

STATE OF MICHIGAN
COURT OF APPEALS

WALTER PARIZON as Next Friend of MELISSA
PARIZON, a Minor,

UNPUBLISHED
December 15, 2000

Plaintiff-Appellee,

v

Nos. 213251;213754
Wayne Circuit Court
LC No. 95-512734-NO

CHILDREN'S HOSPITAL OF MICHIGAN,

Defendant-Appellant.

Before: Wilder, P.J., and Holbrook, Jr., and McDonald, JJ.

PER CURIAM.

After a jury awarded plaintiff \$15,000 in this medical malpractice action, the trial court granted plaintiff's motion for additur and entered a judgment awarding plaintiff \$505,992, plus interest, taxable costs and fees. Defendant now appeals. We reverse.

Plaintiff's complaint alleged that, during a hospital stay in August 1980, Melissa Parizon, then an infant, was injured when an IV inserted into her ankle infiltrated into the subcutaneous tissues around the vein. Plaintiff alleged that defendant was negligent in failing to recognize that the IV had infiltrated, in monitoring the infant's condition, and in failing to immediately and properly treat the injury. As a result of defendant's alleged negligence, Melissa Parizon suffered permanent scarring and disability. Following a trial, a jury found that defendant was negligent, that Melissa had suffered damages as a proximate result of defendant's negligence, and that the amount of the damages from the date of the injury to the filing of the complaint was \$15,000. The jury did not award any interest on the award for past damages, or award any future damages.

Plaintiff moved for additur or in the alternative a new trial. The court found that the jury's verdict was "totally inadequate" and, therefore, granted the motion for additur in plaintiff's suggested amount of \$505,992, plus interest, taxable costs and fees, and entered judgment for plaintiff in that amount. Defendant rejected the amount of additur and filed various motions for clarification and/or rehearing of the trial court's order, arguing that the court should have granted plaintiff's motion for a new trial unless defendant consented to the entry of judgment in an amount determined by the court to be the lowest amount supported by the evidence. The trial court denied defendant's motions.

I

Defendant argues that the trial court abused its discretion by finding that the jury's verdict was inadequate and that the lowest amount the evidence would support was an amount more than thirty-three times the amount of the jury's verdict. This Court reviews a decision to grant additur for an abuse of discretion. *Arnold v Darczy*, 208 Mich App 638, 639; 528 NW2d 199 (1995).

MCR 2.611(E)(1) provides:

If the court finds that the only error in the trial is the inadequacy or excessiveness of the verdict, it may deny a motion for a new trial on condition that within 14 days the nonmoving party consent in writing to the entry of judgment in an amount found by the court to be the lowest (if the verdict was inadequate) or highest (if the verdict was excessive) amount the evidence will support.

The proper consideration when reviewing a trial court's grant of additur is whether the jury award was supported by the evidence. *Arnold, supra* at 640. Awards for personal injury damages, particularly pain and suffering, rest within the sound discretion of the trier of fact. *Meek v Department of Transportation*, 240 Mich App 105, 122; 610 NW2d 250 (2000). An appellate court reviewing a personal injury award should decide each case on its own facts, although awards in analogous cases may be one factor considered. *Id.*, citing *Precopio v Detroit*, 415 Mich 457, 471-472; 330 NW2d 802 (1982). Other factors that may be considered include "whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact" and "whether the verdict was within the limits of what reasonable minds would deem just compensation for the injury sustained." *Palenkas v Beaumont Hospital*, 432 Mich 527, 532; 443 NW2d 354 (1989).

In this case, the jury's \$15,000 award for past damages is explainable by evidence suggesting that, while Melissa Parizon was injured, she had not suffered serious damages. At the time of trial, Melissa was a high school varsity athlete, playing on her school's basketball and softball teams. The jury had the opportunity to view the scar on her ankle, to listen to her testimony describing how the ankle hurt every day and how she was embarrassed by the scar, and to view a video of Melissa playing basketball. The jury was free to accept or reject the evidence regarding damages. *Joerger v Gordon Food Service, Inc.*, 224 Mich App 167, 172; 568 NW2d 365 (1997). We believe the evidence allowed for a jury determination that plaintiff's past damages were minimal. Moreover, while the evidence supported some award for future damages for disfigurement, given the permanent nature of Melissa's scar, a fact that was uncontroverted, the trial court abused its discretion in finding that evidence of future pain and suffering was also uncontroverted.

