

STATE OF MICHIGAN
COURT OF APPEALS

CHARLOTTE DENEEN SWINDLE,

Plaintiff–Appellant,

v

HURON ESTATES LIMITED PARTNERSHIP,
d/b/a, HURON ESTATES MOBILE HOME
COMMUNITY,

Defendant–Appellee.

UNPUBLISHED

June 7, 1996

No. 176188

LC No. 92-215284 NO

Before: Taylor, P.J., and Murphy and E.J. Grant,* JJ.

PER CURIAM.

The trial in this negligence action resulted in a \$38,500 verdict in favor of plaintiff. Nevertheless, plaintiff appeals as of right the trial court’s ruling on an evidentiary matter and the trial court’s denial of plaintiff’s post-trial motion for an additur or for a new trial. We affirm.

Plaintiff was injured in a fall on a snow- and ice-covered basketball court. At trial, plaintiff claimed that she was forced to walk across the basketball court because defendant had not removed snow and ice accumulation from the sidewalk. In support, plaintiff offered a photograph of the sidewalk taken more than two years after plaintiff’s fall. As foundation for this exhibit, plaintiff offered to testify that the photograph was a fair and accurate depiction of the sidewalk as it appeared on the day of the accident. The trial court excluded the photograph.

Plaintiff argues that the trial court abused its discretion by excluding the photograph. However, we need not address this question. When a party appeals an evidentiary ruling, this Court will not reverse unless the party shows both: (1) that the ruling was erroneous, and (2) that the ruling prejudiced a substantial right of the party. *Gregory v Cincinnati, Inc.*, 202 Mich App 474, 484; 509 NW2d 809 (1993), *aff’d* 450 Mich 1 (1995).

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

Because, the jury explicitly found that defendant was negligent, the exclusion of the photograph did not prejudice plaintiff's ability to establish defendant's negligence. Nor could exclusion of the photograph have affected the jury's comparative negligence conclusion. The plaintiff, after all, did not fall on the sidewalk depicted in the photograph, but on a nearby basketball court. Therefore, no matter how treacherous the sidewalk was on the day of the accident, that condition would not effect the amount of fault attributable to plaintiff as she crossed the basketball court. Thus, because plaintiff cannot show that she was prejudiced by the ruling, she cannot prevail on appeal even if the trial court's ruling was an abuse of discretion.

Next, we conclude that the trial court did not abuse its discretion by denying plaintiff's motion for an additur. Additur is appropriate where the jury ignores evidence of damages which are "uncontroverted." See *Burtka v Allied Integrated Diagnostic Services, Inc*, 175 Mich App 777, 780; 438 NW2d 342 (1989). On the other hand, if a plaintiff supports her claim for damages from pain and suffering or loss of pleasure only with her own testimony, then the amount of damages is always in controversy, even if the defendant does not provide any evidence to contradict the plaintiff's testimony. *Flonas v Dalman*, 199 Mich App 396, 406; 502 NW2d 725 (1993). That is the case here and, therefore, the denial of additur was not an abuse of discretion.

Affirmed.

/s/ Clifford W. Taylor

/s/ William B. Murphy

/s/ Edward J. Grant