

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

DEVIN DANTE,

Plaintiff,

v

File No. 07-25778-NI
HON. PHILIP E. RODGERS, JR.

PIONEER STATE MUTUAL INSURANCE
COMPANY,

Defendant.

L. Kent Walton (P25123)
Attorney for Plaintiff

Mark D. Williams (P41120)
Attorney for Defendant

DECISION AND ORDER
REGARDING PLAINTIFF'S MOTION FOR
NEW TRIAL OR AMENDMENT OF JUDGMENT

The Plaintiff has filed a Motion for a New Trial or Additur. A motion for new trial is governed by MCR 2.611(A)(1). Specifically, Plaintiff argues that he is entitled to a new trial because of "a verdict clearly or grossly inadequate or excessive." MCR 2.611(A)(1)(d). Alternatively, Plaintiff seeks additur pursuant to MCR 2.611(E).

The case was tried to the jury over a period of two days. The Defendant was Plaintiff's underinsurance carrier and, pursuant to the parties' agreement, the jury was made aware of the underinsured policy limits (\$300,000) as well as the insurance coverage paid by the underlying carrier (\$20,000) who insured the at-fault driver. The Plaintiff was a 14-year-old belted passenger at the time of the collision and was without comparative fault.

The precise injury suffered by the Plaintiff was severe facial trauma caused by the edge of a snowboard striking his face during the motor vehicle collision. Without doubt, Plaintiff has been left with permanent facial scarring. The scar was described as one of approximately six inches in

length running diagonally from his hairline down the middle of his forehead into his eyelid. The question for the jury was whether this permanent facial scarring constituted permanent serious disfigurement.

Initially, the Defendant challenged liability on the grounds that the Plaintiff was not a resident in his mother's household and was not entitled to the coverage afforded by her underinsured motorist coverage. The jury found the Plaintiff to be a resident of his mother's household and that decision has not been challenged.

As to damages, Plaintiff sought compensation for permanent serious disfigurement and serious impairment of body function. The jury rejected the claim of permanent serious disfigurement and awarded \$30,000 for the serious impairment of body function claim. It is these damage determinations that are now at issue.

Permanent Serious Disfigurement

Both parties recognize that juries are given great latitude in making damages determinations. Quoting *Kelly v Builders Square Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001), the defendant properly notes, "The Jury is free to credit or discredit any testimony. It may evaluate the evidence on pain and suffering differently from the proof of other damages. No legal principle requires the jury to award one item of damages merely because it has awarded another item."

The jury instruction regarding damages is consistent with the *Kelly* opinion and advises jurors that they must use their sound judgment in assessing damages since some elements of damage cannot be proved in a precise dollar amount. SJI 2d 50.01.

Following the injury and the surgical repair of Plaintiff's wounds, the scar was revised by laser on two occasions. Plaintiff was present and testified in Court. He was also allowed to approach the jury so that they could take a close look at him and the scar. Recent photographs as well as photographs taken shortly after the time of the accident were also provided to the jury. The jurors determined that the scar did not constitute permanent serious disfigurement.

As the Court stated in ruling on the Defendant's Motion for Summary Disposition, "In this Court's view, juries are far better positioned to assess whether this is permanent serious disfigurement on this young man or not . . . The scar is in the eye of the beholder. I would certainly agree with Mr. Williams that the fact of the scar, the length of any particular scar, and the fact that it's on the face are not necessarily determinative of permanent serious disfigurement."

Here, having presided over the trial and having observed the Plaintiff's scar, the Court declines to grant a new trial or provide an award of damages for permanent serious disfigurement. The case presented a close question and the verdict may well have gone the other way if the Plaintiff was a young woman. However, the jury's finding that the scar was not compensable was not so clearly or grossly inadequate as to justify a new trial.

Serious Impairment of Body Function

The issue of additur presents a more challenging question. The Michigan Supreme Court has often addressed the issue of serious impairment of important body function. Current case law requires that an injury alter the course or trajectory of one's life. The No-Fault Act does not require an injury to be permanent to be serious and the jury instructions provided to citizens since the onset of no-fault have never required that an injury be permanent to be serious. In this particular case, the jury did not find any component of future damages. No physician placed any present limitation on his activities. The Plaintiff had a significant surgery to repair an egregious wound from which he has fully recovered. The Plaintiff has fairly described the evidence regarding this surgery as follows:

1. Open reduction and internal fixation of the "crushed" frontal sinus requiring elevating "with great care the fractured portions of the anterior table of the frontal sinus";
2. Reapproximating and holding in place the fractured portion of the orbital rim "with a 1.2 four hole plate";
3. Bending and fitting a 1.2 [titanium mesh] screen carefully over the fractured area and cutting the screen to size;
4. Elevating the crushed and depressed pieces and securing them "to this screen with 1.2 screws at multiple locations";
5. Attaching this screen "to the secure bone both superiorly and inferiorly to the fracture";
6. Using a "heavy elevator" to "outfracture the right nasal bone" and "application of a nasal case."

