

STATE OF MICHIGAN
COURT OF APPEALS

VICTORIA A. REDDY,

Plaintiff-Appellee,

v

RENE A. SWEETLAND and SPENCER M.
DALLAIRE,

Defendants-Appellants.

UNPUBLISHED

March 23, 2001

No. 217852

Genesee Circuit Court

LC No. 96-044232-NI

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendants appeal as of right from a judgment of \$21,500 (\$23,500 less ten percent comparative negligence) entered in plaintiff's favor in this pre-tort reform, no-fault claim for noneconomic damages pursuant to MCL 500.3135; MSA 24.13135. We affirm.

This action arose as a consequence of plaintiff sustaining a crushing foot injury when a door on the vehicle in which plaintiff was a passenger slammed shut on her foot.¹ A jury trial was conducted in October 1997. Following the close of proofs, the trial court granted plaintiff's motion for directed verdict on the issue of serious impairment of body function. Thereafter, the jury returned a verdict finding defendants negligent and plaintiff ten percent comparatively negligent. The jury awarded plaintiff \$2,500 for past damages and no future damages. Plaintiff moved for additur which the trial court granted in the amount of \$18,000 (\$20,000 less ten percent comparative negligence) for past damages. Defendants did not consent to additur and the trial court granted plaintiff's motion for a new trial on the issue of past damages only. The second jury awarded plaintiff \$23,500 and a judgment was entered for plaintiff in the amount of \$21,500 (\$23,500 less ten percent comparative negligence).

Defendants first argue that the trial court erred by granting plaintiff's motion for a directed verdict on the issue of whether plaintiff's injury resulted in a serious impairment of a

¹ Plaintiff's complaint for noneconomic damages was filed prior to the effective date of the 1995 amendments to the no-fault act (1995 PA 222). See MCL 500.3135(2); MSA 24.13135(2); *Kern v Blethen-Coluni*, 240 Mich App 333, 335-336; 612 NW2d 838 (2000).

body function. We disagree. This Court reviews a trial court's grant or denial of a motion for directed verdict de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). On appeal, this Court reviews all the evidence presented up to the time of the motion, in the light most favorable to the nonmoving party, to determine whether a factual question existed upon which reasonable minds could differ. *Id.*

The parties agree that *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), controls the question of whether plaintiff's injury was a serious impairment of body function. See *Kern v Blethen-Coluni*, 240 Mich App 333, 338; 612 NW2d 838 (2000). The *DiFranco* Court held that the proper inquiry in deciding dispositive motions regarding the serious impairment requirement in a claim for noneconomic damages includes whether a material factual dispute existed as to the nature and extent of the plaintiff's injuries and whether reasonable minds could differ as to whether the plaintiff sustained a serious impairment of body function. *DiFranco*, *supra* at 38-39, 59. The *DiFranco* Court further held that the serious impairment threshold required a determination of the particular body function that was impaired and whether the impairment was serious. *Id.* at 39, 67. Factors to be considered to determine the seriousness of impairment included the extent of the impairment, the body function that was impaired, the length of time the impairment lasted, and the type of treatment required. *Id.* at 39-40, 67-68.

In this case, there was no material factual dispute regarding the nature and extent of plaintiff's injuries. The undisputed evidence produced at trial, which included testimony from both plaintiff's physician and defendants' medical expert, indicated that plaintiff sustained a crushing injury to her foot which resulted in three fractured bones and extreme swelling necessitating two initial surgeries. Because the bones failed to heal properly, plaintiff underwent a third surgery at which time the bones were aligned and stabilized with pins and wire. Subsequently, plaintiff had the pins removed in a fourth surgery. Plaintiff's ability to walk was substantially impaired from the date of the injury until approximately September 1994 as a consequence of her injury and associated medical treatments. Thereafter, and at least through the date of the trial, plaintiff continued to suffer pain, swelling, numbness, and cramping in her foot. Although defendant argued that the bones in plaintiff's foot may not have initially healed properly because plaintiff failed to follow her physician's instruction to remain non-weight bearing, no evidence was produced at trial to support the allegation.