Defendant also contends that the trial court had no authority to simply add to the jury verdict in lieu of offering it the option of accepting the court's determination on additur or having the court grant plaintiff's motion for new trial. We agree. This Court reviews a trial court's interpretation of court rules de novo. *Szymanski v Brown*, 221 Mich App 423, 433; 562 NW2d 212 (1997).

In *Taylor v Manning*, 456 Mich 882; 570 NW2d 661 (1997), our Supreme Court observed:

The circuit court was without authority to add to the jury verdict. Rather, its power was limited to that specified in MCR 2.611(A)(1), granting a new trial to plaintiff on condition that defendant could avoid a new trial by accepting additur.

The order in *Taylor* is precedentially binding, see *People v Phillips*, 227 Mich App 28, 38 n 11; 575 NW2d 784 (1997). Thus, the trial court here erred by simply adding to the verdict amount. Instead, the court should have conditionally granted plaintiff's motion for a new trial, allowing defendant to accept the court's award of additur in lieu of a new trial. Because the amount of additur awarded by the court exceeds the lowest amount supported by the evidence, remand is required.

Defendant also argues that a new trial should not be limited solely to the issue of damages, but entail the issue of liability as well. In a negligence action, a new trial solely on the issue of damages is permissible only where a defendant's liability is clear. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 523; 592 NW2d 786 (1999). Here, for reasons subsequently discussed, we hold that a new trial should be conducted on all issues.

II

Defendant contends that the trial court abused its discretion by striking all of its trial witnesses, except its expert witness and plaintiff's, as a discovery sanction. This Court reviews a trial court's imposition of a discovery sanction for an abuse of discretion. *Thorne v Bell*, 206 Mich App 625, 633; 522 NW2d 711 (1994).

Before trial, plaintiff moved for an order compelling discovery or in the alternative prohibiting defendant from calling any witness at trial other than its expert witness, asserting that defendant failed to provide names of witnesses when responding to plaintiff's interrogatories. In answer to another set of interrogatories, defendant listed 160 witnesses, including 73 doctors and 54 nurses. Defendant explained that, in its portion of the final pre-trial order, it listed only four witness, including the two plaintiffs, one doctor, and one nurse, as well as its expert witness. Defendant further explained that, because the doctor and nurse were no longer in its employ, they had to be subpoenaed and defendant could not supply their anticipated testimony. After hearing arguments from the parties, the court struck all of defendant's listed witnesses, except its expert witness and the two plaintiffs.

In determining an appropriate sanction for a discovery violation, the trial court should consider numerous factors, including:

(1) [W]hether the violation was wilful or accidental; (2) the party's history of refusing to comply with discovery requests (or refusal to disclose witnesses); (3) the prejudice to the [other party]; (4) actual notice to the [other party] of the witness and the length of time prior to trial that the [other party] received such

actual notice; (5) whether there exists a history of [the party's] engaging in deliberate delay; (6) the degree of compliance by the [party] with other provisions of the court's order; (7) an attempt by the [party] to timely cure the defect; and (8) whether a lesser sanction would better serve the interests of justice. [*Bass v Combs*, 238 Mich App 16, 26-27; 604 NW2d 727 (1999).]

The record should reflect that the trial court considered the factors involved, as well as the available options when determining what sanction is just and proper under the circumstances of the case. *Id.* at 26, citing *Dean v Tucker*, 182 Mich App 27, 32; 451 NW2d 571 (1990).