In addressing the issues of additur or remitter, the Court's opinion must be based on objective considerations. In other words, the Court simply cannot substitute its judgment for that of the jury. Again, the Plaintiff did experience a significant injury. The surgical repair required the installation of a mesh plate and multiple screws. The injury, the surgery and recovery there from were obviously painful experiences associated with a period of embarrassment and humiliation.

Both parties recognize the limitations on the Court's inquiry as described in *Palenkas v Beaumont Hosp*, 432 Mich 527, 443 NW2d 354 (1989) and *Pocsi v Lowry-Jensen*, 2005 WL 2675082 (Mich App) (2005).

This inquiry essentially has three components. Was the verdict a result of improper methods, prejudice, passion, partiality, sympathy, corruption, or mistake of law or fact? The answer to this component is clearly no. Second, was the verdict within the limits of what reasonable minds would deem just compensation for the injuries sustained and, third, whether the amount awarded is comparable to awards in similar cases within the state or other jurisdictions? Here, the Court must express surprise at the jury's determination. No injury analogous to this facial injury on a 14-year-old boy surgically repaired with a mesh plate and multiple screws has ever been compensated in so low an amount in the history of this Court.

For a number of years, this Court has made an effort to collect information regarding civil personal injury trials tried in the 13th Circuit, summarize that information and make available the summaries to attorneys. See, Exhibit A. Attorneys use the Exhibit A summaries as guideposts for their own negotiations, as "reality checks" in facilitative mediation or as historical arguments in a case evaluation. While juries have not hesitated to no cause individuals in cases involving serious injury or death where there is no liability, they have not been so penurious where actual liability has been demonstrated in the absence of comparative fault.

As can be seen from Exhibit A, significant injuries with clear liability and no comparative fault tend to generate significant jury awards. One exception was a third-party automobile case that was tried in 2001. There, the injury was an open and comminuted fracture of the tibia and fibula which was resolved with internal fixation by rod. The jury awarded \$35,000.

Here, the injury was far more significant, the surgical repair was substantially more extensive and the injury was to the head and face rather than the lower leg. Considering the Court's experience in three northwestern Michigan counties and comparing it with those cases reviewed in 1989 by the Michigan Supreme Court in *Palenkas*, it is this Court's opinion that the verdict is not within the limits of what reasonable minds would deem just compensation for the injury sustained and is less than amounts actually awarded in comparable cases. Having made this determination, this Court believes its obligation is to enter an award in the lowest amount that would be consistent with what reasonable minds would deem just compensation and that is

comparable to awards in similar cases. Stated alternatively, it is not for this Court to sit as the trier of fact and make a new de novo determination of damages.

The same injury with this same scar in 1989 could have, according to *Palenkas*, supported jury verdicts ranging from \$100,000 to as much as \$500,000. However, this jury did not find permanent serious disfigurement or any future impairment to the Plaintiff's ability to earn a living or any future probable exposure to another surgery or any ongoing pain and suffering. Conversely, 1989 was 19 years ago.

This is a closed period injury and the damage award must be for the pain and suffering associated with the accident itself, the surgical repair and the period of healing that followed. It would also properly include a component for the emotional consequences of the accident, the surgery and the embarrassment and humiliation associated with the facial disfigurement as he healed. The Plaintiff was 14 at the time of the accident. This is a difficult time in any person's life and the embarrassment of even a short-term facial disfigurement cannot fairly be ignored.

For all the foregoing reasons, it is this Court's determination to deny the Motion for New Trial and grant additur for a gross jury verdict award of \$100,000. From this award shall be subtracted the sum of \$20,000 previously paid by the at-fault driver's insurance company.

A judgment in the net amount of \$80,000 shall be noticed for entry by the Plaintiff pursuant to the provisions of MCR 2.602(B)(3).

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: _____