STATE OF MICHIGAN

COURT OF APPEALS

MOLLY PIETILA, Plaintiff-Appellant,	UNPUBLISHED September 29, 2016
v	No. 321652 Marquette Circuit Court
KENT WISOTZKE, Defendant-Appellee.	LC No. 12-050021-NI

Before: MARKEY, P.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Following a jury trial in this negligence action and additur of economic damages, the court entered a judgment in favor of plaintiff in the amount of $14,439.97. Plaintiff appeals as of right, claiming that the trial court erred when it denied her a new trial or additur on the issue of noneconomic damages. We reverse and remand.

I. BACKGROUND

The uncontroverted evidence was that plaintiff and defendant, both skiers, collided on Marquette Mountain. Both suffered injuries. Defendant sustained a severe concussion and two broken bones in his right hand. Plaintiff was hospitalized for almost two weeks. Dr. Folker, plaintiff's treating physician testified that plaintiff suffered "multiple fractures of her facial skeleton and orbit, or eye socket, including fractures of the forehead of the skull, which is the frontal sinus." She had "extensive fractures of her entire eye socket on the right, the nose was directly smashed into [ ] her nasal cavity, and instead of having the projection, the nose was flat." Plaintiff underwent multiple surgeries to reconstruct her face. Plaintiff also broke her jaw, nose, knee, and hand. Follow-up surgeries removed "drains underneath the scalp," "unwired her jaw, removed some staples from her face, and removed a cast from her nasal fracture." Both plaintiff and Dr. Folker testified that plaintiff lost the ability to smell, had decreased ability to taste food, on-going double vision, and some clicking and limited mobility in her jaw. At trial, defendant contested liability, but he did not challenge the nature or extent of plaintiff's injuries. The parties stipulated that plaintiff's past medical expenses were $28,879.93.

The jury, while finding the defendant was 50% negligent and that injury to the plaintiff resulted from that negligence, declined to award either economic or noneconomic damages. Pursuant to a Motion for New Trial under MCR 2.611(A)(1)(c), (d), and (e), or additur under MCR 2.611(E)(1), the court found that the verdict as to economic damages was against the great

weight of the evidence. The court accepted the parties' stipulation as to the $28,879.93 amount of plaintiff's out-of-pocket medical expenses arising from the incident. Conversely, the court found that the jury's decision to award no noneconomic damages was not against the great weight of the evidence. In doing so the trial court, noted:

> [T]here were a number of factors brought out during the trial that the jury can decide their significance, and I think certainly there's evidence that this plaintiff was very young. She's had an excellent recovery. She has a fairly normal lifestyle. There was evidence offered about her relatively normal activity, and so forth. And there's nothing that requires the jury, as far as I look at the evidence as a whole, for them to issue an award of the noneconomic pain and suffering type damages. Since the plaintiff had made a significant recovery.

Thus, the only issue on appeal is whether the court abused its discretion in failing to afford plaintiff relief from the jury's failure to award any noneconomic damages.

II. STANDARD OF REVIEW AND APPLICABLE LAW

We review a trial court's decision on a motion for a new trial or additur for an abuse of discretion. *Setterington v Pontiac Gen Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). The trial court abuses its discretion when its decision falls "outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007).

Pursuant to MCR 2.611(A):

> (1) 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:
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> * * *
>
> (c) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.
>
> (d) A verdict clearly or grossly inadequate or excessive.
>
> (e) A verdict or decision against the great weight of the evidence or contrary to law.

"In deciding whether to grant a new trial, a circuit court must make every effort to reconcile the seemingly inconsistent verdicts." *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31; 609 NW2d 567 (2000) (quotation marks and citation omitted). "If there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent." *Granger v Fruehauf Corp*, 429 Mich 1, 7; 412 NW2d 199 (1987).

With regard to additur, MCR 2.611(E)(1) provides:

> (1) 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 new trial on condition that within 14 days the nonmoving 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 grant or denial of additur is whether the jury award is supported by the evidence." *Setterington*, 223 Mich App at 608. "The trial court's inquiry is limited to objective considerations regarding the evidence adduced and the conduct of the trial." *Id*.

"[T]he authority to measure damages for pain and suffering inheres in the jury's role as trier of fact." *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). When evaluating evidence, "the jury is free to credit or discredit any testimony" and "may evaluate the evidence on pain and suffering differently from the proof of other damages." *Id*. at 39. "No legal principle requires the jury to award one item of damages merely because it has awarded another item." *Id*. "Medical expenses and pain and suffering are distinct categories of damages," each of which "may have a distinct evidentiary basis," and a plaintiff bears the burden of proving "each element of her case, including every item of claimed damages." *Id*. Moreover, "[t]here is no legal requirement that a jury award damages simply because liability was found," as damages must be proven before they can be awarded. *Joerger v Gordon Food Serv, Inc*, 224 Mich App 167, 173; 568 NW2d 365 (1997).

III. ANALYSIS

Plaintiff argues on appeal that this case be remanded for a new trial on the issue of noneconomic damages for two reasons: 1) the inadequate amount of noneconomic damages is evidence that the jury was influenced by passion or prejudice; and 2) the jury's decision to award no noneconomic damages was grossly inadequate and against the great weight of the evidence. While we reject plaintiff's first reason for lack of record support, we agree with the second reason and accordingly, reverse and remand on this issue.

Plaintiff identifies no evidence of passion or prejudice apart from the verdict, and there is simply no indication in the record that the jury's verdict was actually influenced by passion or prejudice, such that a new trial was justified under MCR 2.611(A)(1)(c). See *Wiley v Henry Ford Cottage Hosp,* 257 Mich App 488, 499; 668 NW2d 402 (2003) ("Although the trial court should consider a number of factors, such as whether the verdict was induced by bias or prejudice, the trial court's inquiry is limited to objective considerations related to the actual conduct of the trial court or the evidence presented.").

In Michigan, a new trial is required where the verdict is against the great weight of the evidence. See MCR 2.611(A)(1)(e). "A verdict is against the great weight of the evidence if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Sciotti v 36th Dist Court*, 482 Mich 1143; 758 NW2d 289 (2008).

Here, the evidence would have supported an award of damages for past noneconomic damages. The uncontroverted evidence was that plaintiff sustained severe injuries as a result of

the collision. She was hospitalized for almost two weeks, underwent extensive facial reconstruction and eye surgery, and multiple follow-up surgeries. She expressly testified that her injuries and the surgeries caused her pain. She also testified that she did not return to her high school classroom for the remainder of her junior year following the incident, at least in part because she did not want her appearance to "gross" people out or scare them. Even after she recovered from follow-up surgeries, her physical ailments persisted to a certain extent. She never regained her sense of smell. Her ability to taste food remains negatively affected. Double vision, although improved, still occurs in her right eye when she looks in certain directions. Her right eye will begin to water on occasion, and she will wake up with "eye buggers," or crustiness around her eye, due to the "leakage." She lost a front tooth. Also, her jaw clicks, and she cannot open it as wide as she could previously.

We acknowledge the jury's province to determine the weight of the trial testimony and "to believe or disbelieve a witness's testimony, even when the witness's statements are not contradicted." *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008). It is entirely reasonable that a jury could find that plaintiff's testimony as to her mortification and embarrassment from the physical manifestations of her injury were inflated. They could do that based upon the fact that her appearance at the time of trial was quite attractive and that she continued to model. Thus, they had evidence that others found plaintiff's appearance more than acceptable and they themselves could have done likewise. Therefore, they could rationally conclude that the insecurities of adolescence rather than the incident caused her mortification. To the extent that plaintiff alone addressed the element of damage regarding present pain and suffering, the jury could have also concluded that she exaggerated. It is also not completely outside the realm of rational thought that the jury found based on the actual evidence that because plaintiff was anesthetized for her surgeries and administered some pain medication during her convalesce that her post incident pain and suffering was minimal. We find it inconceivable however, that plaintiff did not suffer excruciating pain from the time of injury until she was anesthetized, as well as during the recuperation process.

We recognize that "[t]here is no absolute standard by which we can measure the amount of damages in personal injury cases. The amount allowed for pain and suffering must rest in the sound judgment of the triers of the facts." *Cleven v Griffin*, 298 Mich 139, 141; 298 NW 482 (1941). However, a jury is still compelled to ascertain its verdict on evidence and not speculation. See *Shivers v Schmiege*, 285 Mich App 636, 643-644; 776 NW2d 669 (2009)[1]. "Given the impossibility of using a simple algorithm for this task, judicial review of compensatory awards must rely on the fundamental principle behind compensatory damages—that of recompensing the injured party for losses proven in the record." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 764; 685 NW2d 391 (2004). Plaintiff here sought

[1] "While mere uncertainty as to the amount will not preclude the right of recovery, and damages need not be ascertained with mathematical precision, *a reasonable basis must exist for their computation*." *Shivers v Schmiege*, 285 Mich App 636, 643–44; 776 NW2d 669 (2009) (quotation marks and citations omitted).

noneconomic damages not just for pain and suffering, but also for denial of social pleasure and enjoyment and for the impairment of her body.

