S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

JERRY COLLIER, Plaintiff-Appellee,	UNPUBLISHED February 15, 2005
v	No. 249404
DANNY KAPLAN, DPM, Defendant-Appellant.	Wayne Circuit Court LC No. 00-032060-NH

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals by leave granted from an order granting plaintiff's motion for a new trial. We reverse.

Defendant argues that the trial court abused its discretion in granting a new trial. A trial court's decision to grant a motion for a new trial is reviewed for an abuse of discretion. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761; 685 NW2d 391 (2004).

Whether a trial court abused its discretion "'involves far more than a difference in judicial opinion.'" *Gilbert, supra* at 761, quoting *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999). A court has abused its discretion "'when "an unprejudiced person" considering "the facts upon which the trial court acted, [would] say that there was no justification or excuse for the ruling made."'" *Gilbert, supra* at 761-762, quoting *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998) (opinion by Kelly, J). Both this Court and the trial court are to be quite cautious in not invading the fact-finding of the jury by substituting its own judgment for the conclusion reached by the jury where reasonable minds could differ on the meaning of the evidence. *Severn v Sperry Corp*, 212 Mich App 406, 415-416; 538 NW2d 50 (1995).

There is a two-step analysis for reviewing a trial court's decision to grant a motion for a new trial. *Vargo v Denison*, 140 Mich App 571, 573; 364 NW2d 376 (1985); *Benmark v Steffen*, 9 Mich App 416, 422; 157 NW2d 468 (1968). First, this Court must determine if the reasons given for granting the motion are legally recognized. *Petraszewsky v Keeth*, 201 Mich App 535, 539; 506 NW2d 890 (1993); *Benmark, supra* at 422. Second, this Court should resolve whether the reasons are supported by a reasonable interpretation of the record. *Id.*

The first part of the *Benmark* test was satisfied. The trial court is permitted to set aside the jury's verdict where it is against the great weight of the evidence. MCR 2.611(A)(1); *Kelly v Builders Square, Inc*, 465 Mich 29, 38; 632 NW2d 912 (2001). In this case, the trial court believed that the verdict was against the great weight of evidence because defendant admitted his negligence during testimony.

However, the second part of the test has not been satisfied. A grant of a new trial because the verdict was against the great weight of the evidence is disfavored, and the trial court should not substitute its judgment for the jury's unless a verdict has been secured by improper methods, prejudice, or sympathy. *Kelly, supra* at 35. Thus, the jury's verdict should not be set aside if there is competent evidence to support it. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 498; 668 NW2d 402 (2003). Because a trial court cannot substitute its judgment for that of the fact finder, if there is conflicting evidence, the question of credibility ordinarily should be left for the fact finder. *Id*.; *Kelly, supra* at 36. A reasonable interpretation of the record does not support the trial court's conclusion that the verdict was against the great weight of the evidence.

In this case, the trial court determined that defendant admitted negligence during the trial by indicating that he prescribed orthotics for plaintiff when he knew that it would not be beneficial to treat a neuroma, and therefore, the jury should have found defendant negligent. Defendant stated that he did not think that orthotics were an appropriate treatment for a neuroma. On October 22, 1998, defendant told plaintiff that he could try using an orthotic for his left foot, although plaintiff never chose to use one. Defendant stated at trial that a reasonably prudent doctor would not recommend an orthotic for treating a neuroma.

> *Q*. So, if I got your testimony right then, Doctor, if we put together what you said under oath in August of 2001 and what you say today, you believe that the standard of care would be violated if you recommended using a device that wouldn't do a patient any good; correct?
>
> *A*. (No response)
>
> *Q*. Right?
>
> *A*. (No response)
>
> *Q*. And you also said that you didn't think an orthodic [sic] would do this guy any good for a neuroma - -
>
> *A*. Right.
>
> *Q*. - - and yet you recommended it to him anyway; true?
>
> *A*. Yes.
>
> *Q*. That's a violation of the standard of care; isn't it Doctor; that's malpractice.
>
> *A*. No.

Defendant did, however, deny that in this case he committed malpractice in suggesting this care for plaintiff. Moreover, testimony also indicated that using an orthotic could be a form of

treatment for a neuroma because it changes the biomechanics of the foot. Moreover, there was other testimony indicating that defendant offered use of the orthotic to assist with plaintiff's crush injury. This indicates that the court's finding, that prescribing orthotics for a neuroma was a self-admission of negligence, is not the only reasonable conclusion comporting with the record.

Further, even if the testimony was considered uncontradicted, it was still possible for the jury to find defendant not negligent despite his testimony that he prescribed orthotics when he did not think it would be beneficial to plaintiff. "'It is said that on some points there was no evidence of a conflicting nature; but that does not aid the claimant. A jury may disbelieve the most positive evidence, even when it stands uncontradicted; and the judge cannot take from them their right of judgment. If they return what he thinks is a perverse verdict, he may set it aside and order a new trial; but he cannot take upon himself their functions as was done here.'" *Vargo, supra* at 574, quoting *Woodin v Durfee*, 46 Mich 424, 427; 9 NW 457 (1881). "'Nevertheless the rule does not give a trial judge unlimited power to grant a new trial merely because he does not agree with the verdict. He may not substitute his judgment for that of the finders of fact, and a grant of new trial should be based upon demonstrable errors in the trial.'" *Vargo, supra* at 574, quoting *Humphrey v Bay Refining Co*, 16 Mich App 394, 397-398; 168 NW2d 314 (1969). There was more than sufficient evidence presented to the jury for it to render a verdict in favor of defendant or plaintiff. Since there was no suggestion that the jury was swayed by improper methods, prejudice or sympathy, the trial court could not overturn the verdict. *Kelly, supra*. To do so on this record could not be justified. *Gilbert, supra.*

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens