

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD M. GEERDES,

Plaintiff-Appellee,

v

DEBORAH JEAN GLUPKER and MARK
FREDERICK HAASE,¹

Defendants-Appellants.

UNPUBLISHED
December 4, 2007

No. 264856
Kent Circuit Court
LC No. 02-08670-NI

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

PER CURIAM.

In this third-party, no-fault insurance action, defendants appeal by leave granted the trial court's order granting plaintiff's motion for new trial. We affirm.

On September 29, 1999, plaintiff Richard M. Geerdes was struck while in his car by a vehicle driven by defendant Deborah Jean Glupker.² Plaintiff was stopped at a red light at the time of the impact. Plaintiff filed suit against defendants in September 2002, alleging that he suffered a serious impairment of body function as a result of the accident, and seeking tort recovery for noneconomic damages, pursuant to MCL 500.3135(1). Plaintiff's case proceeded to trial before a jury.³ During deliberations, the jury sent a note to the trial court indicating that it

¹ On October 30, 2002, the parties presented a stipulation and order to amend the complaint. The parties amended the complaint to correct the typographical error that "Mark Haase, Jr." was not the appropriate defendant, but rather "Mark Haase" was the named defendant.

² According to the complaint, defendant Mark Haase was the owner of the vehicle driven by defendant Glupker.

³ On June 2, 2003, defendants filed a motion for summary disposition, asserting that plaintiff's prior disabling injuries were severe, any additional pain had no impact on his limited lifestyle, and there was no objective evidence of an injury until two years after the accident. Plaintiff opposed the motion for summary disposition, asserting that there was evidence of a serious impairment of body function and that defendants purposefully omitted plaintiff's treatment with a rehabilitation and physical therapy specialist for a two and a half year period. In a written order entered on July 10, 2003, the trial court denied defendants' motion for summary
(continued...)

was “hung” with regard to the question of whether the collision was the cause of some injury to plaintiff, question two on the verdict form.⁴ However, the jury also indicated that it had reached an agreement regarding question three, addressing whether the injury sustained by plaintiff in the collision resulted in a serious impairment of body function. Specifically, the jury concluded that plaintiff had not sustained a serious impairment of a body function. The trial court advised the jury that it could consider the case concluded and entered a judgment of no cause of action on behalf of defendants.

Plaintiff subsequently moved for judgment notwithstanding the verdict or, in the alternative, a new trial. The trial court overturned the jury’s determination on the threshold injury issue and granted a new trial on the issues of causation and damages. In so holding, the trial court discussed the evidence presented at trial as follows:

It is undisputed at trial that, in February 2002, plaintiff began to experience atrophy and weakness of his right arm which, by November 2003, had progressed to “partial paraly[sis]” and “intense pain,” in the words of the neurosurgeon who later performed spine surgery on plaintiff to alleviate the underlying cause. The surgery took place on February 19, 2004. Nor was it disputed that a myelogram and a CAT scan demonstrated that the cause of the atrophy and paralysis was compression (pinching) of nerves on both the left and right sides of plaintiff’s cervical spine. Observations during surgery confirmed that the cause of the compressions was “a combination of degenerative disc and bony proliferation.” Finally, it was also undisputed that, after approximately a month of post-operative recuperation, plaintiff’s arm became “stronger and his numbness has improved dramatically,” although some weakness and pain persist.

It necessarily follows that, until relieved by surgery, plaintiff had endured a “serious impairment of body function” as defined by MCL 500.3135(7). That its genesis was nerve compression verified by a myelogram, a CAT scan, and observations during surgery means that it was objectively manifested. *Jackson v Nelson*, 252 Mich App 643, 652-653 (2002), *lv den* 468 Mich 884 (2003). The progressive loss over two years of the use of a limb, culminating in partial paralysis and intense discomfort which required spinal surgery to correct, was the kind of impairment, not minor interruption in life, which satisfies the Michigan no-fault statute. *Kreiner v Fischer* (aft rem) 471 Mich 109 (2004). If paralysis, except, perhaps, very short-term paralysis, is not serious enough to warrant third-party tort recovery, only catastrophic impairments remain subject to such liability, which is not what the Legislature intended. *Kreiner, supra*, at 131, fn 14.

(...continued)

disposition “[f]or the reasons stated ... in an opinion dictated from the bench immediately at the conclusion of oral argument.” The parties have not provided a transcript of the trial court’s ruling. Based on the posture of the case and the briefs, it appears that the trial court concluded that factual issues were presented.

⁴ Question one on the verdict form inquired whether defendant Deborah J. Glupker was the cause of the collision, and the jury answered this question affirmatively.

It was, therefore, error for this Court to have submitted to the jury the issue of serious impairment. Given that there was no factual dispute concerning the nature and extent of plaintiff's paralysis and its underlying physical etiology, and no basis for finding that that paralysis and its pain were other than a serious impairment, it was this Court's obligation to itself have resolved the issue favorably to plaintiff, not as a traditional directed verdict, but in fulfillment of its legislatively-assigned responsibility. See MCL 500.3135(2). See also *Kreiner, supra*, at 120, 121. It would be another violation of that statute to leave standing the jury's determination that plaintiff had not sustained a serious impairment. Doing so would be tantamount to improperly reformulating the no-fault statute to reassign to juries the role given to the courts by the Legislature.

Although the trial court held that this analysis was the basis of its decision to order a new trial, the trial court proceeded to proffer reasons that the jury came to a decision to the contrary. First, the trial court noted that the instructions given did not notify the jurors that the serious impairment need not continue, but rather the existence of a serious impairment at some point in time was sufficient. The trial court also noted the lack of testimony regarding the injuries that may arise from a low speed collision. Although defendants contended that a low speed collision could not cause significant injury, defendants did not present "bio-mechanic experts" to substantiate the argument. Therefore, the trial court concluded that a new trial, instead of judgment in favor of plaintiff, was appropriate. Irrespective of the conclusion that plaintiff suffered a serious impairment of a body function, the trial court held that the trier of fact had to resolve the question of causation, and the trial court erred in allowing the jury to fail to determine if plaintiff's injuries were the result of the September 1999 accident.⁵

On appeal, defendants argue that whether plaintiff suffered a serious impairment of body function was a question of fact for the jury and, therefore, that the trial court erred in overturning the jury's decision and granting plaintiff's motion for new trial. We review a trial court's decision to grant a motion for new trial for an abuse of discretion. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). An abuse of discretion occurs when the trial court's decision results in an outcome that is not within the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). MCR 2.611 authorizes the trial court to order a new trial and includes the circumstances where a verdict is against the great weight of the evidence, contrary to law, the result of an error at law in the proceedings, or the result of a mistake by the trial court. See MCR 2.611(A)(1)(e), (g). The authority to grant a new trial was established historically to give the trial court the power to correct errors or prevent injustice. See *Aetna Casualty & Surety Co v Yeatts*, 122 F2d 350, 352-354 (CA 4 1941). The trial court has the duty to correct errors and has the opportunity to do so when ruling on a motion for new trial. *Termaat v Bohn Aluminum & Brass Co*, 362 Mich 598, 602; 107 NW2d 783 (1961).

⁵ The trial court also questioned the veracity of defendant's expert, but held that the issue of resolution of the conflicting testimony regarding causation was an issue for the trier of fact.

In the no-fault automobile insurance act, MCL 500.3101 *et seq.*, tort liability for noneconomic losses is permitted when the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1); *Hardy v Oakland Co*, 461 Mich 561, 565; 607 NW2d 718 (2000). A serious impairment of body function is defined in the no-fault act as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7). The issue of whether a plaintiff has suffered a serious impairment of body function is a question of law to be decided by the trial court, unless there is a material factual dispute concerning the nature and extent of the person's injuries. MCL 500.3135(2)(a); *Kreiner v Fischer*, 471 Mich 109, 120; 683 NW2d 611 (2004).

Our Supreme Court developed a multi-step analysis for trial courts to use in determining whether a plaintiff, who alleges a serious impairment of body function, meets the statutory threshold for third-party tort recovery. *Kreiner, supra* at 131. First, the trial court must “determine that there is no factual dispute concerning the nature and extent of the person’s injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function.” *Id.* at 131-132. See MCL 500.3135(2)(a). If the court so concludes, then it may decide the issue as a matter of law and continue to the next step. *Id.* at 132. Next, it must determine if an important body function has been impaired and, if so, whether the impairment was objectively manifested. *Id.* Finally, if the impairment of an important body function was objectively manifested, the court must decide whether the impairment affected the plaintiff's general ability to lead a normal life. *Id.*

In the instant case, plaintiff alleges that he suffered from chronic neck pain and radiating pain, numbness, and tingling in his upper appendages after the 1999 accident. The trial court ultimately determined, in deciding the new trial motion, that there was no material factual dispute concerning the nature and extent of plaintiff’s cervical spine condition, and that this condition constituted a serious impairment of body function. We agree. It is undisputed that the ability to move one’s neck is an important body function, and we agree with the trial court that plaintiff presented ample objective evidence to establish that his ability to use his neck and upper appendages was severely impaired after the 1999 accident. For an impairment of an important body function to be objectively manifested, there must be a medically identifiable injury or condition which has a physical basis, *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002), and the injury must be capable of objective verification by qualified medical personnel, either as visually apparent or as detectable by medical testing, *Netter v Bowman*, 272 Mich App 289, 296; 725 NW2d 353 (2006). Plaintiff’s treatment records indicate that he developed chronic neck pain and bulging discs immediately following the accident and, 14 months later, plaintiff’s physician diagnosed him with cervical radiculopathy. Plaintiff’s diagnoses were subsequently confirmed by MRIs, EMGs, myelograms, and CAT scans. Plaintiff’s symptoms heightened over time, so that four years after the accident, he suffered from visibly severe pain and a partially paralyzed limb. And, his cervical spine condition ultimately necessitated surgical intervention.

