STATE OF MICHIGAN

COURT OF APPEALS

ROBIN LYNN CETRONE, Plaintiff-Appellee,	UNPUBLISHED January 21, 2014
v	Nos. 310270 & 313668 Clinton Circuit Court
MAGEN LYNDSEY STODDARD and CAMMI ANN ROBINSON, Defendants-Appellants.	LC No. 10-010673-NI

Before: WHITBECK, P.J., and FITZGERALD and O'CONNELL, JJ.

PER CURIAM.

In Docket No. 310270, defendants, Magen Lyndsey Stoddard and Cammi Ann Robinson, appeal as of right a jury verdict of $100,000 in non-economic damages in favor of plaintiff, Robin Lynn Cetrone, in her automobile negligence case. In Docket No. 313668, Stoddard and Robinson appeal as of right the trial court's order awarding Cetrone $80,000 in attorney fees as case evaluation sanctions. Because the trial court did not (1) err by denying Stoddard and Robinson's motions for a directed verdict and judgment notwithstanding the verdict, (2) make evidentiary errors warranting reversal, or (3) award Cetrone unreasonable attorney fees, we affirm.

I. FACTS

A. THE ACCIDENT

On August 21, 2009, Stoddard drove through a red light and struck the driver's side of Cetrone's car. Robinson owned the vehicle that Stoddard was driving. Cetrone testified that she had been on her way to meet a friend, Tracy Jones, for lunch. According to Cetrone, when Stoddard's car struck her car, she felt the car spin around and come to a stop. Her left shoulder and head struck the side of the car.

Jones testified that Cetrone called her and told her that she had been in an accident. Cetrone testified that she could not remember calling Jones. According to Jones, when she arrived at the accident scene, Cetrone seemed dazed and confused. Jones helped Cetrone into her car and drove her to the emergency room. Cetrone testified that she did not recall Jones being at the scene of the accident, but did remember being inside of Jones's car. The emergency room performed a CT scan of Cetrone's brain, which showed that her brain was normal.

B. CETRONE'S INJURIES

Cetrone testified that she followed up with her family doctor, Dr. John Behm, three days after the accident. According to Cetrone, Dr. Behm referred her to a pain management specialist for her shoulder pain, but treatments did not help it. Cetrone testified that Dr. Behm also referred her to Dr. Edward Cook, a neuropsychologist, on the basis of her complaints of memory loss, loss of concentration, and fatigue. Cetrone testified that these symptoms interfered with her ability to work, do household chores, and participate in hobbies.

The trial court admitted the deposition testimonies of various doctors at trial. Dr. Cook testified at his deposition that he performed a series of cognitive tests on Cetrone. On the basis of Cetrone's cognitive problems, Dr. Cook concluded that Cetrone had suffered a traumatic brain injury in the auto accident. Cetrone testified she participated in occupational therapy, speech rehabilitation, and counseling in East Lansing.

When Cetrone moved to Benton Harbor, she was referred to Dr. Christina Pareigis. Dr. Pareigis testified at her deposition that she believed that Cetrone had suffered a brain injury on the basis of Cetrone's visual dysfunction and posttraumatic headaches. Dr. Pareigis testified that she referred Cetrone to Dr. Dan Fortenbacher, an optometrist, for an evaluation.

Dr. Fortenbacher testified that he diagnosed Cetrone with "convergence insufficiency consistent with acquired brain injury." Dr. Fortenbacher explained convergence insufficiency is when the brain has trouble coordinating the images from each eye, causing the patient to have double vision.

Dr. Michael Jakubowski testified at his deposition that he examined Cetrone on March 7, 2011, and did not believe that Cetrone had suffered a significant brain injury.

C. PROCEDURAL HISTORY

Cetrone sued Stoddard and Robinson for motor vehicle negligence. Stoddard and Robinson admitted negligence, but proceeded to trial on the issues of threshold injury, causation, and damages.

Before trial, Cetrone moved to exclude evidence of her conviction of second-degree retail fraud under MRE 609. According to the charging document, Cetrone entered an Elder-Beerman store and placed about $1250 of merchandise into an Elder-Beerman shopping bag, then attempted to leave the store without paying. Cetrone pleaded guilty to misdemeanor second-degree retail fraud. The trial court granted Cetrone's motion to exclude the evidence.

