STATE OF MICHIGAN

COURT OF APPEALS

GEORGIA BACON,

Plaintiff–Appellee,

v

ARBOR DRUGS INCORPORATED,

Defendant–Appellant.

UNPUBLISHED
March 28, 1997

No. 177313
Wayne Circuit Court
LC No. 92-226844-NO

GEORGIA BACON,

Plaintiff-Appellee,

v

ARBOR DRUGS INCORPORATED,

Defendant-Appellant.

No. 181872
Wayne Circuit Court
LC No. 92-226844-NO

Before: Marilyn Kelly, P.J., and MacKenzie and J.R. Ernst,* JJ.

PER CURIAM.

In this consolidated negligence action, defendant appeals as of right from a jury verdict rendered in plaintiff's favor and from a trial court's order granting attorney fees to plaintiff. We affirm.

I

Defendant's first argument is that the trial court erroneously instructed the jury on plaintiff's duty of care pursuant to SJI2d 19.04. We disagree. SJI2d 19.04 was written in response to our Supreme Court's decision in *Jaworski v Great Scott Supermarkets, Inc,* 403 Mich 689; 272 NW2d 518

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*Circuit judge, sitting on the Court of Appeals by assignment.

(1978). At the time *Jaworski* was written, Michigan was a contributory negligence state which barred a plaintiff from recovering for injuries if even marginally negligent. To avoid this harsh rule, our Supreme Court held that, when no evidence is presented at trial to show that a plaintiff was negligent, the trial court should not instruct the jury on contributory negligence.

A year after the decision in *Jaworski*, our Supreme Court rescinded the contributory negligence rule and adopted a rule of pure comparative negligence. It allowed a plaintiff to recover if marginally negligent, but would reduce recovery by the percentage of fault attributable to him. *Placek v Sterling Heights*, 405 Mich 638, 667-668; 275 NW2d 511 (1979), limited *Craig v Larson*, 432 Mich 346 (1989). After this doctrine was implemented, all issues regarding a plaintiff's negligence were to be submitted to the jury which would then be charged with the duty of determining the percentage of fault attributable to each party when deciding how much a plaintiff could recover. *Murphy v Muskegon Co*, 162 Mich App 609, 614; 413 NW2d 73 (1987). This legal development led us to declare that "[w]ith the advent of comparative negligence in Michigan, we find that *Jaworski* no longer states the applicable law and would not be followed by the Supreme Court." *Charleston v Meijer, Inc*, 124 Mich App 416, 419; 335 NW2d 55 (1983).

Defendant's reliance on *Charleston v Meijer, Inc, supra*, to support its argument that SJI2d 19.04 no longer states the applicable law in this state is misplaced. Our Court's statement in *Charleston* was based on the belief that, with the advent of comparative negligence, all issues regarding a plaintiff's negligence, whether real or hypothetical, should be submitted to the factfinder. We specifically held that, "The trend is towards allowing all issues to go to the jury and away from arbitrary policy decisions." *Id.* Therefore, our decision in *Charleston, supra*, did not invalidate or overrule SJI2d 19.04. We find defendant's remaining arguments relating to the validity of SJI2d 19.04 to be without merit.

II

Defendant's next argument is that the trial court made several erroneous evidentiary rulings that require reversal of the jury's verdict.

We reject defendant's claim that plaintiff's testimony concerning the handicapped parking permit issued to her by her physician was irrelevant and should have been excluded. The permit itself, as well as plaintiff's testimony regarding why she was issued the permit, were relevant to the issue of damages. The permit and plaintiff's testimony made the existence and scope of plaintiff's injuries more probable than they would have been without the evidence. MRE 401; *McDonald v Stroh Brewery Co*, 191 Mich App 601, 605; 478 NW2d 669 (1991).

Defendant's second claim is that the trial court erred in allowing plaintiff to retake the witness stand to rehabilitate the testimony which she gave on direct examination. We disagree. The mode and order of admitting proofs and interrogating witnesses rests within the sole discretion of the trial court. MRE 611; *Hartland Twp v Kucykowicz*, 189 Mich App 591, 595; 474 NW2d 306 (1991). After plaintiff was recalled, defendant was able to fully cross-examine her about her testimony. This testimony was necessary so that the jury could ascertain the truth about plaintiff's prior injuries. Therefore, the

trial court did not abuse its discretion in allowing plaintiff to retake the witness stand to clarify her earlier testimony.

III

Defendant next argues that the trial court erred in allowing plaintiff to cross-examine defendant's employees with their deposition testimony. A witness may be cross-examined on any matter relevant to any issue in a case including credibility. MRE 611(b). Furthermore, the purpose of cross-examination is to uncover or expose hidden biases and to discredit a witness's testimony. There is no error in allowing a party to cross-examine a witness with that witness's deposition testimony. MCR 2.308.

IV

Defendant claims that the trial court abused its discretion in refusing to allow defendant's claims adjuster to sit at defense table during the trial. Allowing a key witness, an expert witness, or anyone else with whom counsel might want to confer during the course of a trial, to sit at counsel table is permissible at the discretion of the trial judge. *Patton v Avis Rent-A-Car Systems, Inc*, 44 Mich App 556, 561; 205 NW2d 615 (1973). In light of defense counsel's argument that defendant's claims adjuster had investigated plaintiff's case and was assisting defense counsel throughout trial, we believe that the trial court abused its discretion in refusing to allow the claims adjuster to sit at counsel table during trial. However, because defendant has not explained how this error prejudiced him, and cannot show that the jury's verdict would have been different if the adjuster had been allowed to sit at counsel table, any error committed by the trial court was harmless and does not require reversal of the jury's verdict.

V

Defendant alleges that the trial court did not have jurisdiction to award attorney fees after defendant filed its claim of appeal with this Court. We disagree. The filing of a claim of appeal divests the circuit court of its jurisdiction to amend its final orders. *Wilson v General Motors Corp,* 183 Mich App 21, 41; 454 NW2d 405 (1990). While an award of attorney fees is ordinarily considered an amendment of the trial court's order granting judgment, a trial court may determine the amount of costs to be taxed after a claim of appeal has been filed if the original judgment provides for costs. *Id.; Admiral Ins Co v Columbia Casualty Ins Co,* 194 Mich App 300, 314; 486 NW2d 351 (1992). In the present case, the trial court's order granting judgment in plaintiff's favor specifically provided that plaintiff was entitled to receive "all taxable costs in connection with [the] action." For purposes of the mediation rule, actual costs include the costs taxable in any civil action and reasonable attorney fees. MCR 2.403(O)(6)(a) and (b). Thus, all that remained to be done was the ministerial task of documenting the costs and fees. *Lincoln v Gupta*, 142 Mich App 615, 631; 370 NW2d 312 (1985). Therefore, the trial court had jurisdiction to award attorney fees and costs to plaintiff.

VI

Finally, defendant argues that some of the costs and attorney fees awarded to plaintiff should not have been awarded and were unreasonable. Whether a party is entitled to mediation sanctions, and the amount of costs and attorney fees to be assessed, are questions to be decided by the trial court in its discretion. *Dean v Tucker*, 205 Mich App 547, 551; 517 NW2d 835 (1994).

Here, the court did not abuse its discretion in awarding attorney fees to plaintiff for the time her attorney spent preparing for the hearing to determine the fees and costs owing. *Troyanowski v Village of Kent*, 175 Mich App 217, 226-227; 437 NW2d 266 (1988). However, the court did abuse its discretion in awarding $200 an hour to plaintiff's attorney for the time he spent deposing expert witnesses, and $300 an hour for the time spent in trial. This case was a relatively simple slip and fall case that presented no difficult questions of liability for plaintiff's lawyer. Despite the fact that plaintiff's attorney is undoubtedly a respected trial attorney, the fees assessed by the trial court were excessive. See 1994 Desktop Reference on the Economics of Law Practice in Michigan, 67 Mich BJ No. 11B, pp 1217-1246. Therefore, we reverse the trial court's award of attorney fees and remand this case to the trial court for imposition of a more reasonable attorney fee.

Affirmed in part, reversed in part, and remanded. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Marilyn Kelly
/s/ Barbara B. MacKenzie
/s/ J. Richard Ernst