IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ALVIN OWENS,
Plaintiff-Appellant,

v.

COMMONWEALTH HEALTH CENTER,
Defendant-Appellee.

SUPREME COURT NO. 2008-SCC-0012-CIV
SUPERIOR COURT NO. 04-0288E

OPINION

Cite as: 2012 MP 5

Decided June 7, 2012

George L. Hasselback, O'Connor Berman Dotts & Banes, Saipan, MP, for Plaintiff-Appellant.
David W. Lochaby, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Defendant-Appellee.

BEFORE: MIGUEL S. DEMAPAN,[1] Chief Justice (Ret.); JOHN A. MANGLONA, Associate Justice; EDWARD MANIBUSAN, Justice Pro Tem.

MANGLONA, J.

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[1] Chief Justice Miguel S. Demapan heard oral argument. He retired from the Commonwealth Judiciary prior to the issuance of this opinion.

¶ 1 Alvin Owens ("Owens") appeals the Superior Court's denial of his motion for judgment as a matter of law and his alternative motion for a new trial. He argues that he was entitled to judgment as a matter of law or, alternatively, a new trial on the issue of his future economic and non-economic damages. He also appeals the trial court's conclusion that the fees he paid to his expert witnesses are not recoverable against the Commonwealth.

¶ 2 We affirm the trial court's denial of Owens' motions for judgment as a matter of law and for a new trial as to his future economic damages. However, we reverse the trial court's denial of Owens' motion for judgment as a matter of law as to his future non-economic damages, and remand this case for entry of judgment as matter of law that Owens is entitled to future non-economic damages. We also reverse the trial court's denial of Owens' motion for a new trial and remand for a new trial to calculate both the past economic damages and the future non-economic damages to which Owens is entitled. Finally, we affirm the trial court's conclusion that expert witness expenses are not recoverable against the Commonwealth.

I

¶ 3 In 2004, Owens was injured while riding a motorized scooter and sought treatment at the Commonwealth Health Center ("CHC"). He brought suit against CHC after discovering that his ankle fracture had been misdiagnosed as a sprain.[2] A jury trial was held in April 2007, and at the close of trial the jury concluded that CHC was liable to Owens for $13,797.00[3] in past non-economic losses. However, the jury declined to award Owens any amount attributable to past economic losses, future economic losses or future non-economic losses.

¶ 4 In May 2007, the trial court accepted the jury verdict and entered final judgment against CHC in the amount of $13,797.00. Owens subsequently filed an omnibus post-trial motion ("omnibus motion") wherein he requested that the trial court grant him either judgment as a matter of law ("JMOL") or a new trial with respect to his past economic damages and his future economic and non-economic damages. He also requested that the trial court award him certain fees and costs.

¶ 5 The trial court issued an order adjudicating Owens' omnibus motion in February 2008. As a threshold matter, it concluded that Owens had raised the issue of damages with sufficient specificity in his

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[2] Owens specifically alleged that CHC acted negligently in diagnosing and treating his injury. The traditional elements of negligence are duty, breach of duty, causation and damages. Here, parties stipulated during trial that CHC had a duty to Owens and that it breached that duty by failing to meet the applicable standard of care. Thus, the only issues left for the jury were proximate cause and damages. The jury determined that CHC's negligence had proximately caused Owens' injury, and it accordingly proceeded to award damages.

[3] The jury originally awarded Owens $22,995.00 in past non-economic losses. However, the jury also found that Owens himself had acted negligently by failing to return to CHC following his discharge. It reduced Owens' damage award of $22,995.00 by forty percent pursuant to the Commonwealth's Comparative Fault Act, for a final award of $13,797.00.

prior motion[4] for JMOL and that his post-trial motion for JMOL was therefore proper.[5] As to the merits of Owens' claims, the trial court granted the post-trial motion for JMOL with respect to Owens' past economic damages and also "conditionally granted" the request for new trial[6] with respect to past economic damages.[7] It reasoned that "[Owens] provided ample tangible evidence supported by receipts and other documents that [he] incurred such costs in treating his injuries up to the trial." Order at 4. However, the trial court denied the motions for JMOL and for a new trial with respect to Owens' future economic and non-economic damages, stating that it "[could not] find that the jury was unreasonable in withholding an award to Plaintiff in the future, economic and future non-economic damages categories." *Id.* at 5. It also concluded that any expenses Owens incurred to obtain the testimony of his expert witnesses were "witness fees" as defined by 7 CMC § 3208[8] and were therefore not recoverable against the Commonwealth.[9]

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[4] At the close of CHC's case-in-chief, Owens orally moved the trial court for JMOL "in the entire case but especially in particular as to the duty of care of the hospital . . . ." *Owens v. Commonwealth Health Ctr.*, Transcript of Proceeding April 10 to April 18, 2007 ("Transcript") at 462. The trial court granted Owens' motion as to the standard of care issue but denied it otherwise. *Id.* at 552 ("Mr Banes: We made an omnibus [motion], Your Honor, but then we made in in [sic] particular as to----" The Court: Well, that's the only part portion I'm granting.")

[5] On appeal, CHC attempted to file an untimely responsive brief arguing that Owens' motion for JMOL during trial did not address the issue of damages with sufficient specificity, and that his post-trial motion for JMOL was therefore improper. We denied CHC's motion to file its out-of-time brief. *See infra.* We therefore do not consider CHC's argument as to the propriety of the motion for JMOL, and we assume that the trial court was correct when it concluded that Owens raised the issue of damages with sufficient specificity in his original motion for JMOL. *See generally Santos v. Nansay Micronesia, Inc.*, 4 NMI 155, 165 n.30 (1994) (stating that issues not raised in an appellant's brief are generally waived).

[6] It was proper for the trial court to grant both Owens' motion for JMOL and his motion for a new trial with respect to his past economic damages. *See* NMI R. Civ. P. 50(c)(1) ("If a renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed . . . .").

[7] *Owens v. Commonwealth Health Ctr.*, No. 04-0288E (NMI Super. Ct. Feb. 8, 2008) (Order: Granting in Part and Denying in Part Plaintiff's Motion for Judgment Not On the Verdict; Denying Plaintiff's Motion for New Trial and Limited Conditional Ruling Granting New Trial on Remand; Partial and Conditional Grant of Plaintiff's Motion for Court Costs and Fees at 11) ("Order").

[8] Section 3208 states:

> All fees and expenses paid or incurred under this chapter for the service of process, *witness fees*, of [sic] filing fees on appeal, by any party prevailing in any matter other than a criminal proceeding, shall be taxed as part of the costs against the losing party or parties unless the court otherwise orders; provided, that no fees paid to a witness who is a party in interest and is called and examined on his own behalf or on behalf of others jointly interested with him shall be allowed or taxed as costs; and provided further, that no costs shall be taxed against the United States of America or the Commonwealth.

7 CMC § 3208 (emphasis added).

[9] In April 2008, the trial entered an order adjudicating Owens' request for fees and costs and awarding him $12,403.60 in fees and costs against CHC. *Owens v. Commonwealth Health Ctr,* No. 04-0288E (NMI Super. Ct. April 10, 2008) (Amended Order Awarding Costs at 2). However, these fees and costs did not include any expenses that Owens incurred to obtain the testimony of his expert witnesses.

¶ 6 Owens then filed a notice of appeal alleging that the trial court erred by: (1) denying him future economic and non-economic damages; and (2) failing to award him the costs he incurred to obtain the testimony of his expert witnesses. Although Owens filed a timely opening brief, CHC missed the filing deadline for its responsive brief and subsequently moved to file a cross-appeal and responsive brief out-of-time. In *Owens v. Commonwealth Health Ctr.*, 2011 MP 6 ¶ 24, this Court denied CHC's motion to file an out-of-time brief but did not otherwise adjudicate Owens' appeal. We now issue this opinion to address the merits of Owens' claims on appeal.

