SECOND DIVISION
November 4, 2020

Nos. 1-19-2027 & 1-19-2254 (cons.)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ARI MACH, a minor, by his guardian and next friend, Steven Mach,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 17 L 4447
	)	
BOARD OF EDUCATION OF THE CITY OF CHICAGO,	)	The Honorable Daniel Joseph Lynch,
	)	Judge Presiding.
Defendant-Appellant.	)	

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Lavin and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant was not entitled to judgment notwithstanding the verdict where the direct and circumstantial evidence was sufficient to allow the jury to conclude that the dangerous condition at issue was a proximate cause of the plaintiff's injuries. The trial court did not abuse its discretion in granting a new trial on damages for disfigurement.

¶ 2 Following a jury verdict in favor of the plaintiff, Ari Mach, a minor, by his guardian and next friend, Steven Mach, and against the defendant, the Board of Education of the City of Chicago, the trial court entered orders denying the defendant's motion for judgment notwithstanding the verdict and partially granting the plaintiff's motion for a new trial on damages. This court allowed

the defendant's petition for an interlocutory appeal of these orders of the trial court. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This is a premises liability case involving a nine-year-old plaintiff who was injured while playing tag with other children at a playground when he ran into a piece of playground equipment referred to as a "talk tube." A talk tube is a tube or pipe that runs underground and allows children's speech to be transmitted between the two ends of the tube. The talk tube in this case was a metal pipe. Each end of it rose about four and a half feet straight up out of the ground, and a round metal "box" with holes for speaking and listening was attached to each end. It is undisputed that the end of the talk tube that the plaintiff ran into did not have a cap on top of the speaking box, but the speaking box at the opposite end of the tube did have a cap.

¶ 5 The testimony and evidence at trial was that on Saturday, October 15, 2016, the plaintiff and his ten-year-old brother went with their father, Steven Mach, to the playground at Otis Elementary School in Chicago. The playground was owned by the defendant, and it was open to the public. Steven testified that while he was watching his sons playing tag, he had an emergency bowel movement and needed to go to a restroom. His house was about two blocks away. He told his sons that he really had to go to the bathroom, that he was going to run home to do so, and that he would be right back. He estimated he was away for about 20 minutes. When he returned, he noticed his older son waving to him while standing next to a man huddled on the ground. Steven ran to where they were, and he saw the plaintiff on the ground and a small pool of blood next to the talk tube. The other man was holding a blanket against the plaintiff's face. Steven looked at the plaintiff's nose and saw that it was injured. He identified a photograph showing the injuries to the plaintiff's nose taken that day, which was admitted into evidence.

¶ 6 The plaintiff was taken by ambulance to Lurie Children's Hospital, where he underwent surgery to repair his nose. He required stitches, and Steven testified that the plaintiff's nostril appeared "droopy" once it had healed and that he continued to have a scar. The plaintiff then underwent a second surgery in an attempt to fix the asymmetry of his nose, but it was not successful in doing so. The plaintiff's nose is still asymmetrical, and he still has a scar. He testified that the plaintiff's nose was symmetrical before his injury at the playground.

¶ 7 The plaintiff explained in his testimony that a talk tube was a piece of playground equipment that children would speak though and have the sound heard at the other end. He identified several photographs depicting the talk tube that he ran into when he was injured, which were admitted into evidence. He testified that one end of the talk tube had a cap on it, but the pole he ran into did not have a cap on it on the day he was injured. The plaintiff testified that on the day at issue, he was playing tag with some other children on the playground. His dad told him that he needed to leave to go to the bathroom, and his injury occurred about 15 or 20 minutes after that. He explained that he was being chased by one of the other children, and he looked back to see if anybody was behind him. When he turned his head back around, he hit his face on the pole. He confirmed that several photographs accurately depicted the pole he ran into. The pole did not have a cap on it. There was no other covering or warning tape on the pole.

¶ 8 After he was injured, he fell to the ground. A man came up to him and asked him who he needed to have called. At this point, his dad came back. He was taken by ambulance to the hospital. He underwent surgery and had stitches for three months. After the stitches came out, he had a second surgery. He testified that he still has a scar today, and he notices that the side of his nose that struck the pole "droops down a little bit." During the plaintiff's testimony, the jury was given the opportunity to view his face up close.

¶ 9 On cross-examination, the plaintiff admitted that there was a large field nearby in which the children would have had more open space to run around. He acknowledged that he knew the pole was there when he was running around, and he had noticed that the pole did not have a cap on it. He agreed that after the accident, from his perspective it looked like he had a little cut on his nose. He testified he was embarrassed by his stitches. He agreed that the scar made him feel "kind of cool." He stated that he felt emotionally upset about the scar when other kids started making fun of him about it, which happened on two occasions. He testified that he did not want to undergo a second surgery, and he felt that people should accept him for who he was regardless of whether he had a scar.

¶ 10 Eric Burson testified that as of October 2016, he was employed by the defendant as an engineer assigned to Otis Elementary School. He was responsible for maintenance of the school and the playground, including the playground equipment. It was his job to identify potentially dangerous conditions on the playground. He testified that sometime in September 2016, he became aware that a different child had been injured on the talk tube on the playground. He was told by the assistant principal that the child had sustained a cut above the eye. In response, he performed an inspection of the talk tube. He identified the photograph of the talk tube he inspected, which was the same photograph as the talk tube on which the plaintiff testified he was injured. He testified that when he inspected it in September 2016, he noticed it did not have a cap. He informed the assistant principal that the talk tube was missing a cap and that he would order a new cap. He then began calling vendors in an attempt to locate the manufacturer of a replacement cap. He sent an email to order a replacement cap on October 4, 2016. He received a quote on October 14, 2016, stating that the cost to replace the cap would be $40.96. However, he never ordered or obtained a replacement cap. Rather, the pole remained uncapped until April 2017, when he decided to have

it removed. Burson testified he did not think the pole was dangerous without a cap, and his concern was that all the poles on the playground match. He testified that his concern in obtaining a quote for a replacement cap was not with safety. He did not put any cones or warning signs around the talk tube or do anything else to let people know it was missing a cap. He testified that at the top of the talk tube, when the cap is off, a metal ring is exposed. He did not think that the metal ring was dangerous.

¶ 11 Nancy Mendez testified she had been the principal of Otis School for the past 10 years. She authenticated an incident report authored by the assistant principal of Otis Elementary School dated September 23, 2016. The incident reported stated that a child was playing at recess and ran into a fixture, causing a cut above his right eye. She had no personal knowledge of what the school engineer did in response to this incident report. She had no knowledge of whether he inspected the talk tube following the incident of September 23, 2016. She testified the pole was eventually removed, and its cap was never replaced as of the time it was removed. On examination by the defendant's attorney, Mendez testified she did not believe the incident in September 2016 involved the talk-tube at issue. She testified that the talk tube did not appear dangerous without a cap. She identified an exhibit showing an overhead view of the playground and testified that there was an open field without any poles on the playground. There was also an adjacent dog park, and there were no poles located in that area.

¶ 12 Dr. Farooq Shahzad testified that he was a plastic surgeon at Lurie Children's Hospital. He first saw the plaintiff as a patient on October 15, 2016. Dr. Shahzad testified that the plaintiff's parents told him that he had injured his face while he was playing with his brother and inadvertently ran into a pole. He testified that the plaintiff had a full thickness laceration or cut to his nose that extended to his cheek, along with a laceration to his lip and some bruising and minor

injuries to his forehead. These injuries were consistent with the reported mechanism of injury. Dr. Shahzad performed surgery to repair the plaintiff's facial injuries. The injuries required stitches. The plaintiff then had several follow-up visits. In August 2017, Dr. Shahzad noted that the plaintiff had asymmetry of his nose and recommended a second surgery to improve it. On October 2, 2017, he again performed surgery to try to make the right side of the nose as symmetric as possible to the left side. However, the surgery did not fully fix the problem with the asymmetry of the plaintiff's nose. If the plaintiff wanted to resolve that asymmetry in the future, he could have another revision surgery. Dr. Shahzad testified that the cost of that future revision surgery would be similar to what the first revision surgery cost. He testified that the scar on the plaintiff's cheek would be permanent. He completed his direct examination by testifying that in his medical opinion, all of the plaintiff's injuries were consistent with the history given of running into the pole.

