STATE OF MICHIGAN

COURT OF APPEALS

FORD ORLO JONES, BETTY JO JONES, and JAN P. BENEDICT, Conservator of the Estate of AMANDA KAY JONES,

Plaintiffs-Appellants,

v

ARLYN BOSSENBROOK, Personal Representative of the Estate of JOHN KENNETH HARPER, and MOTHER LODE BAKING COMPANY, d/b/a THE SILVER DOLLAR SALOON,

Defendants-Appellees.

September 19, 1991

No. 117709

Before: Gillis, P.J., and Weaver and Doctoroff, JJ.

PER CURIAM.

Plaintiffs suffered injuries when they were involved in a head-on collision with a vehicle driven by Kenneth Harper. Harper was killed on impact. Plaintiffs subsequently filed this action against Harper's estate and against the three drinking establishments Harper visited prior to the accident. Only the claims against Harper's estate and Mother Lode Baking Company, d/b/a The Silver Dollar Saloon, went to trial. The jury returned a verdict in favor of both plaintiffs against Harper's estate, awarding $990,000 to Betty Jones and $150,000 to Ford Orlo Jones on his loss of consortium claim. The jury returned a verdict of no cause of action in favor of Harper's estate on Ford Orlo Jones' claim of serious impairment of body function. The jury also returned a verdict of no cause of action in favor of defendant Mother Lode Baking Company, d/b/a The Silver Dollar Saloon. Plaintiffs' motions for judgment notwithstanding the verdict and new trial were denied. Plaintiffs appeal as of right, arguing that the jury's verdicts that Ford Orlo Jones did not suffer a serious impairment of body function and that Harper had not been served alcohol at the Silver Dollar Saloon were against the great weight of the evidence, that the trial court erred in excluding evidence, that they are entitled to a new trial because defense counsel violated a pretrial order, and that the trial court abused its discretion in awarding attorney fees and costs to defendant Mother Lode Baking Company. We affirm.

On January 11, 1986, Harper drove his friend, Erich Miller, to Mingles Bar where they drank beer and shots of schnapps. After approximately two and one-half hours, the pair left Mingles Bar and drove to the Irish Pub. They purchased a pitcher of beer, but did not consume it all. They left the Irish Pub after approximately a half hour and drove to the Silver Dollar Saloon. The pair split up after entering the bar. After a period of time, Harper drove Miller home. After leaving Miller's house, Harper drove south on Airport Road in DeWitt Township. After entering an S-curve, Harper drove into the northbound lane and collided head-on with plaintiffs' vehicle.

Plaintiffs' first claim is that the jury's verdict that Ford Orlo Jones did not suffer a serious impairment of body function was against the great weight of the evidence.

A new trial may be granted if a jury's verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e). The grant or denial of a motion for new trial is left to the sound discretion of the trial court. Bosak v Hutchinson, 422 Mich 712, 737; 375 NW2d 333 (1985), reh den 424 Mich 1201 (1985). The trial court's ruling will not be disturbed unless a clear abuse of discretion is shown. Id.; Harrigan v Ford Motor Co, 159 Mich App 776, 788; 406 NW2d 917 (1987), app dis 431 Mich 905 (1988). A jury's verdict should not be

set aside if there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder. Bell v Merritt, 118 Mich App 414, 422; 325 NW2d 443 (1982), lv den 417 Mich 954 (1983).

Where there is conflicting evidence, the question of credibility is for the factfinder. Rossien v Berry, 305 Mich 693, 701; 9 NW2d 895 (1943). On review, this Court affords deference to the trial court's decision because the trial court heard the witnesses and, thus, is uniquely qualified to judge the jury's assessment of witness credibility. In re Leone Estate, 168 Mich App 321, 324; 423 NW2d 652 (1988); Kochocian v Allstate Ins Co, 168 Mich App 1, 11; 423 NW2d 913 (1988); Drouillard v Metropolitan Life Ins Co, 107 Mich App 608, 623; 310 NW2d 15 (1981), lv den 413 Mich 874 (1982).

In order to recover damages for noneconomic loss resulting from a defendant's negligent operation of a motor vehicle, a plaintiff must prove, as a threshold requirement, that he suffered a serious impairment of a body function. MCL 500.3135(1); MSA 24.13135(1); Byer v Smith, 419 Mich 541, 545; 357 NW2d 644 (1984); Beasley v Washington, 169 Mich App 650, 659; 427 NW2d 177 (1988). The question whether the plaintiff suffered a serious impairment of a 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); Beasley, supra, p 659. If the threshold issue were properly submitted to the trier of fact, its findings generally should not be disturbed. DiFranco, supra, p 39.

In summarizing its holdings, the Court in DiFranco stated:

> 6) The "serious impairment of body function" threshold contains two inquiries:
>
> a) What body function, if any, was impaired because of injuries sustained in a motor vehicle accident?
>
> b) Was the impairment of body function serious?
>
> The focus of these inquiries is not on the injuries themselves, but on how the injuries affected a particular body function. Generally, medical testimony will be needed to establish the existence, extent, and permanency of the impairment.
>
> 7) 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. An impairment need not be permanent to be serious. [427 Mich 32, 39–40.]