II

¶ 7 "The Supreme Court has appellate jurisdiction over judgments and orders from the Superior Court of the Commonwealth." 1 CMC § 3102(a).

III

A. Motion for Judgment as a Matter of Law and for New Trial

¶ 8 Owens contends that he is entitled to future economic and non-economic damages as a matter of law. We review the trial court's denial of a motion for judgment as a matter of law de novo, and we view the evidence in the light most favorable to the non-moving party. *Mendiola v. Commonwealth Utils. Corp.*, 2005 MP 2 ¶ 26. When reviewing a jury verdict on damages, we will only reverse a denial of a JMOL motion where it is found to be "grossly excessive, clearly not supported by the evidence, or based only on speculation or guesswork." *Santos*, 4 NMI at 165 (citations omitted). "A jury verdict is supported by the evidence where supported by 'substantial evidence.'" *Id.* at 167 (citation omitted). Generally, substantial evidence is defined as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *Id.* (internal quotation marks and citations omitted). However, we take a limited review of a jury's award of damages in order "to ensure that we do not encroach upon the jury's functions." *Id.* (citations omitted); *see also Chevalier v. Reliance Ins. Co.*, 953 F.2d 877, 881 (5th Cir. 1992) (stating that a jury has particularly great discretion in determining and awarding damages in personal injury actions); *Hoskie v. United States*, 666 F.2d 1353, 1354 (10th Cir. 1981) ("Trial courts are vested with broad discretion in awarding damages, and appellate courts do not lightly engage in a review of a trial court's actions."). Thus, a verdict awarding damages is supported by substantial evidence and should not be overturned so long as it "could reasonably have been reached by the jury." *Santos*, 4 NMI at 167 (internal quotation marks and citations omitted).

¶ 9 Owens also contends that the trial court abused its discretion by not ordering a new trial on the issue of his future economic and non-economic damages. NMI Rule of Civil Procedure 59 states in relevant part that "[a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ." NMI R. Civ. P. 59(a). We review a trial court's ruling on a motion for new trial for manifest or gross abuse of discretion. *Fitial*

v. Kim Kyung Duk, 2001 MP 9 ¶ 2. A trial court grossly abuses its discretion "when it clearly exceeds the bounds of reason or disregards rules or principals of law and practice to the substantial detriment of a party or litigant." *Id.* Having stated the general principles that govern our review of the trial court's judgment, we now turn to Owens' specific arguments as to his future economic and non-economic damages.

1. Future Economic Damages

¶ 10 At trial, the only evidence of future economic damages was Owens' self-serving testimony that, upon the recommendation of Dr. Whitt, an orthopedic specialist he visited in the United States, he took one Aleve before and after jogging or other exercise. *Owens v. Commonwealth Health Ctr.*, No. 02-0488E (NMI Super. Ct. April 10-19, 2007) (Transcript of Proceedings at 21, 143, 181) ("Transcript"). There was no expert testimony that Aleve was medically necessary or that Owens would continue to take Aleve for the duration of his life. Because a reasonable jury could have chosen to disbelieve Owens' testimony that Aleve was necessary or chosen to disbelieve that he would continue to take one Aleve before and after physical activity for the duration of his life, the trial court did not err when it refused to grant Owens JMOL or a new trial on the issue of future economic damages. *See, e.g., 3750 Orange Place Ltd. P'ship v. NLRB*, 333 F.3d 646, 663-64 (6th Cir. 2003) (rejecting petitioner's "self-serving and speculative" testimony as to future plans to expand housekeeping business); *Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312, 1314 (5th Cir. 1986) ("Self-serving and speculative testimony is subject to especially searching scrutiny." (citation omitted)). The trial court's denial of Owens' motion for JMOL and new trial on the issue of future economic damages is affirmed.

2. Future Non-economic Damages

¶ 11 As to his future-non-economic damages, Owens proffered testimony at trial from orthopedic surgeon Dr. John Chase ("Dr. Chase"), from himself, and from his wife Marsha ("Mrs. Owens"). The defense proffered testimony from Dr. Thomas Austin ("Dr. Austin"), an orthopedic surgeon employed by CHC who served as Owens' treating physician when he returned to CHC for surgery on his fractured ankle. To determine whether the jury could reasonably have concluded that Owens was not entitled to any future non-economic damages, we examine the testimony of each witness in turn.

¶ 12 Dr. Chase testified on direct examination that Owens had permanent scarring around the area of his fracture. He also testified that, in his medical opinion, Owens would likely never fully recover from his injury and would continue to experience pain:

> Q: Since it has been more than three years and Alvin still reports symptoms, will Alvin's ankle ever fully recover?
> A: Very unlikely.
> . . .
> Q: Dr. Chase, in your medical opinion, Alvin Owens testified that he is still experiencing pain, stiffness and swelling in his ankle after the surgery. So in your opinion, will he now *always have pain, stiffness and swelling in his ankle*?

A: I think *it's medically probable that he will*.
Q: So Alvin is permanently injured?
A: That's another way of saying it.

Owens v. Commonwealth Health Ctr. et al., No. 04-0288E (NMI Super. Ct. April 12, 2007) (Transcript of Proceeding: Testimony of Dr. John Chase at 46-47) ("Chase Transcript") (emphasis added).

¶ 13 Although the defense succeeded in calling the accuracy of Dr. Chase's medical opinion into question, it never refuted Dr. Chase's claim that Owens' injury was permanent. On cross-examination, Dr. Chase admitted that he had written in a September 27, 2005 report that "it is not clear at this time what Mr. Owens residual from his injuries may be." Chase Transcript at 58. Dr. Chase argued that his altered opinion expressed at trial — that Mr. Owens was permanently injured — was based upon "additional information." *Id.* Yet, when pressed, he admitted that he had not obtained any additional medical information since September 2005 and that his additional information was derived solely from Owens' attorneys. *Id.* Dr. Chase also admitted that he had never performed an examination of Owens' ankle and that such an examination would be ideal for an assessment of Owens' pain and the limitations on his activities:

Q: So, but to make a better or more accurate testimony of his residuals, is it still correct that you would need a detailed orthopedic examination to include assessment of his pain, limitation of activities, etcetera?
A: That would be — *that certainly would be ideal* if I was being asked about more precise answer than I've already given, yes.

Id. at 59 (emphasis added).

¶ 14 Turning to the testimony of the defense expert Dr. Austin, Dr. Austin agreed with Dr. Chase that Owens had permanent scarring over and around the area of the fracture. Transcript at 260. He also testified that Owens' range of motion in his injured ankle "could be decreased" by the scarring and that the scar tissue would never become as pliable as regular tissue. *Id.* at 263, 325. In addition, Dr. Austin conceded that the scar tissue might cause Owens pain and difficulty when performing certain activities:

A: The scar tissue at the back of his ankle may cause him to have pain in his ankle when he puts his foot or ankle into certain positions.
Q: And what positions are those?
A: Well, really that would depend on what activities he was doing, but I can't----I don't think you can say necessarily what positions it would be. . . .
Q: All right. Would it be possible for a person with that kind of problem to have difficulty playing tennis?
A: Yes, it would be.
Q: Or difficulty playing basketball
A: Yes, it would be.
Q: Or difficulty walking on uneven surfaces?
A: Yes, it would be.

Id. at 332. Dr. Austin's testimony as to Owens' scar tissue and its possible future effects was uncontroverted at trial.

¶ 15 Finally, Owens and Mrs. Owens testified as to the following facts: (1) Owens could jog approximately two miles, but only while wearing a cloth ankle brace;[10] (2) he could and did play tennis,[11] baseball,[12] and volleyball,[13] but not as "competitively" as he had before his injury;[14] (3) he found it difficult to play beach volleyball;[15] (4) he could no longer sprint;[16] (5) he experienced pain and swelling in his ankle after using an elliptical machine;[17] (6) his ankle was swollen and sore after he walked for an hour and played ultimate frisbee on sand on Managaha;[18] (7) he sometimes experience a sharp and shooting pain in his ankle after jumping, pivoting, or walking over uneven surfaces;[19] (8) he took one Aleve before and after exercising;[20] and (8) and he was generally "not as active and competitive" as he had been before the injury.[21] Owens additionally testified that, after physical activity, his pain level was approximately a three out of a possible ten. Transcript at 147-148. Finally, both Owens and Mrs. Owens testified that Owens sometimes elevated his ankle and rested it for a period of time after he exercised. *Id.* at 148.

¶ 16 In rebuttal, the defense offered various testimony suggesting that the restrictions on Owens' activities were not as serious as he claimed. For example, on cross-examination, Mrs. Owens admitted that Owens was in the process of enlisting in the United States Army as a Chaplain and that he had passed a medical exam with the examiners reporting no problems with his ankle. Transcript at 28. However, Owens' testimony as to the activities he could and could not perform following his injury, and the pain resulting from his injury, remained largely uncontroverted.

¶ 17 In light of the evidence above, we conclude as follows. First, the jury was offered uncontroverted testimony from Dr. Chase and Dr. Austin that Owens had permanent scarring surrounding the area of the fracture and that the scarring may cause him pain and difficulty when performing certain activities. Second, the jury was offered uncontroverted testimony from Owens and from Mrs. Owens that Owens

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10 Transcript at 17, 20, 27, 139, 176.

11 *Id.* at 18-19, 141.

12 *Id.* at 19.

13 *Id.* at 20, 140, 176.

14 *Id.* at 17, 27, 141-42.

15 Transcript at 140.

16 *Id.* at 19.

17 *Id.* at 175.

18 *Id.* at 107, 131.

19 *Id.* at 111, 139.

20 Transcript at 21, 143.

21 *Id.* at 24.

suffered some amount of pain and swelling from his ankle after he performed physical activity. Third and finally, the jury was offered uncontroverted testimony from Owens and Mrs. Owens that Owens was unable to participate in certain activities he had enjoyed before his injury and that his participation in other activities was restricted by his injury. The jury was never offered any evidence suggesting that Owens' injury would fully heal in the future, that he would someday be able to perform all of the activities he had performed prior to his injury, or that he would someday cease to suffer pain from his injury.

¶ 18 Considering the uncontroverted testimony that Owens' injury produced physical pain following strenuous activity and prevented or restricted his participation in a number of physical activities he had enjoyed prior to his injury, we find that no reasonable jury could have concluded Owens' future non-economic damages to be zero. Even taking into account the jury's great discretion in determining and awarding damages, it was beyond any fair interpretation of the evidence to suppose that he would suffer no future pain and suffering or other future non-economic losses as a result of his injury.[22]

¶ 19 It is of course possible that the jury chose to disbelieve all of the expert and lay testimony as to the nature of Owens' injury and its effect on his physical activity. However, "[t]he difficulty with that argument is that, carried to its logical conclusion, there never could be an inadequate verdict, because the conclusive answer would always be that the jury did not have to believe the witnesses who testified as to damages, even though there was no contradiction or dispute." *Ide v. Stoltenow*, 289 P.2d 1007, 1009 (Wash. 1955). Although the jury is the sole judge of the credibility of the witnesses and the weight to be given their testimony, and the general rule is that it is entitled to accept or reject any or all testimony, "a

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[22] *See, e.g., Thomas v. 14 Rollins St. Realty Corp.*, 807 N.Y.S.2d 56, 57-58 (N.Y. App. Div. 2006) (increasing award of $100,000.00 for future pain and suffering to $250,000.00 for plaintiff who suffered leg injury, where plaintiff was largely able to fully resume his activities but suffered some lasting pain and restrictions on activities involving repetitive rising and squatting); *Kroger Co. v. Scott*, 809 So.2d 679, 682-84 (Miss. Ct. App. 2001) (approving inclusion of future economic damages in jury instruction when plaintiff testified that despite maximum medical recovery, she still experiences pain and swelling in her ankle and required over the counter pain medication in order to treat such symptoms); *Morrisseau v. State*, 696 N.Y.S.2d 545, 547-48 (N.Y. App. Div. 1999) (concluding that jury award of $80,000.00 in future non-economic damages was insufficient to compensate plaintiff for ankle injury, when plaintiff's daily activities "continued to be significantly restricted since the accident," plaintiff "continue[d] to experience pain in her foot and difficulty walking," plaintiff's condition was unlikely to improve further, and plaintiff would likely always experience some degree of orthopedic pain); *Fenocchi v. City of Syracuse*, 629 N.Y.S.2d 580, 580-81 (N.Y. App. Div. 1995) (holding award of zero damages for future pain and suffering to be inadequate, when plaintiff suffered fractured ankle, and as a result of fracture movement of ankle was limited to one-half its normal range of motion and all experts agreed that plaintiff had suffered a permanent injury); *Bacle v. Wade*, 607 So. 2d 927, 934-35 (La. Ct. App. 1992) (upholding trial court's award of $50,000.00 in damages for pain and suffering to plaintiff who suffered ankle fracture, knee injury and back injury, when plaintiff continued to work, drive and perform other activities, but also testified to experiencing constant pain in his foot); *Whitman v. Consol. Aluminum Corp.*, 637 S.W.2d 405, 409 (Mo. Ct. App. 1982) (upholding damage award of $42,000.00 to plaintiff who suffered heelbone fracture, when evidence showed that plaintiff's injury was permanent, that plaintiff had difficulty walking and suffered continuous pain, and that plaintiff would come from work and "just want[ed] to sit" whereas prior to his injury he would jog or play with his children).

jury may not ignore undisputed facts and arbitrarily fix an amount of damages which is neither fair nor just." *Horton v. Denny's, Inc.*, 128 S.W.3d 256, 259-60 (Tex. Ct. App. 2003).

¶ 20 In light of the foregoing, we reverse the trial court's denial of Owens' motion for JMOL and remand this case for entry of judgment as a matter of law stating that Owens is entitled to future non-economic damages. We also vacate the trial court's denial of Owens' motion for a new trial and remand for a new trial to determine the amount of Owens' past economic damages[23] and future non-economic damages.[24]

B. Expert Witness Expenses

¶ 21 Fees and costs imposed by the trial court are generally governed by 7 CMC § 3207, which states that "[t]he court may allow and tax any additional items of cost or actual disbursement, other than fees of counsel, which it deems just and finds have been necessarily incurred for services which were actually and necessarily performed." However, 7 CMC § 3208 limits the trial court's ability to award fees and costs against the Commonwealth. Section 3208 states:

> All fees and expenses paid or incurred under this chapter for the service of process, witness fees, or filing fees on appeal, by any party prevailing in any matter other than a criminal proceeding, shall be taxed as part of the costs against the losing party or parties unless the court otherwise orders . . . and provided further, that *no costs shall be taxed against the United States of America or the Commonwealth*.

7 CMC § 3208 (emphasis added). Following trial, Owens submitted a list of his fees and costs which included the hourly fees charged by his expert witnesses ("expert witness expenses"). However, the trial court concluded that expert witness expenses constituted "witness fees" as defined by section 3208 and that Owens therefore could not recover those expenses against the Commonwealth. Appellant's Br. at 14. Owens now contends the trial court erred when it held that his expert witness expenses were not recoverable against the Commonwealth. Because Owens' argument presents an issue of statutory interpretation, our standard of review is de novo. *Pac. Fin. Corp. v. Sablan*, 2011 MP 19 ¶ 9.

¶ 22 A basic rule of statutory interpretation is that we give statutory provisions their plain meaning. *Commonwealth v. Minto*, 2011 MP 14 ¶ 25. Looking to the plain language of section 3208, that section

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[23] The trial court has determined that Owens is entitled to a new trial on the issue of past economic damages, *see infra*, and neither of the parties contest this determination on appeal.

