

STATE OF MICHIGAN
COURT OF APPEALS

DEBBIE BARKER, Next Friend of JESSICA RAY
SMITH, Minor,

UNPUBLISHED
May 26, 1998

Plaintiff-Appellee,

v

No. 198814
Washtenaw Circuit Court
LC No. 95-002172-NO

JERI PELTON and HAROLD PELTON,

Defendant-Appellants,

and

GERALD FARNEL,

Defendant.

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendants Jeri Pelton and Harold Pelton appeal by leave granted from the trial court's order granting plaintiff Debbie Barker's motion for a partial new trial as to damages only. We affirm.

Under MCR 2.611(A)(1)(d), the trial court may grant a new trial on all or some of the issues whenever a party's substantial rights are materially affected by a verdict which is clearly or grossly inadequate or excessive. The decision to grant a new trial is a matter within the trial court's discretion, and appellate courts will not interfere unless there is a palpable abuse of that discretion. *Bosak v Hutchinson*, 422 Mich 712, 731; 375 NW2d 333 (1985); *Setterington v Pontiac General Hospital*, 223 Mich App 594, 608; 568 NW2d 93 (1997); *Constantineau v DCI Food Equipment*, 195 Mich App 511, 514; 491 NW2d 262 (1992). Defendants have failed to show a clear abuse of discretion.

I

First, defendants argue that the trial court failed to cite any objective considerations adduced from the evidence supporting its decision to grant a new trial on damages alone. Under MCL

2.517(A)(2), “[b]rief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts.” This Court has held in many different situations that brief, definite, and pertinent findings are sufficient when it appears that the court was aware of the issues in the case and correctly applied the law. *LaFond v Rumler*, 226 Mich App 447, 458; 574 NW2d 40 (1997); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 176-177; 530 NW2d 772 (1995). Also, if appellate review would not be facilitated by further explanation, the court’s findings will be sufficient. *Triple E Produce, supra* at 177. In *LaFond, supra* at 448, 457-458, the trial court found that an addendum to a land contract was void because it constituted an unenforceable restraint on the right of alienation. This Court found that the court’s statement contained the implicit conclusion that the restrictions constituted the requisite “unreasonable restraint on alienation,” even though the trial court did not use these specific words. Accordingly, this Court upheld the trial court’s findings as sufficient because the court’s opinion revealed that it was aware of the contested issues and correctly applied the law. *Id.*

Here, the trial court, having presided over the civil trial stemming from the gang rape of a thirteen-year-old girl at a party thrown by defendants’ son in defendants’ home, made the following findings with respect to plaintiff’s motions for additur and for a new trial on the issue of damages:

Thank you. MCR 2.611 outlines in relevant part that a new trial may be granted to all or some of the parties on all or some of the issues for any of the following reasons:

“Subparagraph (d) a verdict clearly or grossly inadequate or excessive.”

and, of course, the plaintiff has cited cases in support of that proposition as well as the -
- in Motion for Additur.

I am reluctant to grant the Motion for Additur and I am not going to substitute my judgment as to the damages that this particular jury found.

However, it is clear to me under any argument that \$25,000, the jury having found liability and proximate cause, for a 13 year old being gang raped is clearly - - clearly and grossly inadequate.

The Motion for A New Trial [sic] on damages only is granted.

We believe that the trial court’s statements read as a whole in light of the record made during the trial satisfy MCR 2.517(A)(2). The court explained that the girl’s youth, the number of rapes and the “gang” style of the rapes merited a much higher award. Implicit in this holding is the conclusion that the jury ignored the evidence regarding her past and future damages or improperly discounted defendants’ liability because three of plaintiff’s attackers were not sued in this case. Contrary to defendant’s assertions, the trial court refused to second guess the jury regarding the exact dollar amount that plaintiff should recover. Instead of granting a motion for additur the court decided to ask another jury to evaluate plaintiff’s damages rather than engaging in additur. We find no palpable abuse of discretion in

the trial court's decision that the verdict was clearly and grossly inadequate and that another jury should evaluate plaintiff's damages.¹

We also believe that appellate review would not be facilitated by further explanation. Read in context of the record and the evidence adduced, the trial court's statements regarding the victim, her age, and the fact that she was repeatedly raped by three young men are easily understood. Clearly, the primary damages in this case were for plaintiff's mental and emotional distress.² Accordingly, the trial court's explanation underlying its decision to grant a new trial on damages alone was sufficient and did not constitute an abuse of discretion.