We conclude that the trial court abused its discretion in striking defendant's witnesses as a sanction for incomplete interrogatory answers without first entering an order compelling defendant to submit complete interrogatory answers. Under MCR 2.313(A), a trial court, upon motion of a party, may issue an order compelling discovery, which includes providing answers to interrogatories that the other party has either failed to answer or has given evasive or incomplete answers. Under MCR 2.313(B), the court may impose sanctions if a party fails to obey an order to provide or permit discovery. Under MCR 2.313(D), the trial court may impose sanctions if a party fails to serve answers or objections to interrogatories, but subrule (D) does not provide for the imposition of sanctions for interrogatory answers that are incomplete or evasive. Therefore, before imposing sanctions for incomplete answers pursuant to MCR 2.313(B), the trial court should have first issued an order compelling discovery, including complete answers to interrogatories, pursuant to MCR 2.313(A).

III

Next, we reject defendant's claim that the trial court erred in denying its motion for a directed verdict. Defendant contends that plaintiff's only expert witness failed to identify the requisite standard of care and, therefore, plaintiff did not establish a prima facie case of medical malpractice. We review the trial's court's ruling denying defendant's request for a directed verdict de novo. *Meagher v Wayne State University*, 222 Mich App 700, 707-708; 565 NW2d 401 (1997); *Allen v Owens-Corning Fiberglas Corp*, 225 Mich App 397, 406; 571 NW2d 530 (1997). We must consider the evidence in the light most favorable to the nonmoving party, making all inferences in the nonmoving party's favor. *Allen, supra* at 406. A directed verdict is appropriate only when no factual question exists upon which reasonable minds could differ. *Id.*

To survive a motion for directed verdict, a plaintiff alleging medical malpractice must make a prima facie showing of the following elements: (1) the applicable standard of care; (2) breach of that standard of care by the defendant; (3) an injury; and (4) proximate causation between the alleged breach and the injury. *Locke v Pachtman*, 446 Mich 216, 222; 521 NW2d 786 (1994). The party offering the testimony of an expert witness must demonstrate the witness' knowledge of the applicable standard of care. *Bahr v Harper-Grace Hospitals*, 448 Mich 135, 141; 528 NW2d 170 (1995).

Cynthia Stevens, a registered nurse, testified that she was familiar with the standard of care with regard to registered nurses and the monitoring of an infusing IV. Asked whether the hospital met the standard of care for treating a patient with respect to monitoring an intravenous

feeding tube, Stevens testified that the IV fluid had been monitored by a person not qualified to monitor, a nurse assistant. On cross-examination, Stevens was asked how often the standard of practice required an IV site to be checked, and she responded that there was no standard of practice on how often it should be checked, but that each hospital had its own standards. As a nurse, she would check it, at a minimum, once every eight-hour shift. Stevens also testified that some standards of practice for nurses were “very vague and not specific, but through nursing school, you learn what you are supposed to do and not do, and one of them is you monitor IVs at least once a shift.”

This testimony was sufficient to establish that Stevens was familiar with the standard of practice for registered nurses. Stevens’ testimony was not that she did not know the standard for the frequency of checking IV sites, but that there was no absolute standard. Therefore, the trial court correctly denied defendant’s motion for a directed verdict.

IV

Finally, defendant contends that the trial court abused its discretion in not allowing its expert witness to testify with respect to the standard of practice required of a registered nurse when delegating functions to a nurse assistant. While the evidence at trial indicated that a nurse assistant monitored Melissa’s IV site, there was no testimony regarding a registered nurse who treated Melissa or who delegated the monitoring of Melissa’s IV site to a nurse assistant. Thus, testimony regarding a registered nurse’s standard of care in delegating work to a nurse assistant was not relevant or material to the issue of defendant’s negligence in treating plaintiff and, accordingly, the trial court did not abuse its discretion in excluding this testimony. However, since we have concluded that the trial court abused its discretion in striking defense witness Theresa Scoraniak, R.N., defendant is entitled on remand to attempt to lay the foundation for its proposed expert testimony through the testimony of Ms. Scoraniak.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald