

News Story

Driver Entitled To \$1M Jury Award For Economic Damages

Trial Court's Remittitur Abuse Of Discretion

A driver who was severely injured when her car collided with a Corvette that had spun out on a slippery road was entitled to the full \$1 million jury award she received for economic damages, the Michigan Court of Appeals has ruled.

The trial court had reduced the award to slightly more than \$9,000 per year, subject to an annual growth rate of 3 percent.

On appeal, the defendants argued the reduction was appropriate because the jury award was "grossly excessive" in light of the fact that it was based on an \$8 per hour job the plaintiff had held for only about a month.

But the Court of Appeals disagreed, reinstating the jury award.

"Viewing the evidence most favorable to plaintiff, the jury could have found that she would have continued her full-time employment as a unit clerk if she was not injured," the panel wrote. "Because the jury's verdict was within the range of the evidence presented at trial, the trial court abused its discretion by remitting economic damages."

The 9-page decision is *Fini v. General Motors Corp., et al.*, Lawyers Weekly No. 08-48452. Judges Jessica R. Cooper, William B. Murphy and Kirsten Frank Kelly signed the per curiam opinion.

Appeasement Failed

Detroit attorney Mark R. Bendure, who handled the plaintiff's appeal, said he thinks the trial court reduced the economic loss award in order to appease the defendants.

"Sometimes in significant cases trial judges will grant a modest remittitur on some part of the case in the hope that the defendant won't appeal because it will now have something to lose — or to put both parties in a position where they have something to lose," he explained.

Southfield practitioner Lawrence E. Gursten, one of the plaintiff's trial attorneys, agreed with Bendure's assessment.

"I consider Judge Mester a very good, fair judge," he said. "I think in his mind he was trying to pick a figure both sides could live with."

According to Gursten, the defendants were playing hard ball and the judge may have felt as though he could placate them.

"General Motors was playing very harshly through this entire case," Gursten recalled. "They never offered more than \$100,000 and even contested liability in a clear liability situation. They hard-lined it through negotiations during appeal and took an extremely hard-line position with a client with a severe brain injury and no money."

Bendure added that, once the case was appealed, he knew his client would prevail because the law is clear.

"A jury is permitted to base its future damage calculations on the plaintiff's earnings at the time of the injury even if that level was higher than at any time in the past," he explained.

Bendure also credited extensive trial preparation.

"It was helpful that trial counsel — Steven Gursten and Leonard Koltonow — got admitted into evidence documentary evidence prepared by a rehab economist that listed the plaintiff's future damages that supported the jury's verdict," he said. "It's definitely helpful if you can get something like that admitted into evidence because then you have something in black and white that the jury can take back to the jury room to use for its calculations."

Counsel for the defendants could not be reached for comment before deadline.

Little Red Corvette

On May 9, 1996, defendant Jimmy Frederick Hill left work at defendant General Motors Corporation's proving ground in a company Corvette. It began to rain heavily and the Corvette fishtailed. Hill testified that although he tried to regain control, the Corvette crossed the centerline and ended up perpendicular to the road. Hill said he was traveling about 45 mph in a 55 mph speed zone.

Plaintiff Angela R. Fini's vehicle then collided with the Corvette.

Defendant Hill approached the plaintiff's vehicle and noticed she was unconscious. Emergency workers used the Jaws of Life to extract the plaintiff from the vehicle. A paramedic noted that the plaintiff was alert but did not know what had happened.

The plaintiff was transported to the hospital and was released four days later. She said she had no memory of the actual accident, but did recall that someone was asking her questions. She also said she had head, neck and back pain after the accident.

The plaintiff subsequently sued the defendants for automobile negligence, claiming they violated [MCL 257.626\(b\)](#), careless or negligent driving on a highway, [MCL 257.627](#), speed restrictions given existing conditions, and [MCL 257.401](#), liability of vehicle owner. Evidence at trial indicated that the plaintiff suffered brain damage.

A jury awarded the plaintiff \$600,000 for past-noneconomic damages, \$2,584,934 for future noneconomic losses, and \$1,074,360 for economic losses. The defendants moved for a new trial or remittitur. Although the trial court denied the motion for a new trial, it granted the motion for remittitur in part, reducing the \$1,074,360 award for economic losses to \$9,013 per year, subject to an annual growth rate of 3 percent.

Damages

The panel focused its analysis on the trial court's determination of the damages issue.

It agreed with the plaintiff that the trial court improperly reduced her economic damage award from \$1,074,360 to \$9,013 per year.

"Work loss under the no-fault act refers to the actual loss of income from work that an injured person would have performed after the loss of income exceeds the three-year limitation," the panel explained.

The plaintiff was 27 years old when the accident occurred. She had obtained her GED in 1991 and got a job as a district court traffic clerk for four months. In 1992, she had a child and did not work until 1995, when she got a housekeeping job at a hospital. A month before the accident, the plaintiff became a full-time unit clerk at the hospital making just over \$8 per hour.

One of the plaintiff's experts, Ronald Smolarski, a certified rehabilitation economist, estimated the plaintiff's future economic losses on the basis of her job as a unit clerk.

The trial court rejected Smolarski's projection because the plaintiff had never held a full-time job for more than a year.

The court then reduced the award to \$9,013 per year, subject to an allowable growth rate of 3 percent per year.

The panel found this to be an abuse of discretion.

"The jury's verdict was slightly lower than Mr. Smolarski's assessment but clearly tracked the evidence presented," the panel declared.

"If a jury verdict is within the range of evidence, remittitur is inappropriate."

Invaluable

The panel next rejected the defendant's argument that the trial court improperly denied their motion for a new trial or failed to fully grant their motion for remittitur, characterizing the award as "grossly excessive."

In so doing, the panel noted that, "a dollar amount can never truly be placed on an individual's humiliation or pain and suffering."

It then addressed the evidence.

"Contrary to defendants' claims on appeal, the evidence shows that plaintiff was unable to lead a normal life after the accident," the panel remarked, noting that the plaintiff's experts testified regarding her lack of emotional control and that the plaintiff said she could not return to work or school and was told not to have more children.

Although the defendants also claimed the verdict was excessive compared to awards in other brain damage cases, the panel rejected this argument for lack of support.

"Defendants have failed to cite any judicially reviewed awards to support their position that the jury's award for noneconomic losses was excessive," it observed. "Based on the evidence as a whole and the arguments presented, we cannot conclude that the trial court's decision in this case was 'so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion."

Sudden Emergency

The panel also rejected the defendants' argument that the trial court should have instructed the jury on the sudden emergency doctrine, which is used to rebut a presumption of negligence arising from the violation of a statute.

According to the panel, the only statutory provision to which the sudden emergency doctrine could apply is [MCL 257.627](#) which provides: "A person driving a vehicle on a highway shall drive at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway and of any other condition then existing."

However, the panel pointed out that the sudden emergency doctrine does not apply when the only excuse is a condition that the driver is supposed to consider.

"The 'any other condition' language in [MCL 257.627\(1\)](#) has been construed to encompass weather conditions and requires drivers to regulate their speed accordingly," the panel explained. "Because the only excuse offered by defendants in this case was the heavy rain, the trial court did not abuse its discretion by refusing to instruct the jury on the sudden emergency doctrine."

SPECT Scan

Finally, the panel rejected the defendants' argument that the trial court improperly allowed the plaintiff to introduce a single photon emission computed tomography (SPECT) scan at trial.

According to the defendants, "the trial court abused its discretion by failing to 'assume its role as gatekeeper in controlling the admission of only reliable evidence.'"

The Court of Appeals disagreed.

"Plaintiff provided the trial court with several affidavits and transcripts of deposition testimony from physicians, psychologists, and psychiatrists in the surrounding medical community," the panel noted. "In general, these affidavits supported the proposition that SPECT scans have been recognized within the medical and psychological communities as a reliable tool for assisting in the diagnosis of closed head injuries."

Furthermore, the panel explained, the articles provided by the plaintiff suggested that SPECT scans are considered helpful in identifying abnormalities caused by head trauma not readily apparent on other tests.

In fact, it pointed out, the author of one of the articles cited by the defendants seemed to endorse the use of SPECT scans in a subsequent article as being helpful in revealing abnormalities that appear normal on CT or MRI scans.

"[O]n this record, we cannot conclude that the trial court abused its discretion when it determined that the SPECT images were admissible," the panel concluded. "The evidence demonstrated that SPECT scans were generally accepted within the scientific community as having an ability to

show abnormalities in brain functioning. They are used in the same fashion that a CT scan might be used by an expert to evaluate a patient and reach a diagnosis."

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