Viewing the evidence presented in a light most favorable to defendant Harper's estate, we find that the trial court properly submitted the question of whether plaintiff Ford Orlo Jones suffered a serious impairment of a body function to the jury and that the jury's finding that plaintiff did not suffer a serious impairment of a body function is not against the great weight of the evidence.

Plaintiffs' second claim is that the jury's verdict that Harper had not been served alcohol at the Silver Dollar Saloon was against the great weight of the evidence.

In support of their argument, plaintiffs rely on the testimony of Shawn Rubley and Andrea Albert. Rubley testified that she saw Harper holding a bottle of beer and drinking from it. Albert testified that Harper purchased a pitcher of beer and drank from it. However, both Rubley and Albert consumed several beers before and after arriving at the Silver Dollar Saloon. Renee Smith, who was with Rubley, testified that she did not see Harper with a bottle of beer. In addition, defendant's employee testified that Harper was in the saloon for only ten minutes before he was escorted out of the bar.

The evidence presented a question of credibility. The question of credibility is for the trier of fact. Rossien, supra. We are bound by the assessment of the witnesses' credibility made by the jury and the trial court. Heshelman v Lombardi, 183 Mich App 72, 76; 454 NW2d 603 (1990). Accordingly, we conclude that

the jury's verdict that Harper had not been served alcohol at the Silver Dollar Saloon was not against the great weight of the evidence.

Plaintiffs' third claim is that the trial court erred in excluding evidence that Rubley, Smith and Albert were under 21 years of age on January 11, 1986.

The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. Kochocian, supra, p 12. The trial court correctly ruled that evidence of the witnesses' ages was irrelevant to the issue of whether defendant violated the dramshop act by serving alcohol to a visibly intoxicated person. We reject plaintiffs' argument that the trial court's ruling precluded them from refuting defendant's contention that it diligently enforced its obligations under the dramshop act. Defendant Mother Lode Baking Company did not contend that it diligently enforced its obligations under the dramshop act.

Plaintiffs' fourth claim is that they are entitled to a new trial because counsel for defendant Mother Lode Baking Company violated a pretrial order excluding reference that plaintiffs' claims against Mingles Bar and the Irish Pub had been dismissed.[1]

The Michigan Supreme Court in Reetz v Kinsman Marine Transit Co, 416 Mich 97, 102-103; 330 NW2d 638 (1982), set forth the standard this Court must use when reviewing a claim that a party's lawyer has acted improperly:

> When reviewing an appeal asserting improper conduct of an attorney, the appellate court should first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [Footnotes omitted.]

The claimed error is not in fact error. Defense counsel's remarks challenged the witnesses' credibility. Counsel may discuss in closing arguments the character of witnesses and characterize their testimony. DeVoe v C A Hull, Inc, 169 Mich App 569, 581; 426 NW2d 709 (1988), lv den 431 Mich 863 (1988). Defense counsel's remarks suggested that the witnesses were loyal to their employers, thereby suggesting bias against their rival, the Silver Dollar Saloon. Defense counsel did not imply that Mingles or the Irish Pub were previously defendants in this case who had settled their claims. Defense counsel's remarks were brief and isolated and did not deny plaintiffs a fair trial. Thus, plaintiffs are not entitled to a new trial.

The final claim on appeal is Ford Orlo Jones' claim that the trial court abused its discretion in awarding attorney fees and costs to defendant Mother Lode Baking Company. Plaintiff concedes that defendant is entitled to attorney fees and costs as mediation sanctions pursuant to MCR 2.403(O). However, plaintiff objects to the amount awarded.

In determining the reasonableness of an attorney's fee, the trial court should consider (1) the professional standing and experience of the attorney, (2) the skill, time and labor involved, (3) the amount in question and results achieved, (4) the difficulty of the case, (5) the expenses incurred, and (6) the nature and length of the professional relationship between attorney and client. Wood v DAIIE, 413 Mich 573, 588; 321 NW2d 653 (1982). However, the trial court is not limited to these factors and need not detail its findings as to each specific factor. Id. An award of attorney fees will be upheld on appeal unless the trial court's determination on the "reasonableness" issue was an abuse of discretion. Id., Smolen v Dahlmann Apartments, Ltd, 186 Mich App 292, 296; 463 NW2d 261 (1990).

The trial court determined that twenty percent of Mother Lode Baking Company's costs and attorney fees should be allocated against Ford Orlo Jones and eighty percent be attributed to Betty Jones. The court awarded defendant Mother Lode Baking Company $447.72 in costs and $3,529.82 in attorney fees.

Defendant acknowledged that, since there were two plaintiffs with separate claims litigated in one case, it could not allocate precisely the attorney fees and costs to Ford Orlo Jones' cause of action only. Defendant suggested to the trial court that it award one-third of its costs and attorney fees against Ford Orlo Jones. Plaintiff argues on appeal that defendant is entitled to only nine percent of its total costs and attorney fees.

Having reviewed the record, we conclude that the trial court did not abuse its discretion by awarding defendant twenty percent of its costs and fees.

Affirmed.

/s/ John H. Gillis
/s/ Elizabeth A. Weaver
/s/ Martin M. Doctoroff

[1] The claim against Mingles Bar was mediated as no cause of action and was accepted by all parties. The claim against the Irish Pub was settled before trial.