Aside from the pain and suffering portion of noneconomic damages presented to the jury, plaintiff also argued for damages related to physical impairments. The jury had no evidentiary basis to refute that the impairment of plaintiff's jaw and eye, both of which were supported by a physician's testimony, were not proximally caused by the accident. Nor is there any evidence in the record that plaintiff was not denied social pleasures and enjoyments during her hospitalization and physician mandated convalescent period. To the extent that the special verdict form did not inquire as to whether plaintiff suffered physical impairments, the verdict, if it is interpreted as a denial that those injuries occurred or were proximally related to the accident, was against the great weight of the evidence. For the same reasons, we find that the verdict is also grossly inadequate. It is grossly inadequate to award nothing for either the impairments of the body or the physician mandated convalescence and hospitalization period.

IV. CONCLUSION

We reverse the trial court's order denying plaintiff noneconomic damages and remand to the trial court for a new trial limited to determining noneconomic damages. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Cynthia Diane Stephens

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Before: MARKEY, P.J., and STEPHENS and RIORDAN, JJ.

RIORDAN, J. (*dissenting*).

I respectfully dissent.

Plaintiff appeals as of right the judgment entered in her favor in the amount of $14,439.97 on the basis that the trial court erred when it denied a new trial and/or additur with respect to noneconomic damages. I would affirm.

This case arises following a collision between two skiers on Marquette Mountain. The evidence established that plaintiff was following the assistant coach of her high school ski team down a run called Rocket while defendant was skiing down a run called Snowfield. Just before the collision, plaintiff skied around the corner of Rocket at approximately 35 miles per hour toward Chairlift 2, and defendant skied very fast around the corner of Snowfield toward the ski lodge. They were both headed toward each other when the collision occurred, and there was testimony that defendant's helmet may have made contact with plaintiff's face. Both skiers were knocked unconscious. Multiple witnesses heard a loud noise when the two skiers collided; however, neither plaintiff nor defendant had any clear recollection of the collision or the events leading up to it.

Defendant sustained a severe concussion and broke two bones in his right hand. Plaintiff sustained multiple facial fractures that required several surgeries to repair, one of which lasted six or seven hours. In addition, plaintiff's eye socket was shattered, her jaw and nose were broken, her sinuses were smashed, and her knee and hand were broken. However, the only long-term problems that resulted from plaintiff's injuries included a loss of the ability to smell, a decreased ability to taste food, some vision issues that persisted despite eye surgery, and some clicking and limited mobility in plaintiff's jaw. At trial, defendant contested liability, but he did not challenge the nature or extent of plaintiff's injuries. The parties stipulated that plaintiff's past medical expenses were $28,879.93.

The jury found that defendant was 50% negligent, that plaintiff was injured, and that defendant's negligence was a proximate cause of plaintiff's injuries. The jury also found that plaintiff was 50% negligent and that her negligence was a proximate cause of her injuries. However, the jury found that plaintiff's total amount of damages—including damages for "fright, shock, embarrassment, humiliation, mortification, pain and suffering, loss of social pleasures and enjoyment, disability and/or disfigurement up to the present time"—was $0. Likewise, the jury awarded no damages for future noneconomic losses and no damages for plaintiff's past medical expenses.

Plaintiff moved for a new trial, either limited to damages or on all issues, and/or additur. Plaintiff argued that she was entitled to a new trial pursuant to MCR 2.611(A)(1)(c), (d), and (e) because the jury's "verdict appeared to have been influenced by passion or prejudice, the verdict was clearly and grossly inadequate, and the verdict was against the great weight of the evidence or contrary to law." She argued that she was entitled to additur pursuant to MCR 2.611(E)(1) because the verdict was inadequate as to her economic and noneconomic losses.

The court held a hearing on plaintiff's motion and later entered an order denying plaintiff's motion for a new trial, denying plaintiff's request for additur with regard to noneconomic damages, and granting plaintiff's request for additur with regard to economic damages, i.e., out-of-pocket medical expenses. The trial court determined that it should consider each category of damages separately and provided the following reasoning for denying plaintiff's motion for a new trial or additur with regard to noneconomic damages:

> [T]here were a number of factors brought out during the trial that the jury can decide their significance, and I think certainly there's evidence that this plaintiff was very young. She's had an excellent recovery. She has a fairly normal lifestyle. There was evidence offered about her relatively normal activity, and so forth. And there's nothing that requires the jury, as far as I look at the evidence as a whole, for them to issue an award of the noneconomic pain and suffering type damages.

