

STATE OF MICHIGAN
COURT OF APPEALS

ROBIN PENA,

Plaintiff-Appellant,

v

ROSE GORDON,

Defendant-Appellee.

UNPUBLISHED
September 3, 1996

No. 178210
LC No. 91-412723

Before: Corrigan, P.J., and Jansen and M. Warshawsky,* JJ.

PER CURIAM.

Plaintiff appeals by right the order denying her motions for a new trial, directed verdict and judgment notwithstanding the verdict. Plaintiff also appeals the court's determination of mediation sanctions. We affirm.

This case arose out of an automobile accident involving the parties. Plaintiff was ejected from a minivan after being struck by a car negligently driven by defendant, who ran a red light. Plaintiff suffered injuries to her head, knees, wrist, and buttocks as a result of the accident.

Plaintiff sued defendant to recover for her alleged serious impairment of body function and serious permanent disfigurement resulting from defendant's negligent operation of an automobile. At the close of the testimony, plaintiff moved for a directed verdict on the issues of whether she sustained a serious impairment of body function and a serious permanent disfigurement. Plaintiff argued that a reasonable person could find that the evidence satisfied these two threshold determinations. The trial court denied plaintiff's motion, asserting that the jury must decide the issues. The jury returned a verdict in favor of plaintiff for \$50,000, finding that she sustained a serious permanent disfigurement, but not a serious impairment of body function. Plaintiff moved for a new trial and a judgment notwithstanding the verdict. Defendant then moved for mediation sanctions pursuant to MCR 2.403. The trial court denied plaintiff's motion and granted defendant's motion.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff first argues that the trial court erred in not granting her motions for a directed verdict and judgment notwithstanding the verdict on her claim of serious impairment of body function. We disagree.

In reviewing a court's decision on a motion for directed verdict, this Court views the evidence presented up to the time of the motion in a light most favorable to the nonmoving party, grants that party every reasonable inference, and resolves any conflict in the evidence in that party's favor to decide whether a question of fact existed. *Hatfield v St Mary's Medical Center*, 211 Mich App 321, 325; 535 NW2d 272 (1995). Directed verdicts are appropriate only when no factual question exists upon which reasonable minds could differ. *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 524; 529 NW2d 318 (1995). When deciding a motion for judgment notwithstanding the verdict, a court must examine the testimony and all legitimate inferences that may be drawn therefrom in a light most favorable to the nonmoving party, and decide if the facts preclude judgment for the nonmoving party as a matter of law. *McLemore v Detroit Receiving Hospital*, 196 Mich App 391, 395; 493 NW2d 441 (1992). If the evidence is such that reasonable jurors could have found for the nonmoving party, judgment notwithstanding the verdict is inappropriate. *Id.*

The pertinent Michigan statute states:

A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has sustained death, serious impairment of body function, or permanent serious disfigurement. [MCL 500.3135(1); MSA 24.13135(1).]

Whether a plaintiff sustained a serious impairment of body function must be submitted to the trier of fact whenever the evidence would cause reasonable minds to differ as to the answer. *DiFranco v Pickard*, 427 Mich 32, 38; 398 NW2d 896 (1986); *Kallio v Fisher*, 180 Mich App 516, 517-518; 448 NW2d 46 (1989). This is true even where no material factual dispute exists as to the nature and extent of the plaintiff's injuries. *Id.* This inquiry focuses not on the injuries themselves, but on how the injuries affected a particular body function. *DiFranco, supra* at 39. In determining whether the impairment was serious, several factors should be considered: the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors. *Id.* at 39-40. An impairment need not be permanent to be serious. *Id.*

Plaintiff sustained a concussion, a fractured skull, an injured wrist, and bruised buttocks. Plaintiff testified, however, that she was able to resume all activities within approximately one month of the accident. While an injury does not have to be permanent to be considered a serious impairment of body function, a jury may consider the length of time the impairment lasted. See *DiFranco, supra* at 39.¹ The jury reasonably could have concluded from plaintiff's rapid recovery that she did not sustain a serious impairment of body function. Therefore, we hold that the trial court did not err in denying plaintiff's motions for directed verdict and judgment notwithstanding the verdict because reasonable minds could have differed on whether the evidence established that plaintiff sustained a serious impairment of body function.

