

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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TINA M. SMITH,

Plaintiff-Appellee,

v

WILLIAM D.A. REED and DEMONA REED,

Defendants-Appellants.

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UNPUBLISHED

July 10, 2007

No. 265516

Saginaw Circuit Court

LC No. 03-048194-NI

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Defendants William D.A. Reed and Demona Reed appeal as of right a judgment based on a jury verdict awarding plaintiff Tina M. Smith \$335,910.07 in economic and non-economic damages as a result of injuries that she sustained as a result of an automobile accident with defendant William. Defendants challenge the trial court's denial of their motion for judgment notwithstanding the verdict (JNOV), the trial court's denial of their motion for directed verdict, the trial court's instructions to the jury, the trial court's decision to admit certain evidence, and the jury's verdict. For the reasons set forth in this opinion, we affirm.

I. Facts and Procedural History

On May 12, 2000, plaintiff and defendant William were involved in an automobile accident. William, who was driving a car owned by his mother, Demona, struck plaintiff's vehicle from behind while plaintiff's vehicle was stopped for a school bus. Defendants acknowledge that the accident was caused by William's negligence.

Plaintiff filed a complaint against defendants, alleging that she suffered "severe and permanent injuries amounting to a serious impairment of body function and/or serious and permanent disfigurement" as a result of the accident. At trial, plaintiff testified that she had been employed at various jobs during the three years prior to the accident, and that for approximately five months prior to the accident, she worked for Saginaw County Mental Health. Plaintiff testified that after the accident she suffered from back pain and numbness in her left leg and that, as a result, she had knee surgery and had been receiving medical treatment up until the time of the trial. According to plaintiff, she was unable to work or to perform certain household services because of her pain.

At trial, plaintiff proffered the testimony of her father, two brothers, and two long-time friends, each of whom testified about the negative effects of the accident on plaintiff's physical

and emotional state. Plaintiff also introduced the videotaped depositions of Dr. James Jesko, an orthopedic surgeon who had operated on plaintiff's knee, and Dr. David Wiersema, a physician who treated plaintiff from approximately 11 months after the accident until the time of trial. Each testified regarding plaintiff's symptoms and the course of treatment for her injuries. Additionally, Robert Ancell, Ph.D., a vocational rehabilitation counselor in private practice, testified via videotaped deposition that, "based on the conclusions of her doctor, Dr. Wiersema, who had disabled her and had not released her to productive work," "no jobs . . . exist that . . . [plaintiff] could do and she remains unemployable[.]" Finally, plaintiff proffered the videotaped testimony of Calvin A. Hoerneman, a forensic economist, who testified about plaintiff's economic losses as a result of the injuries that she received in the accident. According to Hoerneman, plaintiff's total economic losses with respect to household work and wage loss was \$828,140.90 when reduced to present value.

At the close of plaintiff's proofs, defendants moved for a directed verdict on the issue of serious impairment of body function, which the trial court denied.

Defendants did not testify at trial. The sole witness for the defense was Dr. Joseph W. Chatfield, who also testified via videotaped deposition. Dr. Chatfield, a physician practicing in pain management, testified that he began treating plaintiff in August 2000. In Dr. Chatfield's opinion, plaintiff was exhibiting "symptom magnification." According to Dr. Chatfield, plaintiff "overreact[ed] to examination," which was "a very out-of-the-ordinary finding for someone who had no wasting or atrophy, could toe and heel walk, squat and recover, etc." In addition, Dr. Chatfield testified that the terms that plaintiff used to describe her symptoms were "excessive." Moreover, Dr. Chatfield testified that plaintiff claimed to have a "total global—meaning the entire leg—loss of sharp discrimination" when pricked with a needle, but that plaintiff "would basically have had to have a stroke . . . to have had that type of loss of sensation." Further, Dr. Chatfield testified that although he initially recommended physical therapy for plaintiff, he ultimately stopped it because "she was not putting forth her full effort" and demonstrated reactions to the treatment that "could be" consistent with symptom magnification. Plaintiff testified that she sought treatment from Dr. Chatfield on three occasions, but that "[h]e seemed mean" so she "asked my doctor to get me somebody else, because I didn't think he was treating me right."

The jury returned a verdict in favor of plaintiff, finding defendants liable for both economic and non-economic damages. Plaintiffs were awarded a total of \$335,910.07 in damages. Defendants filed a motion for JNOV, which the trial court denied. This appeal followed.

## II. Directed Verdict

Defendants argue that the trial court erred in denying their motion for directed verdict based on the absence of a serious impairment of body function. Our review of the grant or denial of a motion for directed verdict is as follows:

This Court reviews de novo the grant or denial of a directed verdict. In reviewing the trial court's decision, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed. A directed verdict

is appropriately granted only when no factual questions exist on which reasonable jurors could differ. If reasonable jurors could reach conclusions different than this Court, then this Court's judgment should not be substituted for the judgment of the jury. [*Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001) (internal citations omitted).]

Under the no-fault act, “[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1). “[S]erious impairment of body function” is statutorily defined as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7).

The first step in determining whether a plaintiff meets the statutory threshold is to decide whether there is a factual dispute concerning the nature and extent of the plaintiff’s injuries. *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004). If there is no factual dispute, or if the factual dispute is not material to the determination of whether the person has suffered a serious impairment of body function, then the trial court may decide the issue as a matter of law. *Id.* at 132. The second step is to determine whether an important body function has been impaired. *Id.* If an important body function has been impaired, it must be determined whether the impairment is objectively manifested. *Id.* Finally, it must be determined if the impairment affects the plaintiff’s general ability to lead his or her normal life. *Id.*

The trial court denied defendants’ motion for directed verdict because it concluded that there was a dispute concerning the nature and extent of plaintiff’s injuries that was material to whether she suffered a serious impairment of body function.

Defendants argue that plaintiff’s proofs did not demonstrate an objectively manifested injury that was caused by the automobile accident. Generally, in order for a plaintiff’s injury to be “objectively manifested,” it “must be capable of objective verification by a qualified medical person either because the injury is visually apparent or because it is capable of detection through the use of medical testing.” *Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006) (footnote omitted). “Subjective complaints that are not medically documented are insufficient” to meet the requirement of an objectively manifested injury. *Kreiner, supra* at 132. An injury is objectively manifested if such injury is confirmed by medical tests such as magnetic resonance imaging (MRI), electromyography (EMG), and x-rays. *Id.* at 124; *McDaniel v Hemker*, 268 Mich App 269, 276-278; 707 NW2d 211 (2005); *Williams v Medukas*, 266 Mich App 505, 508; 702 NW2d 667 (2005).

Contrary to defendants’ argument on appeal, we concur with the trial court that the testimony of plaintiff’s physicians was sufficient to allow a jury to determine whether plaintiff’s injuries were objectively manifested. Dr. Wiersema testified that he performed several physical examinations of plaintiff to determine the potential causes of her pain. According to Dr. Wiersema, he conducted, among other tests, a pinprick test designed to test plaintiff’s reflexes and response to painful stimuli, and a palpation of plaintiff’s hip, leg, and knee area in order to determine the level of plaintiff’s professed pain and weakness in the areas. During his examinations of plaintiff, Dr. Wiersema observed edema (swelling) in plaintiff’s knee, which caused him to suspect that a blood clot was causing plaintiff’s pain. The initial MRI of

plaintiff's knee showed "some fluid collection" and "some edema," which was confirmed by an ultrasound. A follow-up Doppler examination of the area was negative, and an MRI that was performed approximately four months after the first MRI indicated that the amount of fluid in plaintiff's knee "was stable." Dr. Wiersema testified, however, that the swelling in plaintiff's knee was potentially caused by "trauma" or "overuse . . . it's hard to say exactly what causes edema." Dr. Wiersema responded affirmatively when it was suggested by defense counsel on cross-examination that there were no objective signs to explain plaintiff's back pain.

Dr. Jesko's testimony is also relevant to whether plaintiff suffered an objectively manifested injury. According to Dr. Jesko, he performed surgery on plaintiff's knee approximately two years after the automobile accident because of her complaints of chronic pain. Dr. Jesko testified that he performed "arthroscopy to evaluate the surfaces, evaluate the meniscus, [and] make sure there wasn't a small tear." According to Dr. Jesko, during the surgery he identified "chondromalacia[,] which is a roughening of that surface or a loss of the normally smooth surface[.]" He further stated that "the surgical findings of chondromalacia to the patella are consistent with—with an anterior blow to the knee which certainly can happen in a car accident situation." Dr. Jesko stated that, "if [plaintiff] had crepitance<sup>1</sup> prior to her injury and it wasn't causing her pain, then something changed it. And—and that something, in my opinion, probably is the accident."

We hold that the swelling and edema described by Dr. Wiersema and the chondromalacia described by Dr. Jesko constitute evidence that plaintiff suffered an objectively manifested injury. Although Dr. Wiersema's testimony was more conflicted or equivocal regarding whether the accident was the cause of the swelling and edema, Dr. Jesko clearly articulated that the car accident could have caused the chondromalacia. In any event, we must resolve any conflicts in the evidence in plaintiff's favor, as plaintiff was the nonmoving party, and both doctors testified that the conditions they observed in plaintiff's knee could have been caused by trauma. We therefore conclude that the testimony of Dr. Wiersema and Jesko was sufficient to create a question of fact for the jury on the issue whether plaintiff suffered an objectively manifested injury.

We also hold that there was sufficient evidence to create an issue of fact regarding whether plaintiff's injuries affected an important body function that affects her general ability to lead a normal life. Generally, "[a]n important body function is a function of the body that affects the person's general ability to live a normal life." *Kern v Blethen-Coluni*, 240 Mich App 333, 340; 612 NW2d 838 (2000). See also MCL 500.3135(7). "It is insufficient if the impairment is of an unimportant body function. Correspondingly, it is also insufficient if an important body function has been injured but not impaired." *Kreiner, supra* at 132. Important body functions include the use of a person's back, hip, and legs. *Id.* at 136. Additionally, our Supreme Court has held that "[w]alking is an important body function, the serious impairment of which constitutes the 'serious impairment of body function'." *Cassidy v McGovern*, 415 Mich 483, 505; 330 NW2d 22 (1982), overruled in part on other grounds *DiFranco v Pickard*, 427 Mich 32 (1986).

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<sup>1</sup> Dr. Jesko defined "crepitance" as the "grinding sensation that you can feel when you bend the knee up and down."

In order to satisfy MCL 500.3137(7), a plaintiff's overall course of life must be affected by the accident-related injuries. *Kreiner, supra* at 130-131. A minor interruption of some aspects of the plaintiff's life is not enough. *Id.* at 130. In deciding whether the plaintiff's normal life has been altered, the trial court should compare the plaintiff's life before and after the accident and determine whether the injuries have actually affected the plaintiff's "general ability" to conduct the course of his or her life. *Id.* at 132-133. "[M]inor changes in how a person performs a specific activity may not change the fact that the person may still 'generally' be able to perform that activity." *Id.* at 131. Restrictions must be directed by a physician and cannot be self-imposed. *Id.* at 133 n 17. *Kreiner* provides the following nonexhaustive list of objective factors the trial court may consider in evaluating whether the plaintiff's general ability to conduct the course of his normal life has been affected: "(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery." *Id.* at 133 (footnote omitted).

Plaintiff testified that the injuries to her knee, leg, and lower back resulted in chronic pain and rendered her unable to walk without a cane. As a result of her pain, plaintiff underwent knee surgery. These injuries are similar to those that our Supreme Court recognized as an impairment to important body functions in *Kreiner, supra* at 136, and therefore constitute an impairment of an important body function. Furthermore, plaintiff's proofs at trial support the jury's finding that plaintiff has not maintained her general ability to lead her normal life. The testimony at trial indicated that plaintiff's treating physician, Dr. Wiersema, restricted her from working because he did "not feel . . . [that plaintiff] could be productive at any job due to her chronic pain." Plaintiff testified that she was forced to move from her apartment "maybe a year or two after the accident" because she "couldn't afford the rent" as a result of her job loss, and that she ultimately moved from an apartment that she shared with her son to a living situation that alternated between her parents' home and that of a friend. Further, Dr. Wiersema testified that plaintiff's injuries resulted in a prognosis of "not remediable," which meant that "given her presentation and at that point having had pain for that many years and . . . failing to get relief with any of the modalities, the odds of . . . [her injuries] getting better . . . are . . . slim. The longer it lasts, the less likely that we'll be able to . . . do something." Based on Dr. Wiersema's testimony, it is clear that the impairment is one of substantial duration and that the prognosis for eventual recovery was slim. Dr. Wiersema restricted plaintiff from working and she was forced to move from her apartment because she could no longer afford it. Importantly, the work restriction, which resulted in plaintiff having to move, was placed upon plaintiff by a physician and was not a self-imposed restriction. Based on the evidence, we hold that plaintiff's general ability to conduct the course of her normal life was affected by her impairment. Therefore, the trial court did not err by denying defendants' motion for directed verdict.

### III. JNOV

Defendants argue that the trial court erred in instructing the jury pursuant to M Civ JI 17.01 and in denying defendants' motion for JNOV on the basis of the improper instruction.

