STATE OF MICHIGAN

COURT OF APPEALS

GARY HOVANEC,

Plaintiff-Appellee,

v

CITY OF FLINT,

Defendant-Appellant.

UNPUBLISHED
May 11, 2010

No. 289615
Genesee Circuit Court
LC No. 05-082251-NO

Before: TALBOT, P.J., AND FITZGERALD AND M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right from a judgment entered in favor of plaintiff following a bench trial in this negligence action arising from plaintiff's trip and fall over a guardrail post protruding onto a public sidewalk. We affirm.

Defendant first argues the trial court abused its discretion by denying defendant's motion for remittitur. A trial court's decision regarding remittitur is reviewed for an abuse of discretion. *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 231; 755 NW2d 686 (2008). An appellate court reviews all of the evidence in the light most favorable to the nonmoving party. *Id*. An abuse of discretion occurs when the trial court's decision falls outside a range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 2.611(E)(1) states:

> 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 the 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.

In determining whether remittitur is appropriate, the proper consideration is whether the evidence supports the award. *Clemens v Lesnek*, 200 Mich App 456, 464; 505 NW2d 283 (1993). The trial court's determination must be based on objective criteria relating to the actual conduct of the trial or the evidence presented. *Palenkas v Beaumont Hosp*, 432 Mich 527, 532; 443 NW2d 354 (1989). Such objective criteria includes: (1) whether the verdict was the result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact; (2) whether it was within the limits of what reasonable minds would deem to be just

compensation for the injury inflicted; and (3) whether the amount actually awarded is comparable to other awards in similar cases. *Diamond v Witherspoon*, 265 Mich App 673, 694; 696 NW2d 770 (2005). A trial court may grant defendant's motion for remittitur if the verdict is "excessive," meaning it is greater than the highest amount the evidence will support. *Craig v Oakwood Hosp*, 249 Mich App 534, 539; 643 NW2d 580 (2002), rev'd on other grounds 471 Mich 67 (2004). The power of remittitur should be exercised with restraint. *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 462; 750 NW2d 615 (2008). "If the award falls reasonably within the range of the evidence and within the limits of what reasonable minds would deem just compensation, the award should not be disturbed." *Frohman v Detroit*, 181 Mich App 400, 415; 450 NW2d 59 (1989).

In this case, the trial court made the following findings of fact regarding damages:

> The Court now turns to the question of damages. As in jury cases, the Court does have available the instructions given to juries to determine damages. I am reminded that my duty is to determine the amount of money which reasonably, fairly, and adequately compensates plaintiff for the elements of damage I decide has resulted from the City's negligence. I must do that up to the present time and into the future if I determine that damages are to continue into the future. If any element of damage is of a continuing nature, it is my duty to decide how long it may continue. If an element of damage is permanent in nature, then I have to decide how long the plaintiff is likely to live.
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> In this case, plaintiff suffered significant injuries as a result of the incident on December 23, 2003. These injuries were to his left shoulder, left elbow, left wrist and left knee. Plaintiff was also troubled by back spasms. The left shoulder injury turned out to be a torn rotator cuff. The left knee injury involves a torn meniscus. The left wrist injury turned out to be carpal tunnel syndrom [sic] further complications. Plaintiff has had surgery on his shoulder and two surgeries on his wrist. His doctors have attributed his injuries to the incident of December 23, 2003. He is disabled from his previous recreational and athletic endeavors. He finds housework unmanageable. There is no question but that plaintiff has sustained a life altering injury and that the effects of this injury will remain with him for the remainder of his life.

The evidence presented at trial supports these findings of fact. Regarding plaintiff's left shoulder injury, Dr. Terrence Locke testified that plaintiff would always have permanent weakness in the left shoulder, particularly with his hand at or above shoulder level. Locke did not recommend surgery to repair plaintiff's left knee meniscus tear. Regarding plaintiff's left wrist, Dr. Ephraim Zinberg testified that plaintiff's range of motion had slightly improved from the surgeries, but he will always have some pain in his left wrist and should not lift more than five to ten pounds with his left wrist. Plaintiff's primary care physician, Dr. Orestes Iung, testified that plaintiff's qualify of life will be worse because of the injuries and, although plaintiff can do slow walking, he cannot run or play sports, and will be on pain medication for the rest of his life. Plaintiff testified that he continues to have pain in his left knee, but that he only has pain in his left shoulder and hand when he moves his left hand.

In denying defendant's motion for remittitur, the trial court held:

> In terms of remittitur, having reviewed the filings and listened to the arguments, I'm not persuaded that the City has met its burden of proof that would entitle it to that relief. I think the summary of the medical testimony that Mr. Radner included in his response is actually better than anything I prepared and when you read the medical summary of the treating physicians, I'm still convinced the evidence supports the award that was rendered. So, I am going to deny the request in all respects.

The trial court's damage award was not based on sympathy and partiality, nor did the trial court make a mistake of fact. The trial court based its award on what it determined would reasonably, fairly, and adequately compensate plaintiff for his injuries received from defendant's negligence.[1] Viewing the evidence in the light most favorable to plaintiff, the trial court reached a verdict within the limits of principled outcomes. Thus, the trial court did not abuse its discretion in denying defendant's motion for remittitur.

Defendant also argues that the award of damages is against the great weight of the evidence. We disagree. In a bench trial where the great weight of the evidence is challenged, this Court reviews a trial court's findings of fact for clear error and its conclusions of law de novo. *Alan Custom Homes, Inc v Krol,* 256 Mich App 505, 512; 667 NW2d 379 (2003), citing MCR 2.613(C). The trial court's determination of damages following a bench trial is also reviewed for clear error. *Krol,* 256 Mich App at 513. MCR 2.613(C) states, "[f]indings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been made. *Walters v Snyder,* 239 Mich App 453, 456; 608 NW2d 97 (2000).

MCR 2.611(A)(1)(d) provides that a new trial may be granted if "a verdict or decision [is] against the great weight of the evidence or [is] contrary to law." Such motions are not favored and should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result. *Ellsworth v Hotel Corp of America,* 236 Mich App 185, 194; 600 NW2d 129 (1999).

After making the findings of fact quoted above regarding damages, the trial court opined:

> Taking all of that into account, I assess plaintiff's past economic losses to be $90,181.92. This includes medical, loss of inventory work and miscellaneous expenses incurred as a result of this incident. I assess plaintiff's future economic losses to be $140,000. This award takes into account plaintiff's life expectancy, inflation and reduction to present value. I assess past non-economic loss for fright and shock, pain and suffering, disability, denial of social pleasures and

[1] In the illustrative cases provided by defendant, none of the cases provided contain a single plaintiff with all three injuries that this plaintiff has.

> enjoyments, mental anguish and embarrassment, humiliation and mortification to be $186,000. I assess future non-economic loss to be $450,000. This includes the above elements of damage and takes into account inflation and reduction to present value. Total damages are determined to be $866,181.12.

With regard to economic damages, plaintiff testified about his medical bills, loss of inventory work, and other miscellaneous costs due to the injuries he received. Plaintiff has permanent work restrictions. Defendant did not oppose this testimony at trial or offer an alternative economic damages calculation in its proposed findings of fact.

With regard to non-economic damages, plaintiff testified that he had constant pain in his left shoulder and severe constant pain throughout his left arm before his surgeries. He experienced burning and numbing on the entire left side of his body after the fall. Since his three surgeries, the pain in his left shoulder and left hand has subsided, except for when he moves his left hand. Plaintiff indicated that he continues to have constant pain in his left knee for which he must take pain medication. Before this accident, plaintiff was a very active and social individual, but since the accident he no longer is able to participate in his various social activities. He is not able to participate in sports activities, and he cannot maintain a household. This testimony supports the trial court's final determination of economic and non-economic damages. Thus, the trial court's damages award is not against the great weight of the evidence.

Lastly, defendant argues that the trial court erred in not finding plaintiff more than 25 percent comparatively negligent. We disagree.

MCL 600.2957(1) states:

> [i]n an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to section 6304, in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

MCL 600.6304 states:

> [i]n an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court … shall make findings indicating both of the following:
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> (a) The total amount of each plaintiff's damages.
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> (b) The percentage of the total fault of all persons that contributed to the death or injury….

> (2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

Accordingly, before a trial court can determine a party's comparative negligence, it must first be established that the defendant negligently breached a duty that caused injury to another. *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 21-22; 762 NW2d 911 (2009). After determining that the defendant is negligent, the trier of fact must determine the relative fault of each party. *Id*.

Three of defendant's employees, Betty Wideman, Dan Brilinski, and Dave Price, admitted the sidewalk was not safe for public travel. Wideman is responsible for keeping track of all street repairs within the city of Flint and maintaining records of street maintenance. She stated that the department tries to complete all known defects within 30 days. Wideman agreed that six months to repair a guardrail would be excessive and that the photograph of the damaged guardrail shows that the sidewalk is not fit for public travel. Based on the police description in the November 29, 2003, police report, Wideman agreed that a reasonable person could assume the guardrail at Beecher Road and Court Street was damaged, and it would have been reasonable to send a foreman to the area to check for damage despite the fact that the property damage box was not checked. On a scale of one to ten, with one being the worst type of accident and ten being a minor accident, Wideman would place the guardrail damage shown in the photograph at a one or a two.

Brilinski worked for the city of Flint as a coordinator of street maintenance. Brilinski stated all known damage was supposed to be repaired within 30 days. He also stated six months would be too long for defendant to make a repair. Brilinski said that if the condition was known, it would have been barricaded in at least 24 hours until it was fixed to protect the public. Brilinksi stated that the sidewalk was not reasonably fit and safe for public travel because the guardrail was protruding across the entire width of the sidewalk.

Price worked for the city of Flint as an inspector and foreman. Price stated that the photograph of the damaged guardrail showed that it was not reasonably safe for the public to travel on the sidewalk in its current condition unless a person stepped over it.

Plaintiff testified that at approximately 1:00 a.m. on December 23, 2003, he was out speed walking for exercise after he finished working the second shift. A streetlight was located on the other side of the street, but it did not illuminate the guardrail; instead, it created a dark shadow. As plaintiff approached the guardrail, he saw a dark object suspended three to four feet off the ground across the sidewalk. Immediately after seeing the dark, suspended object, plaintiff heard a car blow its horn and plaintiff quickly turned his head to the left to make sure a car was not going to hit him because that part of the sidewalk is close to the road. Plaintiff continued to walk forward as he looked to his left. As plaintiff turned his head back around, the lower part of his foot hit the lower part of a pole that was close to the ground. Plaintiff did not see this lower pole before he struck it; he only saw the higher object in the air.

At the close of proofs, the trial court concluded that defendant was negligent in failing to maintain the sidewalk in a condition safe and convenient for public travel. The trial court found:

> The Court finds that the damage to the guardrail resulted in one of the support posts being pushed over onto the sidewalk such as to impede foot traffic. The result being that the sidewalk on December 23, 2003 was not reasonably safe and convenient for public travel. This finding is supported by testimony from City employees charged with the duty to maintain sidewalks.
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> [The Court finds that] [t]he City either knew or should have known based on the traffic crash report which described the damage and which report was circulated to various City departments for the very purpose of allowing for repairs to be made. The fact that procedure broke down and maintenance did not discover the condition provides no safe haven for the City. Had the report been prepared properly or had maintenance looked at the report, the City would have discovered a defect which was a one or two on a scale of one to 10 and which maintenance says would have been barricaded within 24 hours. I find the City knew or should have known of this condition and I find further that they should have taken steps to repair or minimize the risk before December 23, 2003.
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> [The Court finds that] [g]iven the seriousness of the defect as acknowledged by City employees, the City had [reasonable] time to barricade and/or repair the condition before the date of plaintiff's injury.
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> [The Court finds] that the City's failure to follow its procedures and affect repairs to an obviously dangerous condition was a proximate cause of plaintiff's injuries.

Furthermore, the trial court found that plaintiff was comparatively negligent in causing his injuries. The court found:

> The City has raised as an affirmative defense the comparative negligence of plaintiff. I would note that plaintiff was power walking at 1:00 AM in the winter in an area that was apparently not well lit. He testified that he saw the guard rail but not the post. Plaintiff is required to take responsibility for his actions under these circumstances, the Court finds that plaintiff was comparatively negligent, that is plaintiff was negligent and that his negligence was a proximate cause of his injury was well. I assess plaintiff's comparative negligence to be 25 percent.

The evidence presented supported the trial court's findings of facts. We find no error in

the trial court's denial of defendant's motion for remittitur.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Michael J. Kelly