STATE OF MICHIGAN

COURT OF APPEALS

PAULA MILTGEN,

Plaintiff-Appellant,

v

PAUL BERNARD MILTGEN,

Defendant-Appellee.

UNPUBLISHED
October 11. 1996

No. 171545
LC No. 91-072850-NI

Before: Doctoroff, C.J., and Hood and Bandstra, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's judgment awarding her $14,000 in this third-party no-fault action. We affirm.

On February 5, 1990, plaintiff, who was eighteen years old, was a passenger in a vehicle driven by her father, defendant Paul Miltgen (defendant). While driving plaintiff home from a pom-pom practice at her school, defendant made a left turn in front of an oncoming vehicle driven by John Mast on Five Mile Road, a four lane highway, in Plainfield Township. There was evidence that defendant was under the influence of alcohol. Witnesses generally testified that Mast was traveling near the speed limit and could not have done anything to avoid the accident. As a result of the accident, plaintiff suffered a mild to moderate closed head injury and a cervical neck fracture.

On May 29, 1990, following a practice for her high school graduation ceremony, plaintiff was a passenger in the rear seat of a vehicle driven by Tammy Schneider. While proceeding north on Monroe Street in downtown Grand Rapids, a car driven by defendant Robert Gillette hit their car while making a U-turn. As a result of the accident, plaintiff broke her neck. A "halo" device was placed on her head, held on with four pins screwed into her head. Plaintiff wore the halo for four months, and then wore a neck brace for six months.

Plaintiff brought suit against defendant for injuries she sustained in the February 5, 1990 automobile accident. Plaintiff also brought suit against defendant Gillette for injuries she sustained in the May 29, 1990 automobile accident. The cases were consolidated. Following a twelve-day jury trial, plaintiff was awarded $14,000 in non-economic damages against defendant, and $6,000 in non-

economic damages against Gillette. The jury found that plaintiff was not entitled to any economic damages for work-loss from either defendant. The jury also determined that plaintiff was three percent negligent for her failure to wear a seat belt.

Plaintiff moved alternatively for a judgment notwithstanding the verdict, new trial, or additur in the amount of $150,000. The court denied plaintiff's motions.

We initially note that plaintiff has raised several claims relating to defendant Gillette. Plaintiff, however, has not claimed an appeal of the judgment against defendant Gillette in lower court docket no. 91-072961-NI, the case with which this case was consolidated below. This Court has jurisdiction to decide issues relating only to the judgment against defendant Miltgen in lower court docket no. 91-072850-NI, which is the case appealed. This Court does not have jurisdiction to decide issues relating to the lower court case that has not been appealed. MCR 7.203(A)(1); *People v Anderson*, 209 Mich App 527, 538; 531 NW2d 780 (1995). We therefore decline to address plaintiff's claims relating to defendant Gillette.

Plaintiff first argues that the trial court erred in restricting evidence of her work-loss to her $4.75 wage level attained while she worked at Design I and Hair Tech and in precluding the testimony of Roy Welton that she would have earned between $420,000 and $504,000 as a cosmetologist over the course of her forty-two year work life ,but for the injuries she suffered as a result of the automobile accident. We disagree.

Work-loss is not restricted to an injured person's wage level at the time of injury where she can show convincingly that she would have earned a higher income. *MacDonald v State Farm Mutual Ins Co*, 419 Mich 146, 151; 350 NW2d 233 (1984); *Kirksey v Manitoba Public Ins Corp*, 191 Mich App 12, 16; 77 NW2d 441 (1991). Where the fact of damage is not established, the question of the amount of damage is not reached. See, generally, 22 Am Jur 2d, Damages, § 4, pp 35-36, §§ 487 and 488, pp 568-573. Because the jury found that plaintiff had not suffered any economic damages for work-loss, the issue of whether the trial court erred in restricting evidence regarding the extent of plaintiff's work-loss is moot.

Next, plaintiff argues that defense counsel repeatedly attacked her character with sexual innuendoes, and questions about her interpersonal relationships, smoking, and consumption of alcohol as a minor ,even though the inquiries were irrelevant and unfairly prejudicial.

When reviewing an appeal asserting improper conduct of an attorney, this Court should first determine whether the claimed error was in fact error and, if so, whether it was harmless. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982). If the claimed error was not harmless, we then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. *Id.* at 103. If the error is preserved, then there is a right to appellate review; if not, we 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. *Id.* If we cannot say that the result was not affected, then a new trial may be granted. *Id.* Studied attempts to prejudice the jury and divert its attention from the merits of a case will not be tolerated. *Wischmeyer v*

Schanz, 449 Mich 469, 481; 536 NW2d 760 (1995). "However, evidence does not present a danger of unfair prejudice unless it threatens the fundamental goals of MRE 401 and MRE 403: accuracy and fairness." *Id*.

In this case, although plaintiff's claim for damages for problems with sexual functioning or interpersonal relationships may not have been the focus of her claim for damages, these issues were part of her claim for damages. Because the questions were relevant to plaintiff's claim for damages, it was fair for defense counsel to elicit testimony to refute the claim. MRE 401. Furthermore, contrary to plaintiff's assertion, the issue was injected into trial in response to questioning by her attorney and, when given the opportunity to withdraw any claim she had in this regard, plaintiff declined to do so. The comments and questions were generally responsive to terms used or questions asked by plaintiff's counsel on direct and redirect examination. In addition, the probative value of the questions and comments was not substantially outweighed by unfair prejudice such that the trial court abused its discretion in permitting this line of inquiry or in admitting the evidence. MRE 403; *Wischmeyer, supra*.

Plaintiff further claims that defense counsel improperly impugned her credibility with a reference to a possible claim under the Americans with Disability Act. However, plaintiff failed to raise this issue below, and failed to adequately argue it on appeal. This issue is therefore waived, and we decline to review it on appeal. *Roberts v Vaughn*, 214 Mich App 625, 631; 543 NW2d 79 (1995); *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995).

Plaintiff next argues that she was prejudiced by defense counsel's repeated reference to other dismissed claims by her against John Mast and Tammy Schneider. When there is no genuine dispute regarding either the existence of a release or a settlement between plaintiff and a codefendant or the amount to be deducted, the jury shall not be informed of the existence of a settlement or the amount paid, unless the parties stipulate otherwise. *Brewer v Payless Stations, Inc*, 412 Mich 673, 678-679; 316 NW2d 702 (1982). However, a one-time casual or vague reference to a large verdict in another case may not be sufficiently prejudicial to require a new trial. *Reetz, supra* at 106. Immediate instruction by the court may cure any error. *Id.* Where a judge fails to instruct the jury to ignore these references and the references were so numerous that it is doubtful any instruction would have been effective, a new trial is required. *Id.*

At oral argument, plaintiff conceded that several of the challenged comments were made by defense counsel for Gillette. In fact, defendant Gillette's counsel initially commented on the other lawsuits during opening argument. The initial reference by the instant defense counsel was during the cross-examination of Mast concerning whether he had met plaintiff previously. Plaintiff objected to the comment, and the court sustained the objection. The court then instructed the jury that Mast was not a party to this litigation and that the jury was not to concern itself with how the case may have been resolved with respect to Mast. The court also explained that there may be more than one proximate cause of an accident. The court instructed defense counsel not to pursue questions regarding settlements or the status of the case regarding Mast, but only question him regarding his conduct with regard to the accident.

Defense counsel also gave Mast a copy of the complaint and asked him to read it. Plaintiff objected, and the court ruled that the complaint was not evidence. Later, defense counsel asked plaintiff's sister "from what particular judgment" was plaintiff planning to buy a car. Plaintiff's counsel did not object, but stated that there have been no other judgments. Finally, during closing argument, defense counsel mentioned "defendant Mast." Plaintiff failed to object to the characterization. However, prior to closing argument, the trial court instructed the jury that there were no other judgments in favor of the plaintiff against anyone else.

Having reviewed the record, we are not convinced that defense counsel's actions caused the result or that plaintiff was denied a fair trial. *Id.* at 103. In fact, the more prejudicial comments were made by defense counsel for Gillette. Yet, defendant Gillette is not a party to this appeal. With regard to the comments made by defense counsel, the trial court sustained plaintiff's objections concerning any reference to the claims against Mast. The trial court also properly instructed the jury concerning the references. The court's immediate instructions cured any error. We are not convinced that defense counsel's references were so numerous that the court's instructions were not effective. We therefore conclude that, under these circumstances, reversal is not required.

Plaintiff also argues that the trial court erred in instructing the jury that it may determine whether John Mast or Tammy Schneider was the proximate cause of plaintiff's injuries. However, when a party fails to object to jury instructions, appellate review is precluded absent manifest injustice. *Phillips v Deihm*, 213 Mich App 389, 403; 541 NW2d 566 (1995). We do not find any manifest injustice caused by the trial court's jury instructions.

Finally, we reject plaintiff's argument that the cumulative effect of the errors in this case requires reversal and a new trial.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Richard A. Bandstra