This Court reviews claims of instructional error as follows:

We review claims of instructional error de novo. In doing so, we examine the jury instructions as a whole to determine whether there is error requiring

reversal. The instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them. Instructions must not be extracted piecemeal to establish error. Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury. We will only reverse for instructional error where failure to do so would be inconsistent with substantial justice. [*Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000) (internal citations omitted).]

When reviewing a trial court's decision on a motion for JNOV, this Court must "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). "Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted." *Id.*

M Civ JI 17.01 provides as follows: "The defendant has admitted that [*he/she*] is liable to the plaintiff for any [*injury/damages*] which [*he/she*] caused. You are to decide only (what [*injuries/damages*] were caused by defendant and) the amount to be awarded to the plaintiff for such [*injury/damages*]." The trial court's instructions to the jury included M Civ JI 17.01:

You must consider all the evidence regardless of which party produced it. When I use the word proximate cause [*sic*], I mean first that the negligent again [*sic*] conduct must have been a cause of plaintiff's injury; and, second, that the plaintiff's injury must have been a natural and probable result of the negligent conduct.

There may be more than one proximate cause. To be a proximate cause, the claimed negligence need not be the only cause or the last cause. A cause may be proximate although it and another cause act at the same time or in combination to produce the occurrence.

*The defendants have admitted that they are libel [*sic*] to the plaintiff for any injury and damage they caused. You are to decide only what injuries and/or damages were caused by the defendant [*sic*] and the amount to be awarded to the plaintiff for such injury and/or damage. [Emphasis added.]*

Defendants argue that M Civ JI 17.01 required the jury to hold defendants liable for plaintiff's damages even if defendants were not the proximate cause of plaintiff's injuries and that the instruction was inconsistent with substantial justice. Both the plain language of M Civ JI 17.01 and the context in which it was presented to the jury support a finding that the trial court did not err in giving the instruction. Defendants admitted that defendant William was negligent in causing the automobile accident. The plain language of M Civ JI 17.01 clearly requires that the jury decide which, if any, of plaintiff's injuries were caused by defendant and the amount of damages to be awarded to plaintiff because of defendant's negligence. Moreover, the trial court specifically instructed the jury that: "[I]n order to recover damages for either economic or noneconomic loss, plaintiff has the burden of pro[ving] . . . that the negligence of the defendant was a proximate cause of injury to the plaintiff." Thus, defendants' contention that the instruction was inconsistent with substantial justice because it required the jury to award damages irrespective of causation is without merit.

Furthermore, read as a whole, the jury instructions include all the elements of plaintiff's claims for economic and non-economic damages under the no-fault act and do not omit material issues, defenses, or theories that are supported by the evidence. Defendants claim error in the trial court's giving of one particular instruction, M Civ JI 17.01; generally, instructions must not be extracted piecemeal to establish error. *Case, supra* at 6. Therefore, even if the challenged instruction standing alone would possibly create confusion in a jury, which we do not believe it does, a somewhat imperfect instruction is not sufficient grounds for this Court to reverse the lower court. *Id.* For these reasons, the trial court did not err by giving the disputed instruction and did not err in denying defendants' motion for JNOV on this basis.

#### IV. Exclusion of Evidence

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

At trial, defendants sought to introduce evidence that plaintiff had been injured at work three years prior to the automobile accident and that she had recovered workers' compensation benefits as a result of the injury. Defendants proffered this evidence to support their theory that plaintiff was magnifying the symptoms of her injury to recover damages in the instant lawsuit. The trial court denied defendants' request to introduce the evidence as proof of motive, but permitted the evidence for the limited purpose of impeaching plaintiff's prior testimony. Specifically, the trial court ruled as follows:

I am inclined in this case not to allow it in under 404(b), although I do believe the door was opened with plaintiff's testimony about being able to do everything before [the accident] and not being able to do things since. The record will reflect the specific testimony that was offered.

I will allow some recross-examination on that issue for impeachment purposes.

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Generally, MRE 404(b) is a rule of inclusion, which means that a trial court may "admit other acts evidence *whenever* it is relevant on a noncharacter theory," *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993) (emphasis in original), amended 445 Mich 1205 (1994), subject to certain limitations. MRE 404(b) applies equally to both civil and criminal cases. *Lewis v LeGrow*, 258 Mich App 175, 207; 670 NW2d 675 (2003). In order for evidence to be admissible under MRE 404(b), the following three-prong test must be met: First, the other acts evidence must be for a purpose other than a character or propensity theory. *People v Sabin (After Remand)*, 463 Mich 43, 55; 614 NW2d 888 (2000). Second, the evidence must be relevant to an

issue of fact that is of consequence at trial. *Id.* Third, under MRE 403, the danger of undue prejudice must not substantially outweigh the probative value of the evidence. *Id.* at 55-56. Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. *Id.* at 56.