At the close of Cetrone's proofs, defense counsel moved for a directed verdict on the basis that Cetrone did not prove that she had an objectively manifested serious impairment of a bodily function because a licensed physician who regularly diagnoses and treats closed head injuries did not testify that she suffered a serious neurological impairment. The trial court denied the motion on the basis that Cetrone's claim independently met the criteria of a serious impairment of a bodily function. Ultimately, the jury found that Cetrone suffered a serious impairment of a bodily function as a result of the accident, and awarded her $100,000 in non-

economic damages. Robinson and Stoddard moved for a judgment notwithstanding the verdict, which the trial court denied.

D. ATTORNEY FEE HEARING

Before trial, a case evaluation panel evaluated Cetrone's case at $52,500. Cetrone accepted the evaluation, but Stoddard and Robinson rejected it. After the trial court entered the judgment, Cetrone moved for case evaluation sanctions.

The parties stipulated that counsel provided 200 hours of services after Stoddard and Robinson rejected the case evaluation. After considering the 2010 Michigan State Bar survey and article titled The Economics of Law Practice in Michigan (the Bar survey),[1] the trial court found that $400 an hour was a reasonable base attorney fee. The trial court considered additional factors and determined that the base fee did not warrant upward or downward adjustment, and awarded Cetrone $80,000 in attorney fees.

II. EVIDENTIARY ISSUES

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion preserved challenges to the trial court's evidentiary rulings.[2] The trial court abuses its discretion when its outcome falls outside the range of principled outcomes.[3] We review de novo the preliminary questions of law surrounding the admission of evidence, such as whether a rule of evidence bars admitting it.[4]

B. CETRONE'S RETAIL FRAUD CONVICTION

1. LEGAL STANDARDS

Generally, parties cannot attack or support a witness's credibility by using extrinsic evidence of specific instances of the witness's conduct.[5] However, parties can attack a witness's credibility by using extrinsic evidence of a prior conviction if the conviction meets certain requirements.[6] One way in which a prior conviction may be admissible is if "the crime

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[1] Economics of Law Practice in Michigan: 2010 Attorney Income and Billing Rate Key Findings Report, 90 Mich B. J. 14 (February 2011).

[2] *Howard v Kowalski*, 296 Mich App 664, 675; 823 NW2d 302 (2012).

[3] *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472, (2008) (Opinion by TAYLOR, C.J.).

[4] *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

[5] MRE 608(b).

[6] MRE 608(b), MRE 609(a).

contained an element of dishonesty or false statement[.]"[7] Crimes containing elements of dishonesty or false statement are those crimes

> such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves *some element of deceit, untruthfulness or falsification* bearing on the accused's propensity to testify truthfully.[8]

2. APPLYING THE STANDARDS

Stoddard and Robinson assert that the trial court erred when it determined that Cetrone's conviction of second-degree retail fraud was not admissible under MRE 609 because the facts of her crime contained elements of dishonesty or false statement. Because the trial court must consider the elements—not the facts—of the crime at issue, we disagree.

A theft crime is admissible if it "incorporate[s] a dishonest act, such as deceit or falsification, as an *element of the offense itself*."[9] Thus, theft crimes such as larceny by false pretenses—which contains an *element* of dishonesty or false statement—are admissible under MRE 609(a)(1).[10]

Retail fraud may be committed in one of three ways: (1) altering or otherwise misrepresenting the price at which property is offered for sale, (2) stealing property, or (3) fraudulently attempts to obtain property from the store as a refund or exchange for property that the person did not pay for.[11] Thus, some forms of second-degree retail fraud do contain elements of dishonesty or false statement.[12] For example, altering the price tag of an item is an element of second-degree retail fraud that involves deceit or untruthfulness.[13] However, if a person merely steals the property of a store, the conviction is not properly admissible under MRE 609(a)(1).[14]

Stoddard and Robinson assert that the factual circumstances of Cetrone's conviction indicate that she committed the crime by dishonesty. However, the question is whether Cetrone's conviction incorporated dishonesty or false statement as an *element* of the offense.[15]

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[7] MRE 609(a)(1); See *People v Allen*, 429 Mich 553, 593-594; 420 NW2d 499 (1988).

[8] *Allen*, 429 Mich at 593-594 n 15 (quotation marks and citation omitted, emphasis added).

[9] *People v Parcha*, 227 Mich App 236, 243; 575 NW2d 316 (1997) (emphasis supplied).

[10] *Allen*, 429 Mich at 596 n 17; *Parcha*, 227 Mich App at 244 n 3.

[11] MCL 750.356d(1).

[12] *Parcha*, 227 Mich App at 246.

[13] *Id*.

[14] *Id*. at 247.

[15] See *Id*. at 243.

Thus, we conclude that the factual circumstances of Cetrone's conviction are only relevant to the extent that they indicate which type of second-degree retail fraud she committed.

Here, Cetrone was convicted of second-degree retail fraud after she placed items into a shopping bag to give the appearance that she had already paid for them. Cetrone did not commit second-degree retail fraud by altering an item's price tag, nor did she commit second-degree retail fraud by fraudulently returning or exchanging goods that she did not purchase. That leads us to conclude that Cetrone committed retail fraud under MCL 750.356d(1)(b)—stealing property from the store. Because this version of second-degree retail fraud does not contain an *element* of dishonesty or false statement, we conclude that the trial court properly held that the evidence was not admissible under MRE 609(a)(1).

C. DR. FORTENBACHER'S OPINION

1. LEGAL STANDARDS

MRE 702 provides the mechanism by which experts may offer testimony:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

MRE 702 obligates the trial court to "ensure that any expert testimony admitted at trial is reliable."[16] MRE 702 requires that the "witness's expertise fit the nature of the witness's proposed testimony."[17]

2. APPLYING THE STANDARDS

Stoddard and Robinson assert that the trial court improperly permitted Dr. Fortenbacher to testify (1) about the mechanisms of brain injury, (2) that doubled vision is a common symptom of brain injury, (3) about the affects of a brain injury on vision and other areas, and (4) that Cetrone's brain, rather than her eyes, caused her vision problem. We disagree.

Here, Dr. Fortenbacher testified that he is board certified in developmental vision and vision therapy, an area that

> work[s] on the areas that deal with the visual process involving eye coordination, visual information processing, and how vision interacts with other sensory

[16] *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004).

[17] *Id*. at 789; *Gay v Select Specialty Hosp*, 295 Mich App 284, 291; 813 NW2d 354, 357 (2012).

> systems . . . to help patients specifically that have either developmental delays or some type of neurological event that affects their use of their vision.

Dr. Fortenbacher's curriculum vitae also emphasized his focus on brain function and his post-graduate studies in neuro-optometry.

Thus, Dr. Fortenbacher had knowledge, experience, and training in the areas relating eye function to brain function. Dr. Fortenbacher was also familiar with the types of neurological events—including acquired brain injuries—that can affect a person's vision. We conclude that the trial court's decision to allow Dr. Fortenbacher's testimony concerning brain injuries did not fall outside the range of reasonable outcomes.

III. SERIOUS IMPAIRMENT

A. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision regarding a motion for a directed verdict or judgment notwithstanding the verdict.[18] When reviewing such decisions, "this Court views the evidence and all legitimate inferences drawn from the evidence in the light most favorable to the nonmoving party."[19]

B. LEGAL STANDARDS

Michigan's No-Fault Insurance Act[20] generally limits tort liability for non-economic loss in cases of motor vehicle negligence to a few specific circumstances.[21] "A person remains subject to tort liability for non-economic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of a bodily function, or permanent serious disfigurement."[22] A serious impairment of a bodily function is "an objectively manifested impairment of an important bodily function that affects the person's general ability to lead his or her normal life."[23]

MCL 500.3135(2)(a) provides the circumstances under which the trial court can rule on a plaintiff's impairment as a matter of law:

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[18] *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW2d 186 (2003).

[19] *Id*.

[20] MCL 500.3101 *et seq*.

[21] MCL 500.3135; *McCormick v Carrier*, 487 Mich 180, 189; 795 NW2d 517 (2010).

[22] MCL 500.3135(1).

[23] MCL 500.3135(7).

> The issues of whether the injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:
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> (*i*) There is no factual dispute concerning the nature and extent of the person's injuries.
>
> (*ii*) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

Thus, whether a plaintiff has suffered a serious impairment of a bodily function in closed-head-injury cases is not a question of law for the court if either (1) a licensed allopathic or osteopathic physician testifies under oath that there may be a serious neurological injury, *or* (2) the evidence creates a material, factual dispute concerning the nature and extent of the plaintiff's injury.[24]

C. APPLYING THE STANDARDS

Stoddard and Robinson assert that the trial court erred by denying their motions for a directed verdict and judgment notwithstanding the verdict because Cetrone did not present evidence that she suffered an objectively manifested closed-head injury. Stoddard and Robinson essentially ask this Court to conclude that, because Cetrone's CT scan did not reveal any *injury* to her brain, she did not have an objectively manifested impairment of her brain. We decline to do so.

The Michigan Supreme Court has squarely rejected the assertion that a plaintiff must prove an objectively manifested *injury* to proceed on a claim of automobile negligence. "[A]n 'objectively manifested' impairment is commonly understood as one observable or perceivable from actual symptoms or conditions."[25] An impairment is distinct from an injury, and the statute does not require that a plaintiff has suffered an objectively manifested injury.[26] "[W]hile an injury is the actual damage or wound, an impairment generally relates to the effect of that damage."[27] The focus is on "'how the injuries affected a particular body function.'"[28] However,

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[24] *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000).

[25] *McCormick*, 487 Mich at 196.

[26] *Id*. at 197, 197 n 11.

[27] *Id*. at 197.

[28] *Id*., quoting *DiFranco v Pickard*, 427 Mich 32, 67; 398 NW2d 896 (1986).

the plaintiff must establish that "'there is a physical basis for their subjective complaints of pain and suffering[.]"[29]

Here, the physical basis for Cetrone's complaints of pain and suffering was her brain injury. Cetrone's actual symptoms and conditions included memory loss, confusion, difficulty concentrating, and doubled vision. Dr. Cook testified that Cetrone was cognitively impaired, and attributed her impairments to the automobile accident causing a brain injury. Dr. Pareigis testified Cetrone suffered from visual dysfunction and posttraumatic headaches, which she attributed to a brain injury related to the accident. Dr. Fortenbacher testified that Cetrone was suffering from doubled vision. Dr. Fortenbacher testified that, because Cetrone's eyes were physically normal, he attributed Cetrone's doubled vision to a brain injury instead of an eye injury. Cetrone testified that her injury interfered with her ability to work, do household chores, and participate in hobbies.

Thus, viewing the evidence in the light most favorable to Cetrone, Cetrone's impairments were objectively manifested because they were perceivable from her actual symptoms and conditions, even though her injury was not perceived by the CT scan at the hospital. We conclude that the trial court did not err when it concluded that Cetrone presented sufficient evidence that she suffered a serious impairment of a bodily function.

IV. ATTORNEY FEES

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's award of attorney fees and costs as case-evaluation sanctions.[30] The trial court abuses its discretion when its outcome falls outside the reasonable and principled range of outcomes.[31]

B. LEGAL STANDARDS

Generally, each party pays its own attorney fees.[32] However, if a party has rejected a case evaluation, the opposing party has accepted it, and the party who accepted it receives a more favorable verdict, then the party who accepted the case evaluation is entitled to costs.[33] Costs include reasonable attorney fees "necessitated by the rejection of the case evaluation."[34]

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[29] *McCormick*, 487 Mich at 198, quoting *DeFranco*, 427 Mich at 74.

[30] *Smith*, 481 Mich at 526.

[31] *Id*.

[32] *Id*. at 526.

[33] MCR 2.403(O); *Smith*, 481 Mich at 526-527.

[34] MCR 2.403(O)(6); *Smith*, 481 Mich at 527.

Reasonable attorney fees are fees "similar to that customarily charged in the locality for similar legal services[.]"[35] To determine the fee customarily charged in the locality, "trial courts have routinely relied on data contained in surveys such as the Economics of the Law Practice Surveys that are published by the State Bar of Michigan."[36] These surveys can provide the most reliable, credible data from which to determine the fee customarily charged for similar services.[37]

After multiplying the reasonable hourly rate by the reasonable hours billed, the trial court "should consider other factors to determine whether they support an increase or decrease in the base number."[38] Factors may include

> (1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client.[39]

Factors may also include

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
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> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
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> (3) the fee customarily charged in the locality for similar legal services;
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> (4) the amount involved and the results obtained;
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> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
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> (8) whether the fee is fixed or contingent.[40]

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[35] *Smith*, 481 Mich at 528.

[36] *Id*. at 530.

[37] *Id*. at 531-532.

[38] *Id*. at 533.

[39] *Id*. at 530, quoting *Wood v Detroit Auto Inter-Insurance Exchange*, 413 Mich 573, 588; 321 NW2d 653 (1982).

[40] *Smith*, 481 Mich at 530, quoting MRPC 1.5(a).

The trial court may also consider any additional relevant factors.[41]

C. APPLYING THE STANDARDS

Stoddard and Robinson assert that the trial court erred when it determined that $400 an hour was a reasonable base hourly rate. Stoddard and Robinson assert that this rate is legally invalid because it is not supported by evidence of hourly rates actually charged by paying clients. We conclude that Stoddard and Robinson have not supported this assertion.

Stoddard and Robinson do not provide any evidence to support their assertion that the survey's statement of hourly rates does not equate to what plaintiff's personal injury attorneys would normally charge clients paying on an hourly basis. Simply because plaintiff counsel testifies that *he* or she does not ever retain clients on an hourly basis does not mean that the personal injury attorneys who reported their hourly rates to the Bar survey did so fictitiously. Further, we note that the Michigan Supreme Court has heavily emphasized the importance of using objective data, such as the Bar survey, as a baseline.[42] In sum, we conclude that Stoddard and Robinson have not supported their assertion that the trial court relied on a "fictitious" base rate.

Additionally, Stoddard and Richardson assert that $200 an hour would have been a more reasonable fee because $40,000 in attorney fees would have been closer to the $33,333 that plaintiff counsel would have actually recovered under the contingency fee agreement. Stoddard and Richardson rely on Justice Corrigan's opinion in *Smith v Khouri*, in which Justice Corrigan noted that this Court has considered the proportionality of attorney fees to the damages awarded in previous cases.[43] However, Justice Corrigan also noted, "I do not contend that fee awards must always be proportional to the results obtained. I simply suggest that *considering* the results obtained, while not requiring a proportionality rule, is reasonable and prudent."[44]

We conclude that the trial court did not abuse its discretion by failing to reduce Cetrone's attorney fee award on this ground. A contingent fee is neither presumptively reasonable nor unreasonable.[45] The trial court may consider the contingent nature of the fees among the factors supporting its decision, but the factor itself is not determinative.[46]

Here, during its thorough review of the balance of a variety factors, the trial court clearly contemplated the contingent nature of attorney fees for plaintiff's personal injury attorneys when

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[41] *Smith*, 481 Mich at 530.

[42] See *Smith*, 481 Mich at 531-532.

[43] *Smith*, 481 Mich at 541.

[44] *Id*. at 542.

[45] *Univ Rehabilitation Alliance, Inc v Farm Bureau General Ins Co of Mich*, 279 Mich App 691, 700; 760 NW2d 574 (2008).

[46] See *Id*. at 699.

determining whether to adjust the hourly rate. The trial court noted the contingent nature of the fees as it related to several factors it considered in its decision. It determined not to adjust the fees downward from the Bar survey on that basis, in part because it reasoned that the hourly fees that personal injury attorneys provided to the Bar survey took into account the risks inherent in personal injury cases.

Ultimately, the trial court found that the $400 an hour rate reflected the nature of the practice area and plaintiff counsel's skill, experience, and reputation, and it declined to adjust the rate downward on the basis of plaintiff counsel's contingency fee agreement. A thorough reading of the balance of the factors weighs in plaintiff counsel's favor. Thus, we are not convinced that the trial court's outcome fell outside the range of reasonable outcomes.

We affirm.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell