

STATE OF MICHIGAN
COURT OF APPEALS

BRITTANY TAYLOR,

Plaintiff-Appellant,

v

JEFFREY MOBLEY, JODY MOBLEY and
RYAN ARTHUR MOBLEY,

Defendants-Appellees.

FOR PUBLICATION

June 3, 2008

9:15 a.m.

No. 274628

Lenawee Circuit Court

LC No. 04-041741-NO

Advance Sheets Version

Before: Saad, C.J., and Borrello and Gleicher, JJ.

SAAD, C.J.

In this statutory dog-bite action,¹ plaintiff appeals the judgment entered in her favor because she claims the trial court erred when it denied her motion for new trial or additur. In her view, the jury's damage award, which failed to award her noneconomic damages for pain and suffering was either (1) against the great weight of the evidence, or (2) clearly inadequate because the jury ignored uncontroverted evidence of pain and suffering. Plaintiff also says that the trial court's evidentiary ruling that precluded plaintiff from identifying the dog's breed denied her a fair trial. For the reasons set forth below, we affirm the trial court's rulings.

I. Inadequate Monetary Award/Great Weight of the Evidence

Plaintiff contends that the trial court should have granted her motion for new trial or additur because the jury ignored uncontroverted evidence of noneconomic damages, specifically, her pain and suffering in encountering the attack. In analyzing this contention, we are mindful

¹ Michigan's dog-bite statute, MCL 287.351, provides, in part:

(1) If a dog bites a person, without provocation while the person is on public property, or lawfully on private property, including the property of the owner of the dog, the owner of the dog shall be liable for any damages suffered by the person bitten, regardless of the former viciousness of the dog or the owner's knowledge of such viciousness.

that the adequacy of the amount of damages awarded is ordinarily within the province of the jury, and that awards for pain and suffering rest within the sound judgment of the trier of fact.² Yet, despite this significant deference we must pay to the jury's determinations, there is room for limited appellate review. MCR 2.611(A).³

Plaintiff asserts that the jury award is "inadequate" under MCR 2.611(A)(1)(d) because the jury simply ignored evidence that the dog bite resulted in some measure of pain and suffering, and fright and shock. She argues that the evidence of these damages was uncontroverted because defendants never argued that the dog bite was not frightening or painful, but confined their defense to the extent or amount of the damages. In plaintiff's view, because the jury awarded her past medical expenses only, this establishes that the jury ignored this uncontested evidence of other damages. While plaintiff's argument has some surface merit, it does not withstand closer scrutiny, for several reasons, one of which is contained in the form of the verdict form. The verdict form, which, significantly, was prepared by plaintiff, reads:

If you find that Ms. Taylor's injuries resulted in noneconomic damages for pain and suffering; mental anguish; fright and shock; denial of social pleasure and enjoyments; embarrassment; humiliation or mortification; and scarring on her leg, what is the total amount of Ms. Taylor's noneconomic damages to the present date? [Emphasis added.]

Because of the conditional nature of the inquiry posed by the verdict form, plaintiff cannot demonstrate that the jury ignored evidence of noneconomic damages by simply pointing to the jury's entry of zero on the verdict form. The plain language of the verdict form does not compel the conclusion that the jury ignored uncontested evidence of damages, but instead leaves open other plausible explanations. For example, the jury may have considered plaintiff's testimony and either disbelieved plaintiff's testimony regarding pain and suffering or determined that plaintiff's noneconomic damages were insufficiently serious to be compensable, or both. The verdict form asks the trier of fact to decide whether plaintiff sustained noneconomic damages, and, if so, to assign a dollar amount to the damages. The jury could have reasonably

² *Kelly v Builders Square, Inc.*, 465 Mich 29, 35; 632 NW2d 912 (2001); *Bosak v Hutchinson*, 422 Mich 712, 736; 375 NW2d 333 (1985).

³ MCR 2.611(A) provides, in part:

(1) A new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected, for any of the following reasons:

* * *

(d) A verdict clearly or grossly inadequate or excessive.

(e) A verdict or decision against the great weight of the evidence or contrary to law.

considered and properly assigned weight to the evidence presented, and concluded that plaintiff lacked credibility regarding her testimony about pain and suffering, or that plaintiff experienced a minimal amount of pain and suffering that was insufficient to warrant compensation.

Moreover, though plaintiff testified that she experienced pain and suffering, the jury may have both disbelieved her and credited and given great weight to countervailing evidence that undermined plaintiff's credibility and spoke to the lack of "seriousness" of this component of damages. The jury may have credited and relied on evidence that plaintiff waited three days before she sought medical attention for the dog bite and, when she did go to the hospital, her treatment was limited to the administration of antibiotics and a prescription for pain medication, and did not involve stitches or other surgical procedures. And, though plaintiff did meet with a cosmetologist and a plastic surgeon, these consultations occurred about 18 months after the incident and plaintiff viewed the \$25 treatments offered by the cosmetologist as too expensive. Testimony also revealed that plaintiff appeared to be only in "a little bit of pain" immediately after the "little" dog bite. Of course, most importantly, the jury, and not this Court, had the opportunity to weigh the credibility of plaintiff.⁴

In *Kelly v Builders Square, Inc.*, 465 Mich 29, 38-39; 632 NW2d 912 (2001), the Michigan Supreme Court held:

The grounds for granting a new trial, including a verdict contrary to the great weight of the evidence, are now codified at MCR 2.611(A)(1). The court rule provides the only bases upon which a jury verdict may be set aside A jury's award of medical expenses that does not include damages for pain and suffering does not entitle a plaintiff to a new trial unless the movant proves one of the grounds articulated in the court rule.

* * *

In short, the jury is free to credit or discredit any testimony. It may evaluate the evidence on pain and suffering differently from the proof of other damages. No legal principle requires the jury to award one item of damages merely because it has awarded another item.

Plaintiff and the dissent totally ignore that the jury could have simply disbelieved and discredited plaintiff's testimony regarding pain and suffering.

In light of the jury's unique role in determining plaintiff's credibility and weighing the other evidence that supports the jury's verdict,⁵ plaintiff has failed to demonstrate that the verdict

⁴ "[W]here reasonable minds could differ regarding the level of certainty to which damages have been proved, this Court is careful not to invade the fact finding of the jury and substitute its own judgment." *Severn v Sperry Corp.*, 212 Mich App 406, 415; 538 NW2d 50 (1995).

⁵ The question of credibility is generally for the fact-finder to decide. See *Dep't of Community Health v Risch*, 274 Mich App 365, 372; 733 NW2d 403 (2007). Furthermore, the jurors' (continued...)

was grossly inadequate under MCR 2.611(A)(1)(d), or against the great weight of the evidence under MCR 2.611(A)(1)(e). Thus, plaintiff has not shown that the trial court abused its discretion when it declined to grant her a new trial or additur.⁶

Here, the jury was free to disbelieve plaintiff's testimony regarding noneconomic damages and to credit all countervailing evidence on this issue. *Kelly, supra* at 38-39. The fact that it awarded damages based on physical injury did not obligate it to also award damages for her pain and suffering. *Id.* at 39. Hence, the trial court properly declined to disturb the jury's award.

II. Evidentiary Ruling on Type of Dog

Plaintiff contends, and the dissent agrees, that the trial court abused its discretion when it excluded evidence that her injuries were caused by a pit bull. Under well-established Michigan law, the decision to admit or exclude evidence is within the discretion of the trial court, and this Court will not disturb the ruling on appeal in the absence of an abuse of discretion. *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005). And, though we may have ruled differently, the level of deference we must give to the trial court under well-established Michigan law prohibits reversal if we merely disagree with the trial court. Moreover, a trial court clearly does not abuse its discretion where its decision falls within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Thus, the question before us is not whether we agree with the trial court. Instead, the only question before us is whether the trial court's decision is within the range of principled outcomes?

Though relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403. Unfair prejudice exists where there is danger that the evidence will be given undue or preemptive weight by the trier of fact, or when it would be inequitable to allow the use of such evidence.

Here, the trial court ruled that while the size of the dog is relevant, the fact that the dog is a pit bull is irrelevant to the issue of damages and is more prejudicial than probative. The trial court held that there was danger that the jury could give undue weight to evidence that the dog was a pit bull. The trial court's reasoning suggests that, if plaintiff introduced evidence that she

(...continued)

prerogative to disbelieve testimony, including uncontroverted testimony, is well established. *Strach v St John Hosp Corp*, 160 Mich App 251, 271; 408 NW2d 441 (1987), citing *Baldwin v Nall*, 323 Mich 25, 29; 34 NW2d 539 (1948). See also *Harvey v Office of Banks & Real Estate*, 377 F3d 698, 712 (CA 7, 2004); *Kasper v St Mary of Nazareth Hosp*, 135 F3d 1170, 1173 (CA 7, 1998).

⁶ Our appellate courts substantially defer to trial courts in their determination to grant or deny a motion for new trial, and, thus, we review for an abuse of discretion. *Allard v State Farm Ins Co*, 271 Mich App 394, 406; 722 NW2d 268 (2006). Our deference to trial courts rests in large measure on the trial court's opportunity to hear the witnesses and its consequent position to assess credibility. *Morinelli v Provident Life & Accident Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

was bitten by a pit bull, the jury could confuse or conflate the issues of liability and damages. The trial court expressed concern that the jury could have given undue weight to the reputation of pit bulls as being vicious. Plaintiff is correct in her assertion that there is a difference between being attacked by a pit bull and a chihuahua. However, the trial court recognized and allowed for this difference by permitting plaintiff to describe the size of the dog and the nature and specifics of the attack. We view this evidentiary ruling as a close question, and precisely because this is a close question, we hold that the trial court's evidentiary ruling does not constitute an abuse of discretion. *Maldonado, supra* at 388.

Affirmed.

Borrello, J., concurred.

/s/ Henry William Saad

/s/ Stephen L. Borrello