¶ 13 At the close of the evidence, the defendant moved for a directed verdict on the grounds that the decision whether to replace the cap on the talk tube was an exercise of discretion for which it was entitled to immunity (see 745 ILCS 10/2-109, 2-201 (West 2016)), and that the evidence had not shown willful and wanton conduct on its part. The trial court denied the motion for directed verdict. The defendant did not move for directed verdict on the basis the plaintiff's evidence had failed to causally connect his injury to the dangerous condition of the missing cap on the top of the talk tube.

¶ 14 In closing argument, the plaintiff's attorney argued to the jury that the photographs in evidence depicted the "jagged metal" that was exposed at the top of the talk tube because it lacked a cap. He highlighted the fact that the talk tube on which the plaintiff was injured was the exact piece of equipment that Burson and the assistant principal had inspected following the earlier incident in September 2016 when another child had run into a fixture and suffered a cut over his

eye, and Burson's response was that the cap needed to be replaced. However, they never replaced the cap or took other protective measures after discovering the problem. As for damages, the plaintiff's attorney requested the jury award $20,000 for the future revision surgery that Dr. Shahzad testified the plaintiff needed to fix the asymmetry of his nose. He also requested compensation for disfigurement for the asymmetry and the scar to the plaintiff's face.

¶ 15 The defendant's attorney argued in closing that none of the witnesses testified that they thought the absence of a cap was dangerous, and none of the defendant's actions amounted to willful and wanton conduct. He argued to the jury that the plaintiff never testified that his nose made contact with the pole at the top where there was no cap, and there was no evidence to support the fact that the plaintiff's nose made contact with the top of the pole where there was no cap. He argued that the injury could have come from anything. He argued that the plaintiff was himself negligent in failing to keep a proper lookout for his surroundings.

¶ 16 The jury returned a verdict for the plaintiff. It assessed damages as $55,097.41 for past medical expenses and $20,000.00 for future medical expenses. However, it assessed damages of $0 for past and future pain and suffering, loss of a normal life, and disfigurement experienced as a result of the injuries. It also attributed the percentage of negligence attributable solely to the plaintiff as 49% and therefore reduced his damages to $36,797.73.[1] It also answered a special interrogatory finding that the defendant's conduct was willful and wanton.

¶ 17 Both parties filed posttrial motions. Pertinent to this appeal, the plaintiff filed a motion for a new trial on damages, arguing that the jury had ignored proven elements of damages by failing to

[1] This figure appears to be the result of a math error on the jury's verdict form. The verdict form directed the jury to subtract the $36,797.73 (which is 49% of the total damages attributable to the plaintiff's negligence) from the total damages assessed ($75,097.41), resulting in total recoverable damages of $38,299.68.

assess any damages for the plaintiff's pain and suffering or his disfigurement. The trial court granted this motion in part and ordered a new trial on disfigurement damages only. The defendant filed a motion for judgment notwithstanding the verdict (judgment *n.o.v.*), arguing that the plaintiff had introduced no evidence that the absence of a cap at the top of the talk tube was a proximate cause of the plaintiff's injuries. The trial court denied this motion.

¶ 18 The defendant then filed in this court a petition for leave to appeal from the trial court's order granting the new trial, which this court allowed. Ill. S. Ct. R. 306(a)(1) (eff. Oct. 1, 2019). This brought before the court all rulings of the trial court on the posttrial motions, including the order denying the defendant's motion for judgment *n.o.v.* Ill. S. Ct. R. 306(a) (eff. Oct. 1, 2019). This appeal now follows.

¶ 19 II. ANALYSIS

¶ 20 A. Motion for judgment *n.o.v.*

¶ 21 As it is potentially dispositive, we first address the defendant's argument that the trial court erred in denying its motion for judgment *n.o.v.* on the basis that the plaintiff failed to present evidence establishing that the plaintiff's injury was caused by the dangerous condition at issue, which was the absence of a cap on the top of the talk tube. The defendant correctly points out that, in order to overcome the immunity available to it as a local public entity for an injury where liability is based on the existence of a condition of public property intended or permitted to be used for recreational purposes, including playgrounds, the plaintiff had to establish that the defendant was guilty of willful and wanton conduct proximately causing such injury. 745 ILCS 10/3-106 (West 2016). The willful and wanton conduct that the plaintiff sought to establish was that the defendant had become aware several weeks prior to his injury that the talk tube at issue was missing its cap when another child had run into it and cut his face while playing, but despite this

knowledge, the defendant had failed to take any corrective action to avoid its causing further injury. The defendant argues that the plaintiff failed to present any evidence connecting his injury to the condition of the missing cap. The defendant argues that because of this, the plaintiff failed to establish the element of proximate causation, thereby entitling it to judgment *n.o.v.*