[24] As a general rule, when a jury verdict as to damages is inadequate, the parties remain entitled to have a jury determine the proper amount of damages. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine . . . the extent of the injury by an assessment of damages."). We therefore order a new trial on the issue of future non-economic damages, so that a jury may determine the proper amount of Owens' non-economic damages. *See* NMI R. Civ. P. 50(d) (stating that, in the event that the appellate court concludes that the trial court erred in denying a motion for judgment as matter, the appellate court is not precluded from determining that the appellee is entitled to a new trial or from directing the trial court to determine if a new trial should be granted).

states in relevant part that "no costs shall be taxed against . . . the Commonwealth." 7 CMC § 3208. In light of this language, the key inquiry is whether the hourly fees charged by expert witnesses are "costs" within the meaning of section 3208. If the expert witness expenses are costs, under the plain language of section 3208 they are not taxable against the Commonwealth and the trial court was correct when it declined to award Owens expert witness fees. The Commonwealth Code does not define the term "costs." Nor does it list the specific expenses that may be recoverable as costs. It only states generally that "[t]he court may allow and tax any additional *items of cost* or actual disbursement, other than fees of counsel, that it deems just . . . ." 7 CMC § 3207 (emphasis added). We therefore rely upon our case law to determine the meaning of "costs" as the word is used in section 3208. *See* 7 CMC § 3401.[25]

¶ 23 In *Ishimatu v. Royal Crown Ins. Corp.*, 2010 MP 8, prevailing party Ishimatsu sought to recover his expenses for "expert witnesses, photocopying, mileage, and telecopying" as costs. *Id.* ¶ 74. To determine if Ishimatu could recover his expert witness expenses as costs, this Court began by considering the language of section 3207. *Id.* ¶ 73. The court concluded that section 3207 is "entirely permissive" and that it "allows the trial judge to *award costs* it deems justly and necessarily incurred." *Id.* (emphasis added). Applying this permissive language to Ishimatsu's request for expert witness expenses, the Court concluded that expert witness expenses were a type of cost under section 3207 and that a trial court may therefore "award expert witness costs" as it deems fit. *Id.* ¶ 74. *Ishimatsu* thus established without question that expert witness expenses (i.e. the hourly fees charged by expert witnesses) qualify as costs in the Commonwealth.

¶ 24 Note that this broad interpretation of costs as inclusive of expert witness expenses is consistent with the law of other jurisdictions. Most jurisdictions either explicitly provide via statute or court rule that recoverable costs include expert witness expenses,[26] or interpret the general language of cost-

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[25] 7 CMC § 3401 reads:

> In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, *in the absence of written law or local customary law to the contrary*; provided, that no person shall be subject to criminal prosecution except under the written law of the Commonwealth.

[26] Ariz. R. Civ. P. 54(f) ("Costs . . . (2) In medical malpractice cases only, witness fees . . . shall include reasonable fees paid expert witnesses for testifying at trial."); Cal Code Civ. Proc. § 1033.5(a) (Deering's 2012) ("The following items are allowable as costs . . . (8) Fees of expert witnesses ordered by the court."); Fla. Stat. § 57.071(2) (LexisNexis 2012) ("Expert witness fees may not be awarded as taxable costs unless the party retaining the expert witness furnishes each opposing party with a written report . . . ."); Idaho R. Civ. P. 54(d)(1)(C) ("When costs are awarded to a party, such party shall be entitled to the following costs, actually paid, as a matter of right: . . . [r]easonable expert witness fees for an expert who testifies at a deposition or at a trial . . . ."); Iowa Code § 622.72 (LexisNexis 2011) ("Witnesses called to testify only to an opinion founded on special study or experience in any branch of science . . . shall receive additional compensation, to be fixed by the court . . ."); *Atlantic Richfield Co. v.*

apportionment statutes as applicable to expert witness expenses.[27] In light of the foregoing authority, we hold that "costs" as the word is used in sections 3207 and 3208 include the hourly fees charged by expert witnesses, and that those fees are therefore not recoverable against the Commonwealth pursuant to the plain language of section 3208.

¶ 25 Finally, we must briefly discuss the trial court's conclusion that Owens' expert witness expenses were not recoverable against the Commonwealth because they were "witness fees" as the term is used in section 3208. Although the trial court's ultimate holding was correct, *see supra*, its interpretation of "witness fees" was mistaken. We hold that, under the plain language of the applicable statutes, the phrase "witness fees" is a term of art which refers only to the sums specified in the NMI Judicial Fee Schedule ("Fee Schedule") for a witness' travel and subsistence.[28] *See* 7 CMC § 3204 (titled, "Witness Fees: Effect of Failure to Tender;" stating that "[t]he failure to tender the *sums specified in the rules on judicial fees adopted by the Commonwealth judiciary for mileage or subsistence*, or any part of either or both, does not exempt the witness from complying . . . .") (emphasis added); 7 CMC § 3201 ("Judicial fees, including jury fees, juror fees, mileage fees, execution or service fees, *travel or subsistence fees for witnesses . . . shall be as prescribed in the rules on judicial fees* adopted by the Commonwealth judiciary . . . .") (emphasis added). Witness fees do not include hourly fees charged by a witness, or any other fees in excess of the sums for travel and subsistence specified in the Fee Schedule. This limited interpretation of the phrase "witness fees" in section 3208 is supported by analogy to similar statutory provisions found in other jurisdictions.[29]

IV

State of Alaska, 723 P.2d 1249, 1253 (Alaska 1986) (stating that, under text of relevant administrative rule, experts may recover $25 per hour for time spent testifying).

[27] *See, e.g., Calhoun v. Hammond*, 345 N.E.2d 859, 862 (Ind. Ct. App. 1976) (holding that expert witness fees may be taxed as "costs" pursuant to court rule providing for general award of costs to prevailing party, but that expert witness fees may not be greater than the fees permitted to lay witnesses); *Cooper v. Cooper*, 331 So. 2d 689, 694-95 (Ala. Ct. App. 1976) (stating that "[t]he court cannot award expert's fees as a matter of costs unless provided by statute . . .").

[28] *See* NMI Judicial Fee Schedule at 4 (last revised Oct. 4, 2006) (providing that there is a "regular witness fee" of $25.00 per day; also providing that: "A witness who is summoned to appear and does appear in a civil proceeding which is held on the same island in the Commonwealth where the witness is served, no travel fees shall be paid. A witness who is summoned and appears for a civil proceeding which is on a different island in the Commonwealth, shall receive the cost of transportation . . . .").

[29] *See, e.g.*, Cal Gov't Code § 68093 (Deering's 2012) ("Witness fees [¶] Except as otherwise provided by law, *witness' fees* for each day's actual attendance, when legally required to attend a civil action or proceeding in the superior courts, are thirty-five dollars ($35) a day and mileage actually traveled, both ways, twenty cents ($0.20) a mile."); Ariz. Rev. Stat. § 12-303 (LexisNexis 2011) ("Witness fees and mileage [¶] A material witness attending the trial of a civil action shall be paid twelve dollars for each day's attendance to and including the time it was necessary for him to leave his residence and go to the place of trial and his discharge as a witness. The witness shall also be paid mileage . . . .").

¶ 26 In light of the foregoing, this Court: (1) affirms the trial court's denial of Owens' motions for judgment as a matter of law and for a new trial as to his future economic damages; (2) reverses the trial court's denial of Owens' motion for JMOL on the issue of his future non-economic damages, and remands this case for judgment as a matter of law stating that Owens is entitled to future non-economic damages; and (3) vacates the trial court's denial of Owens' motion for a new trial on the issue of future non-economic damages, and remands this case for a new trial as to both Owens' past economic damages and his future non-economic damages.

SO ORDERED this 7th day of June, 2012.

/s/
JOHN A. MANGLONA
Associate Justice

/s/
EDWARD MANIBUSAN
Justice Pro Tem