However, the court found that the jury's failure to award economic damages was against the great weight of the evidence—but not due to passion or prejudice—in light of the parties' stipulation that plaintiff incurred $28,879.93 in out-of-pocket medical expenses, such that the verdict was inadequate. Thus, pursuant to MCR 2.611(E)(1), the trial court denied plaintiff's motion for new trial on the condition that defendant consent in writing within 14 days to the entry of a judgment in the amount of $14,439.97 as damages for plaintiff's medical expenses. Defendant consented, and plaintiff has not raised a challenge the trial court's grant of additur with regard to the out-of-pocket medical expenses.[1] Thus, the only question on appeal is

[1] Plaintiff asserts in her brief on appeal that it is impossible to reconcile the jury's verdict awarding no economic damages in light of the parties' stipulation that plaintiff incurred $28,879.93 in past medical expenses, and argues that a new trial limited to damages is warranted. However, plaintiff expressly acknowledges that "additur is a route which the court can certainly entertain," and she provides no argument contesting the trial court's grant of additur with regard

whether the jury's failure to award noneconomic damages (1) appears to have been influenced by passion or prejudice, (2) was clearly or grossly inadequate, or (3) was against the great weight of the evidence or contrary to law. See MCR 2.611(A) (listing grounds for a new trial).

I agree with the majority that there was evidence at trial that would have supported an award of damages for past noneconomic damages. However, there also was significant testimony about plaintiff's remarkable recovery. Plaintiff's facial reconstructive surgery was successful, and her facial appearance after the surgery is very similar to her appearance before the accident. Further, plaintiff was under a general anesthetic when her surgeries occurred, and she was on pain medication in the hospital. The jury could have concluded that there was no need to compensate plaintiff for her pain because it was treated medically. In addition, plaintiff testified that before and after the accident she was able to pursue a modeling career. She was also able to return to competitive skiing with her high school ski team the school year after the accident, which indicates, at a minimum, that her vision issues improved greatly. Plaintiff also testified that her eye issues were not going to stop her from living her normal life.

Based on these facts, the jury may have discredited plaintiff's testimony regarding pain and suffering, or determined that her pain and suffering was minimal or not worthy of compensation. See *Palenkas v Beaumont Hosp*, 432 Mich 527, 556; 443 NW2d 354 (1989) ("When a jury verdict is based in part upon pain and suffering, a trial court must balance all of the factors involved against the general principle that *there is no absolute mathematical formula or standard* by which pain and suffering can be measured; thus, *the amount allowed for pain and suffering must ordinarily rest in the sound judgment of the jury*." [Emphasis added.]). Likewise, the question of credibility, and the weight of the trial testimony, is generally for the fact-finder to decide, *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008), and the jury's prerogative to disbelieve testimony—including uncontroverted testimony—is well established. *Kelly*, 465 Mich at 39; *Guerrero*, 280 Mich App at 669.

Therefore, given the evidence in the record that supports the jury's verdict, and the jury's unique role in determining plaintiff's credibility and the weight of the evidence, *Ellsworth*, 236 Mich App at 194, plaintiff fails to demonstrate that the verdict not awarding noneconomic damages was clearly or grossly inadequate under MCR 2.611(A)(1)(d), or against the great weight of the evidence under MCR 2.611(A)(1)(e). Moreover, as the majority correctly recognizes, plaintiff identifies no evidence of passion or prejudice apart from the verdict, and there simply is no indication in the record that the jury's verdict was actually influenced by passion or prejudice, such that a new trial was justified under MCR 2.611(A)(1)(c). See *Anton v State Farm Mut Auto Ins Co*, 238 Mich App 673, 688-689; 607 NW2d 123 (1999) ("A trial court may consider whether a verdict was induced by bias or prejudice; however, its inquiry must be limited to objective considerations relating to the actual conduct at trial or the evidence adduced. The trial judge, who experienced the trial, is generally in the best position to determine whether the jury's verdict was motivated by such impermissible considerations as passion, bias, or anger." [Citations Omitted.]).

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to her out-of-pocket medical expenses. Thus, I understand plaintiff's appeal as only contesting the trial court's decision as to noneconomic damages.

As the plaintiff has not shown that the trial court abused its discretion when it denied plaintiff's motion for a new trial or additur on the issue of noneconomic damages, I would affirm and allow the jury's determination to stand. *Setterington*, 223 Mich App at 608.

/s/ Michael J. Riordan