, 217 Mich App at 235, while "[s]evere distress must be proved," "in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed." The explanation that the emotional distress must be so severe that no reasonable man could be expected to endure it is simply another way of stating what the trial court included in its instructions, namely, that plaintiff was required to prove that he suffered severe emotional distress and "that defendant Ferguson's conduct was so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Because the omitted portion of defendants' proposed instruction would not have added anything of substance to the instructions given by the trial court, we find no error.

Defendants next argue that the trial court erred by failing to give their requested Special Instruction No. 5, which would have provided:

> A party's conduct which might be "extreme and outrageous," may be deemed privileged under certain circumstances. A person is never liable for an intentional infliction of emotional distress where she/he has done no more that

> [sic, than] insist upon his/her legal rights in a permissible way, even though he/she is well aware that such insistence is certain to cause emotional distress.
>
> If you find that Defendant Ferguson was defending himself against Plaintiff's attack and in doing so, was doing nothing more than assisting [sic] upon his legal rights in a permissible way, even though he was well aware that such insistence was certain to cause emotional distress to Plaintiff, your verdict will be for Defendants.

The trial court instructed the jury as follows:

> A party's conduct which might be extreme and outrageous may be deemed privileged under certain circumstances. A person is never liable for an intentional infliction of emotional distress where he has done no more than insist upon his legal rights in a permissible way even though he's well aware that such insistence is certain to cause emotional distress. If you find that defendant Ferguson was defending himself against plaintiff's attack and in doing so was doing nothing more than insisting upon his legal rights in a permissible way even though he was well aware that such insistence was certain to cause emotional distress to plaintiff, your verdict will be for defendant.

We fail to see how the trial court's instruction differed materially from defendants' proposed instruction. The instruction adequately and properly informed the jury that Ferguson would not be liable for intentional infliction of emotional distress if the jury found that he was defending himself from plaintiff in a permissible way even though he was aware that such insistence would cause emotional distress to plaintiff. Accordingly, we find no error.

Defendants next argue that the trial court erred by failing to give their proposed Special Instruction No. 8 on exemplary damages, which they assert is consistent with *White v Vassar*, 157 Mich App 282; 403 NW2d 124 (1987). Even if defendants' proposed instruction would have been proper, the instruction given by the trial court adequately conveyed the concept of exemplary damages. It accurately informed the jury that exemplary damages are intended to make the plaintiff whole by compensating him for increased injury attributable to a defendant's egregious and outrageous conduct in reckless disregard of the plaintiff's rights. Accordingly, the trial court's instruction as given was not erroneous.

VIII. JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants argue that the trial court erred by denying their motion for judgment notwithstanding the verdict (JNOV). A trial court's ruling on a motion for JNOV is reviewed de novo. The motion should only be granted if the evidence, viewed in the light most favorable to the nonmoving party, fails to establish a claim as a matter of law. *Alpha Capital*, 287 Mich App at 599. Once again, defendants ask us to improperly weigh the relative credibility of the evidence and view it in a light most favorable to defendants.

Plaintiff's testimony, if believed, was sufficient to allow the jury to find that plaintiff was assaulted by Ferguson when Ferguson attacked him and beat him with a pistol. See *Smith v Stolberg*, 231 Mich App 256, 260; 586 NW2d 103 (1998) (an assault is any intentional, unlawful

offer of corporal injury to another person by force, or force unlawfully directed toward the person of another, under circumstances which create a well-founded apprehension of imminent contact, coupled with the apparent present ability to accomplish the contact). Plaintiff's testimony also established a battery by Ferguson when he struck plaintiff. See *id.* (a battery is the willful and harmful or offensive touching of another person which results from an act intended to cause such contact).

The evidence was also sufficient to enable the jury to find defendants liable for intentional infliction of emotional distress. The evidence that Ferguson used the employer-employee relationship to lure plaintiff into his office and then violently assaulted plaintiff, and the evidence of plaintiff's severe medical problems afterward, including problems with depression, was sufficient to allow the jury to find that Ferguson engaged in extreme and outrageous, reckless or intentional conduct that caused plaintiff severe emotional distress. See *Roberts*, 422 Mich at 602.

Therefore, the trial court did not err in denying defendants' motion for JNOV.

IX. ZURICH'S RIGHT TO A LIEN

In its cross-appeal, Zurich challenges the trial court's determination that it was not entitled to assert a statutory lien against plaintiff's judgment for worker's compensation benefits paid on behalf of its insured, Ferguson Enterprises. Plaintiff and defendants both argue that the trial court properly found that Zurich was not entitled to a lien where this action was brought against an employer, not a third party. Whether Zurich was legally entitled to assert a statutory right to a lien against plaintiff's recovery is a question of law, which is reviewed de novo by this Court. *Velez v Tuma*, 492 Mich 1, 11; ___ NW2d ___ (2012).

Zurich argues that MCL 418.827 entitles it to reimbursement of the worker's compensation benefits paid to plaintiff. That statute provides, in pertinent part:

> (1) Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section . . .
>
> * * *
>
> (5) In an action to enforce the liability of a third party, the plaintiff may recover any amount which the employee or his or her dependents or personal representative would be entitled to recover in an action in tort. Any recovery against the third party for damages resulting from personal injuries or death only, after deducting expenses of recovery, shall first reimburse the employer or carrier for any amounts paid or payable under this act to date of recovery and the balance shall immediately be paid to the employee or his or her dependents or personal

> representative and shall be treated as an advance payment by the employer on account of any future payments of compensation benefits.

MCL 418.827(1) and (5) plainly indicate that a carrier's right to reimbursement is limited to a third-party action where the injured plaintiff establishes the liability of "some person other than a natural person in the same employ or the employer." See *Pitoniak v Borman's, Inc*, 104 Mich App 718, 730; 305 NW2d 305 (1981). Here, plaintiff did not obtain a judgment against any such third-party defendant. Thus, the trial court properly denied Zurich's request for reimbursement.

Zurich's reliance on *Thick v Lapeer Metal Products*, 419 Mich 342; 353 NW2d 464 (1984), is misplaced. In *Thick*, the Supreme Court, noting that public policy does not favor double recoveries, held that a non-settling insurance carrier was entitled to offset its liability for workers compensation benefits by the amount of a settlement paid by a second carrier. *Id.* at 347. The case was not decided on the basis of MCL 418.827. The public policy concerns in *Thick* are not present here because plaintiff did not receive any double recovery, inasmuch as the trial court applied the collateral source rule to reduce plaintiff's awards for past lost wages and medical expenses and future lost wages and lost earning capacity due to his receipt of worker's compensation benefits.

X. THE COLLATERAL SOURCE RULE

In his cross-appeal, plaintiff argues that the trial court erroneously overstated the appropriate reduction of the jury's award for future lost wages and lost earning capacity under the collateral source rule, MCL 600.6303. We agree and remand for further proceedings.

The trial court applied the collateral source rule to reduce the jury's award of future lost wages and lost earning capacity from $1,355,720 to $158,212, based on plaintiff's receipt of worker's compensation and social security disability benefits. The amount of the reduction was based on calculations offered by defendants' expert, Michael Thomson. Shortly after the judgment was entered, plaintiff filed a motion to amend the judgment under MCR 2.611, alleging that defendants' expert had overstated the amount that plaintiff will actually receive in worker's compensation and social security benefits because his social security benefits will be coordinated with his worker's compensation benefits and, accordingly, he would not be receiving the full amount of social security benefits represented by Thomson. In support of his motion, plaintiff submitted an affidavit from the attorney who represented plaintiff in his worker's compensation and social security cases. The trial court treated plaintiff's motion as a motion for reconsideration and denied it because it concluded that plaintiff had not demonstrated a palpable error, given that he had apparently agreed with the prior calculations.

We believe that the trial court erred by refusing to consider the merits of plaintiff's motion. MCR 2.611(A)(1)(f) and (g) allow a trial court to amend a judgment for an error of law occurring in the proceedings or for newly discovered evidence. Plaintiff's motion indicated that plaintiff only recently became aware of the details of the worker's compensation and social security awards. The trial court did not consider the actual merits of plaintiff's motion to amend, but rather rejected it on procedural grounds, failing to recognize that plaintiff was presenting new facts and legal arguments that had not previously been considered by the court. Plaintiff's

motion and supporting evidence provided facial support for plaintiff's claim that the amount of the collateral source reduction in the trial court's judgment was inaccurate.

Defendants do not contend that plaintiff's claim of an overstated reduction is legally or factually inaccurate. Instead, they argue that it was procedurally improper for plaintiff to rely on his attorney's affidavit to support his argument. We disagree. The affidavit was from the attorney who handled plaintiff's worker's compensation and social security cases. He would have had personal knowledge of the benefits that plaintiff recovered in those cases. Because that attorney did not represent plaintiff in this case, he would not be disqualified from serving as a witness in this case in post-judgment proceedings. Furthermore, MCR 2.611(D)(1) required plaintiff to submit an affidavit in support of his motion to amend because the facts stated in the motion were not already of record. If the trial court found it necessary to call or examine witnesses, it was permitted to do so. MCR 2.611(D)(3).

Because there are questions of fact that must first be addressed by the trial court regarding the correct amounts of the collateral source reduction, we remand this matter for a hearing on the merits of plaintiff's motion so that the trial court can properly determine the appropriate amount of the collateral source reduction. The trial court may permit a reply affidavit from defendants, and it may call and examine witnesses as necessary.[1] MCR 2.611(D)(3).

In a related argument, plaintiff asserts that the trial court also incorrectly reduced the jury's award for past lost wages and medical expenses based on collateral sources. Plaintiff asserts that the trial court reduced that award without considering that it might have included an award for medical liens for past medical care and without ascertaining which portion of the jury's $100,000 award was for past wages and which portion was for past medical expenses. However, plaintiff has not shown that the trial court's calculations in applying the collateral source rule to that award were actually erroneous. We decline to disturb the judgment on this basis.

XI. AWARD OF FUTURE MEDICAL EXPENSES

The trial court remitted the jury's award of $384,000 for future medical expenses to zero because the award was made as part of the jury's response to question #9 on the jury verdict form, which referred only to future lost wages and lost earning capacity. The trial court's decision to remit the award was based on its erroneous belief that it had not permitted the jury to award damages for future medical expenses. Although the verdict form neglected to list future medical expenses as a category of damages, future medical expenses was a disputed issue at trial and testimony on that issue was presented. Further, the jury was instructed before deliberations that it could award future medical expenses as an element of damages.

[1] We note that the possibility that plaintiff's benefits might be reduced in the future is not a basis for not applying the collateral source rule. See *Haberkorn v Chrysler Corp*, 210 Mich App 354, 375-376; 533 NW2d 373 (1995).

During deliberations, the jury asked, in regard to question #9 on the verdict form, whether it could include future medical expenses in any award when that question only addressed future lost wages and earning capacity. After a discussion with the parties, the court indicated that it would respond to the jury's question by telling that the jury that it "may determine whatever future damages it believes has been proven." The completed verdict form shows that the jury, in response to question #9 and consistent with the trial court's supplemental instruction, awarded future medical expenses of $12,000 a year from 2008 to 2040 (for a recited total award of $384,000), and separately awarded future lost wages/earnings of $1,355,720. Thus, although question #9 did not specifically refer to future medical expenses, the trial court's supplemental instruction authorized the jury to include any award of future medical expenses in an award of damages as part of question #9 on the verdict form.

Accordingly, we reinstate the jury's award for future medical expenses. On remand, however, the trial court shall determine whether any portion of that award may be subject to reduction under the collateral source rule.

XII. THE JURY'S MATHEMATICAL CALCULATIONS

Plaintiff lastly argues that the jury's verdict form should be amended to correct manifest mathematical errors on the form. We agree.

A trial court may amend a jury's verdict to conform to what the jury intended where there is a manifest error of either form, and sometimes substance, if the intentions of the jury are ascertainable. *Naccarato v Grob*, 384 Mich 248, 256; 180 NW2d 788 (1970).

In this case, the jury's intention to award $12,000 each year from 2008 through 2040 for future medical expenses can be ascertained from the jury's verdict form. Despite this clear intent, the jury recited the sum total of the $12,000 awards for those 33 years as equaling $384,000. The correct total is actually $396,000. The jury made a similar manifest error in its award for future pain and suffering. The jury's verdict form shows a clear intent to award $11,000 for pain and suffering for each year from 2008 through 2040, but again, the jury mistakenly recited the sum total of the $11,000 awards for those 33 years as equaling $352,000. The correct total is actually $363,000. Accordingly, we remand for correction of the jury verdict form to conform to the jury's clear intent to award (1) total damages of $396,000 for future medical expenses, subject to any adjustment under the collateral source rule, and (2) total damages of $363,000 for future pain and suffering.

XIII. CONCLUSION

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro