STATE OF MICHIGAN

COURT OF APPEALS

NANCY FRANCISCO and JAMES FRANCISCO,

Plaintiffs-Appellants,

v

WILLIAM ROBERT LAUCHMAN a/k/a WILLIAM ROBERT LAUGHMAN,

Defendant-Appellee.

UNPUBLISHED
October 31, 1997

No. 198082
Oakland Circuit Court
LC No. 92-445187-NI

Before: Saad, P.J., and O'Connell and M. J. Matuzak*, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right from the orders of the circuit court denying plaintiffs' motion for a new trial and granting defendant's motion for taxation of costs, fees and sanctions pursuant to MCR 2.405(D). We affirm.

Plaintiff Nancy Francisco's claim for physical and psychiatric damages arises from an August 2, 1991 car accident between Mrs. Francisco and defendant. Prior to trial, defendant admitted that he was at fault for having caused the car accident. Thus, to obtain a verdict in her favor, plaintiff had only to prove that she suffered damages and that a causal relationship existed between her damages and defendant's breach of duty. Plaintiff alleged psychiatric and physical damages as a result of defendant's negligence.

On July 29, 1993, the trial court granted in part and denied in part defendant's motion for partial summary disposition as to plaintiff's alleged psychiatric damages. On appeal, this Court vacated the trial court's order, Docket No. 175304, and remanded the case for further proceedings. This Court noted that plaintiff could seek to recover "compensation for a purely mental component of damages." The case was tried before a jury in November 1995; the jury returned a verdict of no cause of action, finding that there was no proximate causation between defendant's negligence and plaintiff's alleged injuries. Plaintiff then filed a motion for a new trial, which was denied by the trial court in an order dated August 27, 1996. Defendant then brought a

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

motion for taxation of costs, fees and sanctions pursuant to MCR 2.405(D). On August 27, 1996, the trial court granted defendant's motion and awarded a judgment against plaintiffs in the amount of $11,910. Plaintiff appeals as of right from both judgments.

Plaintiff's first argument on appeal is that the verdict was against the great weight of the evidence and that the trial court abused its discretion in denying her motion for a new trial. We find that plaintiff has waived this issue for appellate review because she failed to provide this Court with a transcript of the hearing on plaintiff's motion for a new trial. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Nonetheless, we will address this issue based on the record before us. This Court reviews the trial court's grant or denial of a motion for a new trial for an abuse of discretion, *Scott v Illinois Tool Works, Inc*, 217 Mich App 35, 41; 550 NW2d 809 (1996), giving deference to the trial court's opportunity and ability to assess the credibility of the witnesses, *Kochoian v Allstate Ins Co*, 168 Mich App 1, 11; 423 NW2d 913 (1988). The jury's verdict should not be set aside if there is competent evidence to support it. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990). The determination of whether the verdict is against the great weight of the evidence often involves issues of credibility and circumstantial evidence. *In re Robinson*, 180 Mich App 454, 463-464; 447 NW2d 765 (1989). If there is conflicting evidence, the issue of credibility should be left to the factfinder. *Id.*

We find that the record supports the jury's verdict as well as the trial court's conclusion that plaintiff failed to prove damages. Not only was the testimony of plaintiff and her psychiatrist regarding damages inconsistent, but plaintiff was impeached by her own testimony on a number of occasions. Moreover, plaintiff failed to rebut the overwhelming evidence indicating that she had pain in her neck and back and headaches prior to the accident. Her own chiropractor testified that from 1989 to 1992, he treated plaintiff for problems similar to those complained of subsequent to the accident. Finally, the record indicates that the jury had reason to doubt the credibility of plaintiff's allegations. For example, plaintiff testified that she began seeing her psychiatrist, whose office was three hours from plaintiff's home, at the recommendation of her attorney. Given these facts, we do not believe that the jury's determination was against the overwhelming weight of the evidence or contrary to law. Accordingly, the trial court did not abuse its discretion in denying plaintiff's motion for a new trial.

Plaintiff also argues on appeal that the trial court abused its discretion in awarding attorney fees to defendant where plaintiff accepted and defendant rejected a substantial mediation award and defendant subsequently makes a nominal offer of judgment which was rejected by plaintiff. We review the trial court's decision to award sanctions under the offer of judgment rule, MCR 2.405, for an abuse of discretion. *JC Building Corp v Parkhurst Homes, Inc*, 217 Mich App 421, 426; 552 NW2d 466 (1996), and hold that the trial court's decision to award costs and attorney fees was proper under the circumstances.

A party may serve on an opposing party a written offer to stipulate to entry of the judgment offered. MCR 2.405(B). If the opposing party rejects the offer and the adjusted verdict is more favorable to the offeror than the average offer ("average offer" being the sum of an offer and a counteroffer, divided by two [MCR 2.405(A)(3)]), the offeree must pay to the offeror the offeror's actual costs. MCR 2.405(D). While a trial court may, in the "interest of justice," refuse

to award attorney fees, MCR 2.405(D)(3), this Court has held that a grant of fees under MCR 2.405 should be the rule rather than the exception. *Butzer v Camelot Hall Convalescent Centre, Inc (After Remand)*, 201 Mich App 275, 278; 505 NW2d 862 (1993). An insincere effort at negotiation may, however, justify denial of an award of attorney fees under the "interest of justice" exception. *Luidens v 63rd Dist Court*, 219 Mich App 24, 35; 555 NW2d 709 (1996).

In this case, defendant made an offer of judgment for $3,500 and plaintiff counter-offered for $75,000. When the jury returned a verdict of no cause of action, the verdict was more favorable to defendant than plaintiff and substantially less than the average offer. As a result, defendant could recover actual costs from plaintiff pursuant to MCR 2.405(D). *JC Building Corp, supra* at 426. Plaintiff argues that the trial court should have refused to award costs and attorney fees because defendant's offer of judgment was insincere and because the jury's verdict was against the great weight of the evidence. As previously discussed, however, we do not believe that the jury's verdict was against the great weight of the evidence. Moreover, we cannot say that defendant's offer of judgment was insincere. The purpose of the offer of judgment rule is to encourage settlement before trial. *Hamilton v Becker Orthopedic Appliance Co*, 214 Mich App 593, 596; 543 NW2d 60 (1995). Although the mediators awarded plaintiff $55,000, defendant, obviously confident about the strength of his case, rejected this award. When the jury returned a verdict in favor of defendant, defendant's confidence in the strength of his case was justified. We do not believe the offer of $3,500 was insincere compared to the jury's verdict of no cause of action. The record indicates that the trial court considered these factors, reviewed defendant's bill of costs and attorney fee billings, and considered plaintiff's objections. Under these circumstances, we conclude that the trial court did not abuse its discretion in awarding actual costs and attorney fees to defendant.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Michael J. Matuzak

[1] Since James Francisco's claim of loss of consortium is derivative in nature (loss of consortium), this Court's allusion to "plaintiff" will refer to Nancy Francisco only.