Plaintiff next argues that the trial court erred in denying her motion for a new trial because the great weight of the evidence favored a finding of serious impairment of body function. We disagree. A trial court may grant a new trial if, among other things, the verdict was against the great weight of the evidence or was clearly or grossly inadequate or excessive. MCR 2.611(A). This Court applies an abuse of discretion standard to a lower court's ruling on a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *Bordeaux v Celotex Corp*, 203 Mich App 158, 170; 511 NW2d 899 (1993). The trial court determines whether the overwhelming weight of the evidence favors the losing party, while this Court determines whether the trial court abused its discretion in making that determination. *Id.* The Court should not set aside the jury's verdict if competent evidence supports it. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990).

The overwhelming weight of the evidence did not establish that plaintiff sustained a serious impairment of body function. As discussed above, although plaintiff presented evidence establishing that she sustained more than minor injuries, she presented little evidence to show how these injuries seriously impaired a body function. Therefore, we hold that the trial court did not abuse its discretion in denying plaintiff's motion for a new trial on the basis that the jury's finding was against the great weight of the evidence.

Plaintiff also argues that the trial court erred in denying her motion for additur because the jury award of \$50,000 was inadequate given the evidence presented at trial. The standard of review in an appeal from the grant or denial of a motion for additur is whether the verdict was so clearly or grossly inadequate and so contrary to the great weight of the evidence pertaining to damages sustained by the plaintiff as to shock the judicial conscience. *Burtka v Allied Integrated Services, Inc*, 175 Mich App 777, 780; 438 NW2d 342 (1989). This determination is left to the discretion of the trial court and we will not disturb it absent a palpable abuse of that discretion. *Id.* We hold that that trial court's denial of additur did not constitute a palpable abuse of discretion because the jury's \$50,000 award does not shock the judicial conscience.

Plaintiff next argues that the trial court abused its discretion in determining the mediation sanctions. We disagree. We will uphold an award of attorney fees under MCR 2.403 absent an abuse of discretion. *Michigan Basic Property Ins Ass'n v Hackert Furniture Distributing Co, Inc*, 194 Mich App 230, 234; 486 NW2d 68 (1992). The trial court's decision constitutes an abuse of discretion only if it is grossly violative of fact and logic. *Id.*

MCR 2.403(O) states:

(1) If a party has rejected an evaluation and the action proceeds to trial, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation evaluation. However, if the opposing party has also rejected the evaluation, a party is entitled to costs only if the verdict is more favorable to that party than the mediation evaluation.

* * *

(6) For the purpose of this rule, actual costs are

(a) those costs taxable in any civil action, and

(b) a reasonable attorney fee based on a reasonable hourly or daily rate as determined by the trial judge for services necessitated by the rejection of the mediation evaluation.

A party may recover only reasonable attorney fees incurred after, not before, mediation is rejected. *Michigan Basic, supra* at 235.

The mediators awarded plaintiff \$150,000, which both plaintiff and defendant rejected. After the jury awarded plaintiff \$50,000, the trial court awarded defendant \$16,557.50 in attorney fees and \$3,548.30 in defense costs as mediation sanctions pursuant to MCR 2.403(O). Plaintiff argues that the trial court's mediation award constituted an abuse of discretion because the award contained fees and costs that were not necessitated by her rejection. She asserts that the trial court should have limited the attorney fees award to one-third of the fees incurred because two-thirds of those fees were associated with the defense of co-plaintiffs. Plaintiff further states that the trial court improperly included expert witness fees in the sanction award. Finally, plaintiff asserts that the trial court should not have awarded attorney fees and defense costs relating to the issue of liability when defendant conceded that issue prior to trial.

Plaintiff's argument relating to costs incurred by co-plaintiffs is without merit because the trial court specifically subtracted those costs from the sanctions award. Similarly, plaintiff's argument that the expert witness fees should have been excluded from the sanction award is baseless because this Court has held that expert fees are recoverable. See *Haberkorn v Chrysler Corp*, 210 Mich App 354, 380; 533 NW2d 373 (1995). Finally, plaintiff's argument relating to attorney fees and court costs associated with the negligence issue is unpersuasive. In mediation sanctions, if defendants may not recover attorney fees and defense costs associated with the issue of liability, defendants will not concede liability. This would result in protracted trials, which would burden our trial courts. Therefore, the trial court's inclusion of attorney fees and defense costs associated with the issue of liability was not grossly violative of fact and logic. See *Michigan Basic, supra* at 234. Accordingly, we hold that the trial court's mediation award did not constitute an abuse of its discretion.

Affirmed.

/s/ Maura D. Corrigan
/s/ Kathleen Jansen
/s/ Meyer Warshawsky

¹ Furthermore, plaintiff presented little evidence to show how her injuries seriously impaired a body function. This was crucial since “[t]he focus . . . is not on the injuries themselves, but on how the injuries affected a particular body function.” *DiFranco, supra* at 39.