¶ 22 A trial court properly grants judgment *n.o.v.* only when " 'all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [a] movant that no contrary verdict based on that evidence could ever stand.' " *York v. Rush-Presbyterian-St. Luke's Medical Center*, 222 Ill. 2d 147, 178 (2006) (quoting *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967)). "In other words, a motion for judgment *n.o.v.* presents 'a question of law as to whether, when all of the evidence is considered, together with all reasonable inferences from it in its aspect most favorable to the plaintiffs, there is a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case.' " *Id.* (quoting *Merlo v. Public Service Co. of Northern Illinois*, 381 Ill. 300, 311 (1942)). A court may not enter judgment *n.o.v.* "if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). The standard for obtaining a judgment *n.o.v.* is a difficult standard to meet. *DiCosolo v. Janssen Pharmaceuticals, Inc.*, 2011 IL App (1st) 093562, ¶ 14. Our review of a trial court's denial of a motion for judgment *n.o.v.* is *de novo*. *York*, 222 Ill. 2d at 178.

¶ 23 As stated above, in reviewing the propriety of judgment *n.o.v.*, we view the evidence on this question in its aspect most favorable to the opponent of the motion, which here is the plaintiff. In this case, the plaintiff was the only eyewitness who provided testimony about how his injury occurred. He testified on this topic by making reference to five photographs of the talk tube at

issue, and these photographs were admitted into evidence. The plaintiff explained that four of the photographs (Exhibits 4, 6, 7, and 8) showed the end of the talk tube that he ran into, and the fifth photograph (Exhibit 5) showed the opposite end of the talk tube. Exhibits 4, 6, 7, and 8 showed that one end of the talk tube did not have a cap, and the plaintiff testified that it did not have a cap on the day that he ran into it. The focus of Exhibits 4, 6, 7, and 8 is the speaking box at the top of the talk tube. Exhibit 4 shows the whole speaking box. Exhibits 6, 7, and 8 are close-up images of the exposed metal edge on the top of the speaking box. Exhibits 7 and 8 are taken from straight above it, and a ruler is used to show that the metal edge has a thickness of 1/8-inch. Exhibits 7 and 8 also show lines from the metal-cutting process on the metal edge, approximately one millimeter apart. Exhibit 6 is taken from a side angle above the metal edge, and it purports to show that these lines are somewhat jagged ridges.

¶ 24 In testifying, the plaintiff stated that Exhibit 4 showed the pole he ran into, and it looked the same in that photograph as it did on the day of his injury. He stated that Exhibit 5 showed the same talk tube, except that the end shown in Exhibit 5 had a cap on it. He testified that the pole he ran into did not have a cap on it. He testified that he did not take the cap off, and he did not know who had taken it off. He testified that he was playing tag with some other children in the playground, and his dad had to leave to use the bathroom while he continued playing. Asked to explain what happened when he was injured, the plaintiff answered, “I was being chased by one of the kids and I looked behind me to see if there was anybody behind me and then I turned in front of me and I hit my face on the pole.” He confirmed again that Exhibit 4 showed the pole he ran into. He also confirmed that Exhibits 6, 7, and 8 were “an overshot view of the pole I hit.” These photographs were all published to the jury during the plaintiff’s testimony. On cross-examination, the defendant’s attorney did not question the plaintiff about what part of his face hit what part of the

talk tube.

¶ 25 Although the question is close, we conclude that, when we consider all of the direct and circumstantial evidence and the reasonable inferences to be drawn from that evidence in the aspect most favorable to the plaintiff, there was not a total failure or lack of evidence from which the jury could conclude that the absence of the cap on the talk tube was a proximate cause of the plaintiff's injury. It is clear from the plaintiff's testimony that his injury occurred when he ran into a talk tube that did not have a cap. The plaintiff's testimony identifying the pole he ran into was given with reference to photographs that focused entirely on the speaking box on top of the talk tube and, more specifically, on the metal edge on the top of the speaking box that was exposed by the absent cap. These photographs were admitted into evidence and could be properly considered by the jury.

¶ 26 Further, the jury was aware from Dr. Shahzad's testimony that the major injury sustained by the plaintiff was a full thickness laceration or cut to his nose that extended to his cheek. The photographic evidence was sufficient to provide the jury with a basis to conclude that the metal edge on top of the speaking box had jagged ridges. During the plaintiff's attorney's closing argument, he argued to the jury that these photographs showed, due to the absence of the cap, "how jagged and how rigid that metal was on that pole." It was the province of the jury to decide whether to accept or reject this argument and what weight to give to this evidence. However, we believe that the jurors could have reasonably concluded from their common sense and life experience that the jagged metal edge exposed by the missing cap was the only probable part of the talk tube that would cause a full thickness laceration to the plaintiff's nose and cheek.

¶ 27 While the defendant is correct that proximate cause cannot be proved through surmise or conjecture, and it will lie only when reasonable certainty exists that the defendant's acts caused the injury (see *Barclay v. Yoakum*, 2019 IL App (2d) 170962, ¶ 9), this is not a case in which that

principle bars recovery. Rather, this is a case in which the totality of direct and circumstantial evidence before the jury was sufficient to allow it to conclude the plaintiff's injury was caused by the missing cap. Causation does not always need to be established exclusively through direct evidence. *Gyllin v. College Craft Enterprises, Ltd.*, 260 Ill. App. 3d 707, 713 (1994). Circumstantial evidence is sufficient when causation is shown by facts and circumstances that, in the light of ordinary experience, reasonably suggest that the defendant's conduct operated to produce the injury. *Garland v. Sybaris Clubs International, Inc.*, 2019 IL App (1st) 180682, ¶ 107. A fact can be established through circumstantial evidence if the circumstances are of such a nature and so related to each other that it is the only probable (and not merely a possible) conclusion that can be drawn therefrom. *Id.* We find that the circumstantial evidence discussed in the preceding paragraph satisfies this standard, and thus the jury could conclude from it that the absence of the cap on top of the talk tube proximately caused the injury at issue. We therefore hold that the evidence in this case did not so overwhelmingly favor the defendant that no contrary verdict based on that evidence could ever stand, and the motion for judgment *n.o.v.* was properly denied.

¶ 28 B. New trial on damages for disfigurement

¶ 29 We next address the defendant's argument that the trial court erred in granting the plaintiff's motion for a new trial on damages, limited to the element of disfigurement only. In doing so, the trial court stated that it found that the jury, in assessing $0 for disfigurement damages, had disregarded a proven element of damages where it had awarded the plaintiff $20,000 for future medical expenses for a second revision surgery to correct the scarring and asymmetry of his nose. In its comments, the trial court stated, "I don't know if there was anyone looking at this young plaintiff who would conclude that he wasn't disfigured. It's visibly apparent to the Court and he was standing before the jury. That's visibly apparent to anyone." It described that the plaintiff's

disfigurement was "not as the defense argues here some sort of minor scar that a court could, you know, I suppose allow a jury to disregard because it's a minimal scar and it doesn't amount to in their assessment of disfigurement." The court stated that the plaintiff's disfigurement was "obvious and apparent" and that when the plaintiff stood before the jury it was evident that he had "a severe, significant laceration to his facial area, his nose, which has resulted in his current disfigurement." The defendant argues that by ordering a new trial, the trial court improperly substituted its own opinion over the jury's appraisal of the evidence of disfigurement.

¶ 30 The amount of damages to be assessed in a case is particularly a question of fact for the jury to determine. *Snelson v. Kamm*, 204 Ill. 2d 1, 36 (2003). The jury's award of damages is entitled to substantial deference. *Snover v. McGraw*, 172 Ill. 2d 438, 447 (1996). A trial court may not reweigh the evidence simply because the court may have arrived at a different verdict than the jury did. *Snelson*, 204 Ill. 2d at 37. "Indeed, a court reviewing a jury's assessment should not interfere unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss suffered." *Id.* (citing *Gill v. Foster*, 157 Ill. 2d 304, 315 (1993)); accord *Snover*, 172 Ill. 2d at 447. If it is clear that the jury ignored a proven element of damages, the court may order a new trial. *Hollis v. R. Latoria Construction, Inc.*, 108 Ill. 2d 401, 407 (1985).

¶ 31 In *Snover*, the supreme court reviewed a case arising from a car collision in which the jury's verdict awarded damages for some of the medical expenses claimed by the plaintiffs but no damages for pain and suffering. *Snover*, 172 Ill. 2d at 443. The trial court denied the plaintiffs' motion for a new trial. *Id.* On appeal to the supreme court, the plaintiffs argued that the jury's verdicts were inconsistent by awarding damages for pain-related medical expenses but no damages for pain and suffering. *Id.* The supreme court held that it was not inconsistent for a jury to award

pain-related medical expenses while also determining that the evidence of pain and suffering was insufficient to support a monetary award, as a jury has the power and discretion to award nothing for pain and suffering in a circumstance where the evidence supports such an award. *Id.* at 448. The court emphasized, however, that in certain cases an award of medical expenses without a corresponding award for pain and suffering may be inappropriate. *Id.* at 449. The court stated that if the evidence clearly indicated that a plaintiff had suffered serious injury, a verdict for medical expenses alone could be inconsistent. *Id.* It stated that "[t]his determination is best made by the trial court in a post-trial motion," and a trial court's ruling on a motion for a new trial will not be reversed unless the trial court abuses its discretion. *Id.* Further, it directed trial courts making this determination to consider the distinction between subjective complaints and objective symptoms, noting that a jury may disbelieve a plaintiff's testimony consisting only of subjective complaints unaccompanied by objective symptoms. *Id.*

¶ 32 In this case, we hold that the trial court acted within its discretion in granting a new trial on damages for disfigurement. Although this case involved different elements of damages than those involved in *Snover*, the principles of that case apply. Just as in certain cases an award of pain-related medical expenses without a corresponding award for pain and suffering itself may be inappropriate (*id.*), in some cases an award of disfigurement-related medical expenses without a corresponding award for disfigurement itself may be inappropriate. In both circumstances, the trial court is in the best position to determine whether this has occurred in the case before it. Here, it is evident that the trial court granted a new trial only after undertaking the inquiry contemplated in *Snover*.

¶ 33 As we described above (*supra* ¶ 29), the trial judge, who had the benefit of firsthand observation, determined that the facial disfigurement to the plaintiff resulting from this incident

was significant. It was not, the trial court stated, "some sort of minor scar" that a court could "allow a jury to disregard because it's a minimal scar" that did not amount to disfigurement. Furthermore, the scarring and asymmetry of the plaintiff's nose was something that the jury and court could objectively observe, and evidence of it did not consist merely of subjective complaints that the jury may have chosen to disbelieve. Thus, when the trial court reasoned that the only basis for which future medical expenses had been requested was a second revision surgery to address the plaintiff's facial disfigurement and that the jury had awarded what the plaintiff had requested, it properly found that the assessment of $0 for disfigurement was inconsistent with the award for future medical expenses and that this indicated that the jury had disregarded this proven element of damages. This is the assessment contemplated by *Snover*, and we find no abuse of discretion in the trial court's granting of a new trial on disfigurement damages.

¶ 34 Finally, we reject the defendant's suggestion that the trial court acted improperly in ordering the plaintiff's attorney to supplement the record with a photograph of the plaintiff's facial disfigurement when it granted a new trial. This came up shortly after the defendant's attorney informed the trial court that if it granted a new trial, the defendant intended to pursue an interlocutory appeal of that order. The trial court rightfully recognized that its order had been based on its first-hand observation of the severity of the plaintiff's facial disfigurement and that including a photograph in the record on appeal could assist this court in reviewing the issue. It was not, as defendant suggests, some improper posttrial admission of "new evidence." Contrary to the defendant's assertion, admitting a photograph of the plaintiff into evidence at trial was unnecessary because the plaintiff was personally present where the jury and trial court could see him. The defendant's argument that, by ordering the plaintiff to supplement the record with a photograph "the trial court acknowledged that he was second-guessing the jury's fact-finding on

disfigurement," is wholly without merit. On the contrary, we appreciate the trial court's concern with regard to ensuring that this court was provided with an adequate record on appeal to review its order.

¶ 35 III. CONCLUSION

¶ 36 For the reasons set forth above, we affirm the orders of the trial court granting a new trial on disfigurement damages and denying the defendant's motion for judgment notwithstanding the verdict.

¶ 37 Affirmed.