Further, we agree with the trial court that reasonable minds could not differ as to the seriousness of plaintiff's impairment. The use of a foot and associated ability to stand and walk are important body functions that were impaired by the injury. Further, the impairment was serious as evidenced by (1) plaintiff's physician and defendants' medical expert's characterization of the injury as "very severe" in nature, (2) the fact that four surgeries were required to treat the fractures, (3) plaintiff's associated incapacitation which included periods of being confined to bed, casted, and/or required the use of crutches, (4) plaintiff's inability to work for three months, and (5) plaintiff's residual impairment which included pain, swelling, numbness, and cramping in the foot that plaintiff's physician testified would likely be permanent problems. Accordingly, the trial court did not err in granting directed verdict to plaintiff on the issue of serious impairment of body function.

Next, defendants argue that the trial court abused its discretion in ordering additur and a new trial. We disagree. The proper consideration when reviewing a grant or denial of additur is whether the jury award is supported by the evidence. *Setterington v Pontiac General Hosp*, 223 Mich App 594, 608-609; 568 NW2d 93 (1997). This Court reviews a trial court's grant of additur and a new trial for an abuse of discretion. See MCL 600.6098(4); MSA 27A.6098(4); *Arnold v Darczy*, 208 Mich App 638, 640; 528 NW2d 199 (1995).

In this case, the trial court held that the jury verdict was inadequate, granted additur, and denied plaintiff's motion for a new trial on the condition that defendants consent to a judgment of \$18,000 (\$20,000 less ten percent comparative negligence), the lowest amount the trial court found to be supported by evidence. See MCR 2.611(E)(1). In making its determination that the jury award was inadequate, the trial court properly considered the evidence presented, including that plaintiff sustained three fractures requiring four surgeries and suffered incapacitation and extreme pain from the injury. The trial court held that, although substantial and uncontroverted, the jury apparently ignored such evidence. After carefully reviewing the record and according due deference to the trial court's opportunity to observe the evidence and witnesses, we cannot say that the trial court abused its discretion. See *Setterington*, *supra*.

Finally, defendants argue that the trial court abused its discretion by limiting the second trial to the issue of past damages. We disagree. A new trial on the issue of damages is permissible when a defendant's liability was clearly established. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 523; 592 NW2d 786 (1999); *Denha v Jacob*, 179 Mich App 545, 550; 446 NW2d 303 (1989). Further, new trials limited to "some of the issues" is permitted by the court rules. MCR 2.611(A)(1); *Hierta v General Motors Corp (Supplemental Opinion)*, 148 Mich App 796, 799; 385 NW2d 690 (1986).

In this case, the first jury returned a special verdict which found defendants liable for negligence and separately determined the amount of damages to which plaintiff was entitled and plaintiff's comparative negligence. The only issue disputed by either party was the amount of damages awarded to plaintiff. The jury verdict was not ambiguous and clearly determined that defendants were negligent and such determination was not influenced by any alleged trial error. See generally MCR 2.611(E)(1); *Kern*, *supra* at 337; *Hierta*, *supra* at 800. Further, the evidence clearly established defendants' liability in negligence. Plaintiff was a passenger in the vehicle being driven by defendant Sweetland when Sweetland unexpectedly began driving while plaintiff was attempting to enter and seat herself in the vehicle, before plaintiff could properly shut the door, causing the door to fly open and slam shut on plaintiff's foot. Therefore, a partial new trial on the issue of damages was sufficient. See *Brewster v Martin Marietta Aluminum Sales, Inc*, 145 Mich App 641, 669; 378 NW2d 558 (1985). Accordingly, the trial court did not abuse its discretion by ordering a new trial limited to past damages only.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder