STATE OF MICHIGAN

COURT OF APPEALS

BRITTANY TAYLOR, Plaintiff-Appellant,	FOR PUBLICATION June 3, 2008
v	No. 274628 Lenawee Circuit Court
JEFFREY MOBLEY, JODY MOBLEY and RYAN ARTHUR MOBLEY, Defendants-Appellees.	LC No. 04-041741-NO Advance Sheets Version

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

GLEICHER, J. (*dissenting*).

I respectfully dissent. The jury's failure to award noneconomic damages irreconcilably conflicted with unrebutted, unchallenged, and undeniable evidence that plaintiff suffered pain, fright, and shock during and after the unprovoked attack by defendants' dog. Because the jury's verdict on noneconomic damages was against the great weight of the evidence, I believe that a new trial is required. MCR 2.611(A)(1)(e).

A new trial may be granted whenever the "substantial rights" of a party are "materially affected" by a verdict or decision that is "against the great weight of the evidence or contrary to law." MCR 2.611(A)(1)(e). If the record reveals evidence that preponderates so heavily against a verdict that it would be a miscarriage of justice to allow the verdict to stand, a new trial is required. *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). This is such a case.

The record evidence demonstrates that the dog's attack was both shocking and painful. Plaintiff drove to defendants' home at the invitation of a friend, who was dating defendant Ryan Mobley and wanted plaintiff to meet him. The parties did not dispute that when plaintiff arrived at Ryan's home and attempted to get our of her car, defendants' pit bull suddenly jumped into the vehicle and bit her abdomen and right inner thigh. Plaintiff screamed, and struggled to free herself from the dog's teeth. The dog refused to loosen its grip on plaintiff's leg until Ryan punched it in the head several times. Plaintiff did not know that defendants owned a dog and had no reason to anticipate that the dog would leap at her as soon as she opened her car door. Defendants admitted liability pursuant to a strict-liability statute, which states, in pertinent part, that "the owner of the dog shall be liable for *any* damages suffered by the person bitten . . . ." MCL 287.351(1) (emphasis supplied).

At no time during trial did defendants challenge the obvious fact that plaintiff, a 16-year-old girl suddenly, unforeseeably, and viciously attacked by a pit bull, had suffered fright, shock and pain. To the contrary, defense counsel admitted in his opening statement that although plaintiff continued to engage in normal activities after the attack, "this isn't to say that she wasn't bitten, that it didn't hurt, or that she didn't have some discomfort during the healing process."

The majority opinion does not address defendants' implicit and explicit trial admissions that plaintiff suffered pain, fright, and shock occasioned when their dog lunged at plaintiff and twice bit her. Rather than acknowledging that the jury patently disregarded its duty to "reasonably, fairly and adequately"[1] compensate plaintiff for her unchallenged injuries, the majority seeks to justify the verdict by using the wording of the jury verdict form to construct a hypothesis that the jury "either disbelieved plaintiff's testimony regarding pain and suffering or determined that plaintiff's noneconomic damages were insufficiently serious to be compensable, or both." In my view, the jury verdict form and the hypothesis advanced by the majority have nothing to do with a correct application of MCR 2.611(A)(1)(e).

A jury is certainly entitled to "disbelieve" a witness's testimony. In this case, however, no evidence contradicted plaintiff's testimony regarding the pain that attended the dog's bites, and that she suffered fright and shock during the dog's unforeseen attack. Simply put, no rational or evidentiary basis existed for the jury's "disbelief" of this testimony. The majority apparently concludes that the jury decided that this vicious attack caused neither pain nor fear. If the jury so concluded, it did so against the great weight of uncontroverted evidence.

The majority's suggestion that perhaps the jury decided that plaintiff's noneconomic damages "were insufficiently serious to be compensable" is similarly flawed, both logically and legally. The jury did not conclude that plaintiff sustained *de minimis* damages; it awarded *nothing* for her pain and suffering, despite unchallenged evidence of both. Additionally, no law or legal theory permits a jury to entirely disregard uncontroverted evidence of pain and suffering in a strict-liability case, on the basis of a finding that these damages qualify as "insufficiently serious to be compensable." The law mandates that the jury compensate an injured plaintiff for his or her injuries, and a jury that refuses to do so nullifies the law.

Similarly, this Court may not abdicate its legal responsibility to carefully and fairly examine the evidence under MCR 2.611(A)(1)(e) when requested to so. The court rule requires us to weigh the evidence actually submitted to the jury, and to determine whether the great weight of that evidence preponderated in plaintiff's favor. The verdict form's question regarding noneconomic damages does not, and cannot, alter the nature of the proofs presented at trial. The court rules do not contemplate the construction of hypotheses intended to rehabilitate an unfounded jury verdict that obviously contravenes the great weight of the evidence. Although I agree with the majority that appellate courts owe due deference to a jury verdict, the Michigan Court Rules unambiguously call for a new trial when a verdict is against the great weight of the evidence, and I have difficulty imagining a more appropriate application of that court rule than to this case.

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[1] M Civ JI 50.01.

In denying plaintiff's motion for a new trial, the trial court committed an error of law because it did not weigh the evidence of plaintiff's pain, fright, and shock, all compensable elements of damages pursuant to M Civ JI 50.02.[2] Instead, the trial court focused on the fact that plaintiff's scarring appeared to be minimal, and that she did not see a doctor until three days after the dog had bitten her.[3] Had the trial court followed MCR 2.611(A)(1)(e) and weighed the evidence supporting and refuting plaintiff's claim for noneconomic damages, it would have been forced to concede that *no* evidence contradicted plaintiff's testimony that she suffered pain, fright, and shock, and that no reasonable juror could find that the dog's attack was a painless, nonthreatening event. Because the damages verdict went against the great weight of that evidence, the trial court abused its discretion in failing to grant plaintiff's motion for a new trial.

My analysis is entirely consistent with the Michigan Supreme Court's decision in *Kelly v Builders Square, Inc*, 465 Mich 29; 632 NW2d 912 (2001). In that case, a large box fell on the plaintiff's head and shoulder, and the plaintiff sued under a premises-liability theory. The jury awarded the plaintiff economic damages, but nothing for her pain and suffering. *Id*. at 31-32. The plaintiff asserted in a post-trial motion that the jury's awards of economic and noneconomic damages were fundamentally inconsistent, requiring a new trial. *Id*. at 32-33. The trial court granted the motion, and the Supreme Court reversed. The *Kelly* majority held that the trial court improperly awarded a new trial on the basis of verdict inconsistency because MCR 2.611(A) does not include inconsistency as a ground for a new trial. *Id*. at 38-39. Notably, the Supreme Court expressly declined to address whether the jury's finding of zero dollars for noneconomic damages contravened the great weight of the evidence under MCR 2.611(A)(1)(e), because the Court determined that the plaintiff failed to preserve that argument. *Id*. at 40. The essence of the *Kelly* decision is that a party is not entitled to a new trial "unless the movant proves one of the grounds articulated in [MCR 2.611(A)(1)]." *Id*. at 38. Plaintiff in the instant case followed our Supreme Court's instruction in *Kelly* and moved for a new trial based on MCR 2.611(A)(1)(e).

The majority reasons that "the jury was free to disbelieve plaintiff's testimony regarding noneconomic damages, and to credit all countervailing evidence on this issue." Aside from the

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[2] Regarding pain, suffering, fright, and shock, the trial court cited only a witness's statement that after the attack, plaintiff "appeared only in a little bit of pain . . . ." The actual witness testimony reflects the following exchange:

> *Q*. Was she crying?
>
> *A*. She was scared, yeah.
>
> *Q*. Did she appear to be in pain?
>
> *A*. A little bit. She was bitten by a dog.

[3] The emergency room record introduced at trial states that plaintiff complained of "increased red/pain" at the site of her wounds since the date of the attack, and that she received an injection of an antibiotic, as well as a prescription for Tylenol with codeine.

fact that no countervailing evidence exists in this record, the majority's argument proves too much. If the majority is correct, we must sustain all verdicts challenged on appeal as being against the great weight of the evidence because in every case a jury remains free to ignore overwhelming and uncontroverted evidence. In *Kelly*, the Supreme Court directed courts to follow MCR 2.611(A), not to strip the rule of all meaning. Indeed, the Supreme Court instructed that "[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*." *Id*. at 38 (emphasis supplied). A determination whether a verdict contravenes the great weight of the evidence requires careful analysis of the actual evidence, not formulaic rationalizations.

Moreover, our Supreme Court has firmly rejected the notion that judicial review is properly constrained by a jury's ability to accept or reject evidence. In the summary-disposition context, for example, a nonmoving party may not rely on the potential for jury disbelief to supplant its duty to produce evidence demonstrating the existence of a genuine issue of material fact. MCR 2.116(G)(4). The argument that a jury may simply reject a movant's proffered evidence amounts to nothing more than an impermissible "mere denial," and cannot erase the requirement that a court actually review the evidence when deciding whether to grant summary disposition. See *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991). Indisputably, a jury remains free to accept or reject any testimony at any time. That truism, however, cannot absolve this Court of its court rule-imposed responsibility to conduct an evidentiary review in the context of MCR 2.611(A)(1)(e).

In my view, the plain language of MCR 2.611(A)(1)(e) mandates that this Court review and analyze the actual trial evidence. Had the majority done so, it would have concluded that when fairly weighed against the countervailing evidence, the jury's award of zero for plaintiff's noneconomic damages went against the great weight of the record evidence. If MCR 2.611(A)(1) has any true meaning and relevance, I believe a new trial must be ordered.

Finally, I believe that the trial court in the instant case also abused its discretion when it excluded evidence of the dog's breed. Michigan Court "Rule 403 does not prohibit prejudicial evidence; only evidence that is unfairly so." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Only when marginally probative evidence will be afforded undue or preemptive weight should the court exclude it under MRE 403. *Crawford, supra* at 398. Plaintiff was attacked by a pit bull, not a toy poodle. The breed of the dog had strong probative value in substantiating plaintiff's fear and shock during the attack, and the risk of any undue prejudice was minimal; any risk of unfair prejudice did not *substantially* outweigh the high probative value of evidence regarding the dog's breed. The trial court's improper exclusion of the dog's breed contributed to the evisceration of plaintiff's claim for fright and shock damages. In my view, this error was not harmless, and, in combination with the jury's unsupported verdict, requires a new trial.

/s/ Elizabeth L. Gleicher