STATE OF MICHIGAN

COURT OF APPEALS

CAROLE ANN MACRO,

Plaintiff-Appellant/Cross-Appellee,

v

TWELVE MILE & RYAN SHELL, INC.,

Defendant-Appellee/Cross-Appellant,

and

MICHAEL ALLEN LUPAN,

Defendant-Appellee.

UNPUBLISHED
December 28, 1999

No. 194848
Macomb Circuit Court
LC No. 87-001966 NI

ON REMAND

Before: Collins, P.J., and Jansen and White, JJ.

PER CURIAM.

This case is before us for the third time pursuant to the Supreme Court's order remanding as on rehearing granted for this Court to address whether the trial court abused its discretion in denying plaintiff's motion for mistrial. 459 Mich 861 (1998).[1] We conclude that it did not, and affirm that ruling. Our disposition of this issue makes it necessary for us to address plaintiff's additional claims that the trial court erred in the manner in which it reduced plaintiff's damages to present value, and that the consequent award of mediation sanctions must be vacated.[2] Here, we find error and vacate and remand for further proceedings.

I

We review the trial court's denial of a motion for mistrial for abuse of discretion. *Knight v Gulf & Western*, 196 Mich App 119, 132 n 5; 492 NW2d 761 (1992). A decision to deny a motion for mistrial should be reversed only where a miscarriage of justice would otherwise result. *Id.* Improper conduct by counsel that is so prejudicial as to deny a party a fair trial on the merits may be a

basis for mistrial. *Kern v St Luke's Hospital Ass'n of Saginaw*, 404 Mich 339, 353-354; 273 NW2d 75 (1978); *Wilson v General Motors Corp*, 183 Mich App 21, 26; 454 NW2d 405 (1990).

We conclude that the trial court did not abuse its discretion in denying plaintiff's motion for mistrial. Viewing the entire record, defense counsel's improper questioning was not so prejudicial as to deny plaintiff a fair and impartial trial on the merits. Defense counsel's improper questioning occurred during the course of a trial that spanned more than eleven days. Dr. Jankowiak was one of a number of witnesses who testified regarding plaintiff's medical condition. Although Dr. Jankowiak was the only medical witness to testify live on plaintiff's behalf and was her treating psychiatrist, his conclusion that plaintiff suffered a mild or moderate closed head injury and trauma as a result of the automobile accident was shared by Drs. Siller, Laban and Fisk. Nor was Dr. Jankowiak the only doctor to testify that plaintiff experienced depression and other adverse emotional effects following the accident. Dr. Podolsky, the osteopathic surgeon who treated plaintiff in the hospital immediately following the accident for a fractured sternum, rib, etc., referred in his video deposition to plaintiff's "extreme anxiety and depressed state." He testified that he felt pain impaired plaintiff's ability to work and conduct her normal activities and that her prognosis was "very poor" and "chronic." Dr. Siller, a neuropsychologist who examined plaintiff, testified by video deposition that plaintiff had significant increases in depression, deteriorating sense of self-worth and self-esteem and that she was trying very hard to compensate for these deficits but was unable to do so. Dr. Siller testified he saw no evidence of malingering. Dr. Fisk, a staff psychologist at Henry Ford Hospital who signed another neuropsychological report, testified at deposition that plaintiff's MMPI test results showed elevated depression, although he did not know whether plaintiff suffered psychological distress before the auto accident, and said that he saw no evidence of malingering. Further, the trial court gave a cautionary instruction directing the jurors not to draw any inferences nor to speculate about any possible answer to defense counsel's improper question.

Under these circumstances, we cannot say that the trial court's denial of plaintiff's motion for mistrial constituted an abuse of discretion resulting in a miscarriage of justice.

II

We next address plaintiff's claim of error regarding the court's reduction of damages to present value.

Before closing arguments, the attorneys and the court discussed jury instructions:

> *[Plaintiff's Counsel]:* Now, there is still two issues that I've discussed with [Defense counsel], and I think I raised it with your [sic] Honor –
>
> *[Defense Counsel]:* Are we - - are we going to … - -
>
> *[Plaintiff's Counsel]:* Yeah.

[Defense Counsel]: - - are we going to waive - -

[The Court]: Present - - reduction to present cash value?

[Plaintiff's Counsel]: I believe so.

[Defense Counsel]: Right. But I'm wondering on your - - 60.01 is okay - - the form of the verdict?

[The Court]: Yeah. What about the form?

[Defense Counsel]: Does this follow the - -

[Plaintiff's Counsel]: I think it's verbatim out of 67.04.

[The Court]: It's the standard instruction 67.04.

[Defense Counsel]: The problem I have is it doesn't - - we should - - if we're going to go into future economic value - - whehter [sic] we should go year by year because then the Court automatically performs a reduction for reduction to present cash value for future economic loss.

[The Court]: You know, it doesn't make any difference, if you want to break it down, but prepare a verdict form.

[Defense Counsel]: The question I had is will the Court reduce that - - without that unless we go year by year?

[The Court]: Will I reduce it?

[Defense Counsel]: Right.

[The Court]: Using the formula set forth in the instructions?

[Defense Counsel]: Right.

[The Court]: No.

[Defense Counsel]: Unless you go year by year?

[The Court]: Actually it's never come up.

[Defense Counsel]: Had you ever - - you know that's - -

[The Court]: I always instruct the jury. I'm not sure they pay attention to that instruction but . . .

[Defense Counsel]: No. No. No. The tort reform act provided that you put down for 87 - - well, I guess we start at 91. For 91, her damages are this; for 92, 93, 94, and go down about 30 years and they can fill in that figure and that each year is reduced to present cash value. And there's hot debate in the office. I've tried cases where - - I've tried cases in the office where we have used that reduction, and it's a real laborious thing, tha [sic] the jury ends up with a book and then I've tried cases without it. I am of the opinion that if we try to without going through each year there should still be a reduction to present cash value over the lifetime or the working lifetime of the Plaintiff if they go into non-economic damages.

* * *

[Plaintiff's Counsel]: It seems like every trial that I've had we always waived it and it's just such a cumbersome instruction.

[Defense Counsel]: It's really a bad instruction.

[The Court]: Oh, it's a terrible instruction.

[Plaintiff's Counsel]: I think when it came down everyone had difficulty with it and I think - -

[The Court]: Did you get that, Chris?

[Plaintiff's Counsel]: - - it's waived.

[Defense Counsel]: Put down again, it's a bad instruction.

[The Court]: Terrible instruction.

[Defense Counsel]: But it's really - - it's a real working problem. What do you do with the fact - -

[The Court]: So, what you're asking is not to instruct the jury but for the Court to use the formula and reduce it.

[Defense Counsel]: Exactly.

[The Court]: Mr. Buckley? [plaintiff's counsel]

[Plaintiff's Counsel]: I don't have any problem with that.

[Defense Counsel]: Okay.

[The Court]: Without setting forth 30 years. All right.

[Defense Counsel]: Or whatever her - - the statutory mortality table says.

[The Court]: All right.

[Plaintiff's Counsel]: Right.[3]

Thus, both attorneys agreed that the instruction directing the jury to reduce future damages to present value would not be given, but the court would itself reduce any future damages to present value.

The standard jury verdict form was used, which asked for the total amount of plaintiff's economic loss damages and the total amount of plaintiff's non-economic loss damages. The standard verdict form does not require the jury to separate past damages from future damages, or to state when in the future any future damages would be sustained. This is because the verdict form assumes that the jury has been instructed on reducing future damages to present value and will enter a single figure representing the present value of the total damages, or that the parties have waived the reduction of damages to present value.[4]

The jury determined that plaintiff suffered a total of $40,000 economic loss and $50,000 non-economic loss, and that plaintiff was 50% comparatively negligent. Plaintiff sought entry of a judgment awarding $45,000, based on a total verdict of $90,000, reduced by 50% for comparative negligence. Defendant responded that by agreement of the parties, the verdict had to be reduced by the court to its present value. Defendant offered a formula and chart that divided the total amount awarded in each category (economic and non-economic) by the number of years of plaintiff's work-life and life expectancies, as applicable, and allocated an equal amount to each year. The formula then reduced each future year's award to its present value. Plaintiff objected, arguing that through oversight, neither the parties nor the court thought to have the jury allocate past and future damages, and that plaintiff never agreed that the total amount of damages "would be arbitrarily divided into a twenty-five year period and allotted equally to each year." The court accepted defendants' formula and reduced plaintiff's damages accordingly.

The trial court correctly observed that plaintiff had agreed both that the jury would not be required to breakdown future damages on a yearly basis for the next thirty years[5] and that the court would reduce the award to present value, in accordance with the standard jury instruction providing for the reduction at the rate of 5% per year. However, the parties and the court never discussed how the general verdict on damages would be allocated between past and future damages, or over the future, so that the formula could be applied. This was most likely an oversight. However, in the absence of some agreement between the parties, the court was not free to impose defendants' formula as a resolution of the issue.