Finally, we find that the trial court did not apply an allegedly improper "shocks the conscience test" in ruling on the new trial motion.³ MCR 2.611(A)(1)(d) states:

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.

The trial court used the terms set forth in MCR 2.611(A)(1)(d) in granting plaintiff's motion and said nothing about the damage award shocking the court's conscience. Merely because an award that is clearly or grossly inadequate may also shock the conscience, or vice versa, is no reason to find that the trial court abused its discretion or applied an improper standard. In reality such motions are very rarely granted. Moreover, we find nothing to support defendant's contention that the standard of review applicable to new trial motions brought pursuant to MCR 2.611(A)(1)(e) ("[a] verdict or decision against the great weight of the evidence or contrary to law") is applicable to new trial motions pursuant to MCR 2.611(A)(1)(d).

Thus, while it is difficult to measure the long-term effect of the rape on this victim, we find nothing to support defendant's assertion that the trial court abused its discretion in ordering a new trial pursuant to MCR 2.611(A)(1)(d).⁴

Second, defendants argue that the trial court unfairly prejudiced them when it ordered a new trial only on damages but not liability because the issues were so intertwined that the jury could not determine one in the absence of the other. Limited new trials are not favored by Michigan courts unless liability is clear. See *Tracey v Campbell*, 16 Mich App 265, 266; 167 NW2d 865 (1969) (given the extent of the minor's injuries suffered when jumping over a pile of burning leaves, and considering other factors, the award was "not in good conscience a fair compensation for the pain and suffering occasioned by the burns," thereby requiring a remand for a new trial on damages); *Mulcahy v Argo Steel Construction Co.*, 4 Mich App 116, 130; 144 NW2d 614 (1966). "However, the unambiguous language of [the predecessor to MCR 2.611(A)] clearly indicates an intent to encourage the granting of limited new trials if this procedure will serve the cause of justice to the parties in a given situation." *Mulcahy, supra*; see also *Trapp v King*, 374 Mich 608, 611-612; 132 NW2d 640 (1965).

Defendants, however, failed to raise this issue in the trial court, so it is not preserved for appeal. Generally, we will not review issues raised for the first time on appeal. *Auto Club Ins Ass'n v Lozanis*, 215 Mich App 415, 421; 546 NW2d 648 (1996).

We affirm.

/s/ Janet T. Neff

/s/ Kathleen Jansen

/s/ Jane E. Markey

¹ We would be overstepping our boundaries should we attempt to evaluate the trial court's past experience with damage awards in these types of cases, and defendants point to nothing that would suggest that the court considered any improper evidence in making this determination.

² Defendants' assertion in their appellate brief that "[t]hus, some 15 months after the incident in question, Ms. Smith herself admitted that she was in a better position than before the events leading to this lawsuit" because she was successfully counseled does not support their conclusion that the verdict was adequate.

³ In *Tracey v Campbell*, 16 Mich App 265, 266; 167 NW2d 865 (1969), this Court set forth three tests for determining whether to grant a partial new trial where the jury was properly instructed, no prejudice occurred, and the evidence was not clearly for plaintiff: first, liability must be clear; second, a new trial may be granted "to all or any of the parties and on all or part of the issues whenever their substantial rights are materially affected," and third, the "award must be so inadequate as to 'shock the judicial conscience.'"

⁴ We are cognizant of "the wide range of permissible variance in fixing damages, especially where pain and suffering are involved, the impropriety of substituting the court's judgment for the finding of the jury, and the reluctance of the court to upset a jury verdict even though it might be inclined to a different view of the evidence." Martin, Dean & Webster, *Michigan Court Rules Practice* (3 ed), vol II, p 474. Yet, where granting the limited new trial will "serve the cause of justice to the parties in a given situation," *Mulcahy, supra*, we will condone the application of MCR 2.611(A)(1)(d), as in the case at bar.