Defendants proffered the evidence of plaintiff's prior injury and related workers' compensation claim to demonstrate a motive for magnifying her symptoms in the instant case. Under MRE 404(b)(1), evidence of a prior act is admissible as proof of plaintiff's motive in the present case. Therefore, the first prong of the test has been met.

The next determination involves deciding whether the evidence is relevant in the instant case. *Sabin, supra* at 55. "All relevant evidence is admissible" under MRE 402. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence, therefore, is evidence that is "material (related to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence)." *Sabin, supra* at 57. A material fact is one that is "in issue" in the sense that it is within the range of litigated matters in controversy." *Id.* (quoting *United States v Dunn*, 805 F2d 1275, 1281 (CA 6, 1986)).

Essentially, defendants argue that the fact that plaintiff received workers' compensation benefits for a past work-related injury makes it more probable that she was engaging in symptom magnification in order to receive secondary gain from the automobile accident at the center of the present case. Further, although defendants argue that "[p]laintiff was a symptom magnifier because she had learned the ropes during her previous workers' compensation experience," absent evidence—which defendants did not proffer at trial—that plaintiff's prior injury was feigned, or "magnified," in order to garner workers' compensation benefits, plaintiff's prior injury does not appear to make defendants' symptom magnification theory more probable than not in this case. Therefore, defendants' proffered evidence is not logically relevant to the instant matter, and we need not engage in further analysis in order to conclude that the trial court did not err in denying for the purpose of proving motive the introduction of defendants' proffered evidence of plaintiff's prior injury and related workers' compensation benefits. This is because such evidence was irrelevant to the issues being litigated and the probative value of the evidence is substantially outweighed by the risk of undue prejudice.

## V. The Verdict

Defendants assert that the jury's verdict is "logically and legally inconsistent" based on the timing it awarded damages and the length of time it awarded damages and that it is against the great weight of the evidence.<sup>2</sup> To determine whether a verdict is against the great weight of

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<sup>2</sup> Defendants also argue that the jury's verdict is excessive; however, this argument is not preserved for appeal because defendants did not move for remittitur or a new trial on this ground. *Pena v Ingham Co Rd Comm*, 255 Mich App 299, 315; 660 NW2d 351 (2003). See also MCR (continued...)

the evidence, we review the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon*, 456 Mich 625 (1995). In reviewing a claim that a verdict is inconsistent, a court must make every effort to resolve the inconsistencies. *Kelly v Builders Square, Inc*, 465 Mich 29, 41; 632 NW2d 912 (2001). “If there is an interpretation of the evidence that provides a logical explanation for the findings of the jury, the verdict is not inconsistent.” *Granger v Fruehauf Corp*, 429 Mich 1, 7; 412 NW2d 199 (1987). Generally, “every attempt must be made to harmonize a jury’s verdicts. Only where verdicts are so logically and legally inconsistent that they cannot be reconciled will they be set aside[.]” *Id.* at 9.

Reviewing the evidence as a whole, we conclude that the jury’s award is not against the great weight of the evidence. We cannot find, as argued by defendants, that the jury verdict is illogical such that it defies explanation. The jury’s verdict suggests that the jury believed even if plaintiff would be free of the physical pain and suffering that she had been experiencing, given the amount of time she was out of the workplace and the testimony of Dr. Wiersema that “the longer it lasts, the less likely that we’ll be able to . . . do something . . .,” plaintiff would not be able to ever re-enter the workforce. Thus because we are able to harmonize the jury’s verdict, we decline defendants’ invitation to set aside the verdict of the jury in the case as being so legally inconsistent that it cannot be reconciled. *Allard v State Farm Ins Co*, 271 Mich App 394; 722 NW2d 268 (2006).

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Stephen L. Borrello

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(...continued)

2.611(A)(1)(d). Defendants’ cursory assertion in their motion for JNOV that “plaintiff . . . received damages for excess economic loss” is not sufficient to preserve this issue because it was merely a brief and cursory reference that was not developed, it was not contained in a motion for remittitur or new trial, and the trial court did not address it. In any event, based on the testimony, we observe that the jury’s award was not excessive.