Defendants' formula assumes that the jury intended to award an equal amount for each year of damages. That is, the formula assumes that the jury concluded that plaintiff suffered a total of $925.00 in non-economic damages from the moment of the accident through the first year anniversary, $925.00 in non-economic damages the following year and each year until trial, and that she would suffer the same $925.00 every year until her death. This is totally contrary to the evidence and common sense. If the jury concluded that plaintiff suffered non-economic damages as a result of the accident, which it did, one can reasonably conclude that the jury also determined that the extent of those damages - -pain and suffering, fright and shock, etc.- - was greater at the time of the accident and in the months and years

immediately following the accident. It is unreasonable to conclude that the formula advanced by defendants, allocating the same amount for every year of plaintiff's post-accident life, fairly reduced the jury's verdict to present value. Thus, while plaintiff agreed that the court would reduce any verdict to present value in accordance with the standard instruction, and agreed to waive a verdict form requiring that damages be broken out by year, plaintiff did not agree to defendants' formula for allocating the gross damage amount year by year, and such an allocation is not consistent with the evidence or common sense.

Because defendants waived the same instructions and agreed to the jury verdict form, plaintiff's and defendants' positions with regard to the waiver issue are comparable. Plaintiff contributed to the situation by waiving the future-damage-award-for-each-year verdict form and the reduction to present value instruction, while agreeing to the court's reduction to present value; and defendants contributed to the situation by agreeing to a verdict form that did not separate out the total value of plaintiff's past damages and future damages, after securing an agreement that the future-damage-award-for-each-year verdict form would not be used, but the court would still reduce the verdict to present value. If the court was unable to work out an agreement between the parties after the problem with the verdict form was fully appreciated, the court had no choice but to attempt to devise a formula that was consistent with the proofs and the jury's verdict,[6] or to order a new trial on the issue of damages.

We affirm the trial court's denial of plaintiff's motion for mistrial. We vacate the order of judgment setting the amount of damages and remand for further proceedings consistent with this opinion.[7] In light of this decision, we also vacate the court's award of mediation sanctions, instructing that the issue be revisited after the final damage amount is determined.

Affirmed in part, vacated in part and remanded for further proceedings. We do not retain jurisdiction.

/s/ Jeffrey G. Collins
/s/ Kathleen Jansen
/s/ Helene N. White

[1] Pursuant to Court policy, the case was reassigned to the case call panel that decided the prior appeal (Judges Fitzgerald, Wahls and Saad); however, because of Judge Wahls' passing away and the inability of the remaining panel members to agree on a decision, the case was withdrawn from their consideration and resubmitted to a new three-judge panel.

This case has an unusual procedural history. Plaintiff brought suit against defendant Twelve Mile & Ryan Shell (Shell) for injuries sustained in an accident she had with a vehicle driven by a Shell employee, Michael Lupan. A jury determined that plaintiff suffered $40,000 economic loss and $50,000 noneconomic loss, but was fifty percent comparatively negligent. The trial court reduced the damages to present value, ultimately awarding $16,021.58 for economic loss and $17,237.70 for noneconomic loss. The trial court also awarded Shell mediation sanctions.

Plaintiff appealed the trial court's orders reducing the judgment to present value, awarding Shell mediation sanctions, and denying her motion for mistrial. Shell cross-appealed the judgment in plaintiff's favor. A panel of this Court affirmed the judgment as to liability and comparative negligence, but held that plaintiff was denied a fair trial by an improper question posed by defense counsel to plaintiff's treating psychiatrist, Dr. Richard Jankowiak, and remanded for a new trial on the issue of damages only. *Macro v Twelve Mile & Ryan Shell*, unpublished opinion per curiam, issued February 15, 1995 (Docket Nos. 150198 & 157847) (*Macro I*). After awarding plaintiff a new trial, the panel stated in dicta that the trial court did not err in reducing the jury award to present value, or in awarding mediation sanctions to Shell. *Id.* Regarding Shell's cross-appeal, the Court concluded that the trial court did not abuse its discretion in limiting defendants' cross-examination of Jankowiak. *Id.*

Shell appealed to the Supreme Court which, in lieu of granting leave to appeal, vacated this Court's judgment and remanded the case to this Court for reconsideration in light of *Wischmeyer v Schanz*, 449 Mich 469; 536 NW2d 760 (1995). 451 Mich 892 (1996). On remand, this Court considered the case anew and concluded that the trial court erred in limiting defendants' cross-examination of Jankowiak and, because defendants' substantial rights were affected, remanded for a new trial. *Macro v Twelve Mile & Ryan Shell (On Remand)*, unpublished opinion per curiam, issued April 11, 1997 (Docket Nos. 194848, 194849) (*Macro II*). In light of its remand for a new trial, the Court found it unnecessary to address plaintiff's argument that the trial court abused its discretion in denying her motion for mistrial. *Id.* In addition, because it reversed the jury verdict, the Court vacated the trial court's award of mediation sanctions and determined that the issue of reduction of the jury verdict to present value was moot. *Id.*

Shell again appealed to the Supreme Court, which, in lieu of granting leave to appeal, remanded to this Court as on rehearing granted to address whether the trial court abused its discretion in denying plaintiff's motion for mistrial. 459 Mich 861 (1998). The Supreme Court's order of remand noted that a ruling on this issue was necessary because Shell's cross-appeal "was in *support* of the trial court's denial of the plaintiff's mistrial motion," further noting:

> In its brief in the Court of Appeals, the defense sought as relief an "order affirming the lower court judgment as well as the lower court's award of mediation sanctions." Although the substantial rights of the defendants may have been affected by the trial court's limitation on the cross-examination of Dr. Jankowiak, that does not authorize the Court of Appeals to impose a new trial on a party that not only did not seek one but which explicitly requested an affirmance. Only plaintiff sought a new trial, which would be appropriate only in the event that the trial court abused its discretion in denying the plaintiff's motion for mistrial.

The parties did not file supplemental briefs in connection with either of the two Supreme Court remands to this Court.

[2] The *Macro I* panel decided these issues in dicta. The Supreme Court vacated this Court's judgment in *Macro I* and remanded for reconsideration. On reconsideration, in *Macro II*, the Court found it unnecessary to reach the merits of the issues. Thus, the issue remains in *Macro III*.

[3] Immediately after the jury was instructed and excused, the following colloquy ensued:

> *[Plaintiff's Counsel]:* One point I had, and when we talked about your Honor reducing the award; how did you put that in present case value?
>
> *[Defense Counsel]:* Yeah. In lieu of …
>
> *[The Court]:* Giving the instruction.
>
> *[Defense Counsel]:* In lieu of giving –
>
> *[Plaintiff's Counsel]:* The future damages reduction to present cash value?
>
> *[Defense Counsel]:* I don't think that's what we were talking about. You know, where the jury verdict form has the years '91, '92, '93?
>
> *[The Court]:* Right.
>
> *[Defense Counsel]:* In lieu of that - -
>
> *[Plaintiff's Counsel]:* Right.
>
> *[Defense Counsel]:* - - the Judge said she'd reduce. That's what I was talking about.
>
> *[Plaintiff's Counsel]:* And we didn't give either the interest - -
>
> *[Defense Counsel]:* As part of damages.
>
> *[Plaintiff's Counsel]:* Or future damages.
>
> *[The Court]:* Right.
>
> *[Defense Counsel]:* We waived 5304 [SJI2d 53.04] and 5303 [SJI2d 53.03].
>
> *[The Court]:* That was part of the agreement.

[Plaintiff's Counsel]: I wanted to make sure the record reflected that. I wasn't sure that it did.

[The Court]: Okay.

[4] As a matter of practice, it was common for the defendant to waive the present value instruction, SJI2d 53.03, in exchange for the plaintiff's waiver of the interest instruction, SJI2d 53.04, and sometimes the inflation instruction as well. SJI2d 53.06.

[5] While this agreement was not as clear as was the agreement regarding reduction to present value, it is fairly gleaned from plaintiff's counsel's acquiescence in the use of a verdict form that did not require the jury to enter a damage figure for each future year of plaintiff's life.

[6] In closing argument, plaintiff argued for a total of $474,000 in damages ($105,000 economic, $369,000 non-economic). Defense counsel asserted that if the jury were to award damages, he would suggest total damages of $35,000 for economic loss and $20,000 to $40,000 for non-economic loss. The jury's award was close to defendant's figures. As to the award of non-economic damages, defense counsel's argument in no way suggested that plaintiff would be suffering from this injury for the rest of her life, or that she would suffer any future damages beyond the time of trial, which was held five years post-accident. Rather, he argued that most of plaintiff's complaints were not related to the accident and that the amount he suggested "would fully compensate Mrs. Macro for any and all damages that she may have received" and that "I think a figure in the area of 20 to $40,000 would adequate [sic] compensate Mrs. Macro for the injuries that she received in this accident." In contrast, it appears that both parties calculated the economic damages over 14 years.

[7] Mindful of the error committed by the *Macro II* panel, we instruct the trial court that if defendants agree to the entry of a judgment awarding plaintiff the full $25,000 in non-economic damages (thereby assuming that the award was for the first five years post-accident) and the reduced $16,021.58 in economic damages, which is consistent with the approach taken by both sides at trial (see n 5, *supra*), plaintiff would be entitled to no further relief on this issue, and a retrial would not be necessary.