

STATE OF MICHIGAN
COURT OF APPEALS

KENT PATTENAUDE,

Plaintiff-Appellant,

v

HAROLD LANE,

Defendant-Appellee.

UNPUBLISHED

January 10, 1997

No. 187873

LC No. 93-001601

Before: Hoekstra, P.J., and Sawyer and T.P. Pickard,* JJ.

PER CURIAM.

Plaintiff appeals as of right from a trial court order entering judgment on a jury verdict in plaintiff's favor in this third-party automobile negligence action. We affirm the judgment, but remand for recalculation of the award of attorney fees.

This action arose when defendant, who was driving at a high rate of speed on a wet road, lost control of his car and collided with plaintiff's car. Plaintiff suffered injury to his dominant right hand as a result of the collision. Defendant admitted that he was negligent and that his negligence was the proximate cause of the collision. The case was mediated and both parties rejected the mediation evaluation. At trial, plaintiff alleged that he suffered from reflex sympathetic dystrophy (RSD) in his right hand. The jury found that plaintiff had suffered an injury resulting in serious impairment of a bodily function and awarded \$20,000 in damages, but did not award plaintiff any future noneconomic damages.

Plaintiff first alleges that the trial court erred by denying plaintiff's motion for additur or partial new trial on the issue of future damages because the jury's verdict was clearly inadequate. We disagree. The standard of review in an appeal from denial of a motion for additur or, in the alternative, a new trial is whether the verdict is so "clearly or grossly inadequate and so contrary to the great weight of the evidence pertaining to damages sustained by plaintiff as to shock the judicial conscience." *Burika v Allied Integrated Diagnostic Services, Inc*, 175 Mich App 777, 780; 438 NW2d 342 (1989), quoting *Moore v Spangler*, 401 Mich 360, 373; 258 NW2d 34 (1977). It is well-settled that a jury verdict that ignores "uncontroverted" damages of the plaintiff is inadequate and must be reversed. *Id.*

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

Here, plaintiff argues that the jury's verdict was clearly inadequate because it failed to award noneconomic damages to plaintiff even though plaintiff presented uncontroverted evidence that he suffered a continuing injury. Our review of the record, however, reveals that plaintiff's evidence of a continuing injury was not uncontroverted. Defendant presented expert testimony that plaintiff did not suffer from RSD caused by the car accident. The record shows that defendant challenged plaintiff's allegation of a continuing injury by presenting evidence that after the accident, plaintiff was able to do everything he did before the accident occurred. Plaintiff returned to work one week after the accident, and his ability to perform his job was not significantly impaired. Plaintiff admitted that after the accident he could still pitch horseshoes, play softball, fish, hunt, bowl, and play golf, although plaintiff could not perform at the level at which he performed prior to the accident. Defendant presented testimony that plaintiff's left elbow could be the cause of plaintiff's lowered performance. Defendant also presented expert testimony that plaintiff's current pain in his right hand was not caused by RSD resulting from the accident, but rather could be caused by a previous bone chip in that hand. Because the record supports the jury's finding that plaintiff did not suffer a continuing injury, the jury's verdict, which did not award noneconomic future damages to plaintiff, was not clearly inadequate. The trial court did not abuse its discretion by denying plaintiff's motion for additur or partial new trial.

Finally, plaintiff claims that the trial court abused its discretion when it awarded costs and attorney fees to defendant as mediation sanctions at an hourly rate in excess of those fees that were actually incurred. We agree. Although this Court has previously concluded that nothing in the language of MCR 2.403(0) requires a trial court to equate reasonable fees with actual fees, *Cleary v The Turning Point*, 203 Mich App 208; 512 NW2d 9 (1993), we believe that on the facts of this case, the trial court abused its discretion when it awarded attorney fees at a higher rate than actually charged by defendant's attorney. Here, defendant originally submitted his attorney fees claim on the basis of an \$85 per hour rate, but when plaintiff requested a hearing to require defendant to establish reasonableness, defendant then resubmitted the claim at a \$125 per hour rate, which the trial court eventually awarded. From these facts, the only apparent reason for defendant requesting a higher hourly rate of compensation was plaintiff's demand for a hearing. Because the award at the higher rate, in effect, punishes plaintiff for exercising his right to request a hearing, we find that the trial court abused its discretion in awarding the higher rate. Therefore, we remand to the trial court for purposes of recalculating the award of attorney fees at the rate of \$85 per hour.

Affirmed, but remanded for recalculation of the award of attorney fees.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer

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Before: Hoekstra, P.J., and Sawyer and T.P. Pickard, * JJ.

PICKARD, J. (concurring).

I concur in the majority opinion finding that although this Court has previously concluded that nothing in the language of MCR 2.403(O) requires a trial court to equate reasonable fees with actual fees, *Cleary v The Turning Point*, 203 Mich App 208; 512 NW2d 9 (1994), that on the facts of this case the trial court abused its discretion when it awarded attorney fees at a higher rate than actually charged by the defendant's attorney.

MCR 2.403(O)(1) states that 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 violation. Actual costs are defined by MCR 2.401(O)(6) as:

- (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.

This Court previously concluded that nothing in the language of MCR 2.403(O) requires a court to equate reasonable fees with actual fees. *Cleary*, supra at 212. I agree. However, nothing in the language of MCR 2.403(O) prevents a trial judge from doing so.

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

The *Cleary* Court correctly stated the rule, but failed to instruct trial judges how to apply it. MCR 2.403(O)(6)(b) requires that the trial judge determines a reasonable attorney fee for services necessitated by the rejection of the mediation evaluation. In *Cleary*, the Court awarded a reasonable fee in excess of the actual fee charged. However, the Court failed to explain how that reasonable fee was determined or what process trial judges should use to determine reasonable fees in such situations.

As evidenced by this present case, the trial judge appears to believe that *Cleary* set forth a blanket rule for determining the reasonableness of attorney fees after a mediation evaluation has been rejected. The rule in *Cleary* implies that any reasonable fee may be awarded without consideration of the actual attorney fees charged. Such a rule is unfair and invites abuse. It provides the opportunity for the prevailing plaintiff or defendant to inflate attorney fees. It also provides an opportunity for punitive sanctions.

This Court should take this opportunity to explain how a reasonable attorney fee should be determined under MCR 2.403(O)(6). This judge would suggest the following approach: (1) First, the trial judge should determine if the actual attorney fee charged to the client was reasonable. If that fee is reasonable, that amount should be awarded. (2) Second, if the actual fee charged to the client is unreasonably high or unreasonably low for the services necessitated by the rejection of mediation, then MCR 2.403(O)(6) allows the trial judge to determine a fee which would be reasonable under the circumstances.¹ This process would insure that reasonable fees are taxed to the appropriate party without punishing that party.

/s/ Timothy P. Pickard

¹ This rule should apply uniformly to plaintiffs and defendants. For example, in this case, the defendant was charged \$85 an hour for 118.45 hours by his attorney, totaling \$10,068.25. The court should determine if the \$85 per hour rate was reasonable under the circumstances. If it is, the \$10,068.25 should be awarded the defense. If that rate is unreasonably high or low, then the trial judge should determine a reasonable hourly rate.

If, in this case, the plaintiff had agreed to a \$20,000 mediation evaluation and the defendant had rejected it, and \$20,000 was awarded to plaintiff at trial, the defendant would have to pay the plaintiff's attorney fees pursuant to MCR 2.403(O). If, in this example, the plaintiff's attorney had a one-third contingency agreement, his attorney fees would be \$6,600, or \$55.72 per hour, using the same 118.45 hours billed by defense counsel in this case. The trial judge would need to determine if the \$55.72 per hour rate was reasonable under the circumstances. If it is reasonable, the \$6,600 would be awarded to the plaintiff as attorney fees. However, if that rate is unreasonable, the judge would set a reasonable hourly rate.