Further, the record supports the trial court’s determination that plaintiff’s cervical spine condition affected his general ability to lead a normal life. Our Supreme Court has held that, to determine whether the course of a plaintiff’s normal life has been affected, a court should engage in a multifaceted inquiry, “comparing the plaintiff’s life before and after the accident as well as

the significance of any affected aspects on the course of plaintiff's overall life." *Kreiner, supra* at 132-133. The following nonexhaustive list of objective factors may be considered in evaluating this question: (a) the nature and extent of the impairment; (b) the type and length of treatment required; (c) the duration of the impairment; (d) the extent of any residual impairment; and (e) the prognosis for eventual recovery. *Id.* at 133.

Here, plaintiff underwent injections, multiple rounds of physical therapy, and surgery to treat his cervical spine condition. In the years between the 1999 accident and the 2004 surgery, plaintiff's symptoms gradually heightened. As he lost mobility in his neck, and pain and numbness affected his upper appendages, it became increasingly difficult for plaintiff to do housework, yardwork, and recreational activities, which he participated in before the accident. Eventually, plaintiff's ability to drive, sleep, and eat were also affected. Defendants argue that, because plaintiff suffered from chronic, disabling low back pain before the 1999 accident, that any additional pain caused by his cervical condition had no impact on his already limited lifestyle. We disagree. The mere fact that a person suffers from a disabling condition does not mean that he cannot suffer an additional serious impairment of body function. Here, it is apparent that, although plaintiff had a relatively limited lifestyle prior to the accident, his ability to perform basic functions, such as driving, sleeping, and eating, were substantially altered as a result of his chronic neck pain and related neurological symptoms, including partial paralysis.

Plaintiff acknowledged prior existing medical conditions. He testified that he had moved into a condominium following his back injuries and surgeries to minimize his maintenance activities. However, he managed to maintain the interior of his premises. Plaintiff testified that, although disabled, he was considering returning to part-time employment and had managed to live with a lower back condition. It was asserted that the car accident with defendant Glupker altered his lifestyle. Following the accident at issue in this case, plaintiff testified that he had to rely on his children for assistance with home care and other issues. Although he did not specifically identify his condition after the accident as "partial paralysis," he testified that he experienced numbness and at times lost the ability to grasp items. Plaintiff also had been able to control pain without the use of prescription drugs. However, as the pain and deterioration of his condition continued, his treating physicians recommended the use of prescription pain medication. Additionally, because all surgery presents risks and even the possibility of an unfavorable result, plaintiff sought conservative treatment through physical therapy. Ultimately, plaintiff's treating physicians opined that surgery was a necessary intervention. Since the surgery, plaintiff had seen improvement in his condition. Defendants' expert witness did not refute any of the medical testimony addressing plaintiff's objective injury or the impact on his life.⁶ On this record, we cannot conclude that the trial court's decision to grant plaintiff's motion for a new trial was an abuse of discretion. *Barnett, supra*. A motion for a new trial offers the trial court the opportunity to correct errors. *Termaat, supra*. The trial court did not err in

⁶ We also note that defendant's expert testified that plaintiff had suffered prior neck injuries. For example, he testified that prior reports indicated that plaintiff had suffered a shoulder injury, but that was essentially the same as a neck injury. However, the foundation for such a conclusion was not present in the record.

concluding that this type of impairment to the neck as opposed to the prior low back injury warrants third-party tort recovery, if caused by the accident at issue.

Defendants argue that the threshold injury issue was a question of fact for the jury and that the trial court erred, as a matter of law, in overturning the jury's determination on the issue in deciding the motion for new trial. In so arguing, defendants emphasize that there was a material dispute concerning the effect plaintiff's alleged injury had on his ability to lead a normal life. But, the mere fact that defendants dispute this point does not prevent the trial court from deciding the threshold injury issue as a matter of law. *Range v Gorosh*, 140 Mich App 712, 716-719; 364 NW2d 686 (1984). On the contrary, such disputes should be resolved by the trial court unless it "determines that an 'outcome- determinative genuine factual dispute' exists" concerning the nature and extent of the plaintiff's injury. *Miller v Purcell*, 246 Mich App 244, 247; 631 NW2d 760 (2001), quoting *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). Defendants' challenge does not take issue with the nature and extent of plaintiff's condition, and therefore, the threshold injury issue could properly be decided as a matter of law. Defendants did not present contrary testimony or impeach plaintiff's testimony regarding the new restrictions or limitations that occurred following the accident at issue. To allow the jury's no-threshold verdict to stand would deprive plaintiff of his right to fair trial where the issue of serious impairment of body function should never have been submitted to the jury in the first instance. See *Lahousse v Hess*, 125 Mich App 14, 18-19; 336 NW2d 219 (1983).

On appeal, defendants emphasize that there was a material factual dispute concerning the origin of plaintiff's injury. While we agree that there were opposing expert opinions presented at trial regarding this issue, we point out that the origin of plaintiff's condition is a question of *causation* and is unrelated to whether plaintiff had a serious impairment of body function. Plaintiff's duty to establish the existence of a threshold injury is separate from his duty to establish the element of a tort cause of action. See *Stephens v Dixon*, 449 Mich 531, 539-541; 536 NW2d 755 (1995). The trial court recognized this, granting the new trial for the jury to determine causation and damages.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Michael R. Smolenski