STATE OF MICHIGAN

COURT OF APPEALS

MARY LOU WILFONG,

Plaintiff-Appellee,

v

MICKALICH & ASSOCIATES, INC.,

Defendant-Appellant.

UNPUBLISHED
July 1, 2010

No. 290949
Oakland Circuit Court
LC No. 2007-087068-NI

Before: MURPHY, C.J., and K. F. KELLY and STEPHENS, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order granting plaintiff's motion for a new trial. We affirm regarding the non-economonic claim and reverse regarding the economic claim. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case involves plaintiff's claims for non-economic damages and work-loss damages arising from an automobile accident. The case proceeded to a jury trial before a visiting judge. At the close of plaintiff's proofs, the judge granted defendant's motion for a directed verdict, finding that plaintiff had failed to establish an objectively manifested impairment and had failed to prove her economic damages. Plaintiff thereafter filed a motion for a new trial, which was heard by the original assigned judge. The court determined that the visiting judge erred in granting a directed verdict and granted plaintiff's motion for a new trial.

A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion, which occurs when the decision results in an outcome falling outside the range of principled outcomes. *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). In this case, the assigned judge determined that the visiting judge erred in granting defendant's motion for a directed verdict. A decision on a motion for a directed verdict is reviewed de novo. *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679; 645 NW2d 287 (2001). In reviewing a ruling on a motion for a directed verdict, a court must "examine the evidence and all reasonable inferences that may be drawn from it in the light most favorable to the nonmoving party." *Clark v Kmart Corp*, 465 Mich 416, 418; 634 NW2d 347 (2001). "Only if the evidence so viewed fails to establish a claim as a matter of law should the motion be granted." *Id.* at 419. "If reasonable jurors could honestly have reached different conclusions, neither the trial court nor this Court may substitute its judgment for that of the jury." *Hunt v Freeman*, 217 Mich App 92, 99; 550 NW2d 817 (1996).

In this case, it is clear from the assigned judge's written opinion that his decision granting plaintiff a new trial was based on the evidence presented at trial. Upon de novo review of the trial evidence, we conclude that the visiting judge erred in granting defendant's motion for a directed verdict. Therefore, the assigned judge did not abuse his discretion in granting plaintiff's motion for a new trial.

A person is subject to tort liability for automobile negligence if the injured person "suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is defined 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). This requires that the plaintiff establish that an important body function has been impaired and that the impairment is objectively manifested. *Kreiner v Fischer*, 471 Mich 109, 132; 683 NW2d 611 (2004).

An objectively manifested impairment is a medically identifiable injury or condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002). This means that the injury "must be capable of objective verification by a qualified medical person either because the injury is visually apparent or because it is capable of detection through the use of medical testing." *Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006) (footnote omitted). An impairment can be objectively manifested, for example, by an x-ray, *Sherrell v Bugaski*, 140 Mich App 708, 711; 364 NW2d 684 (1984), other objective tests such as an MRI or an EMG, *Kreiner v Fischer (On Remand)*, 256 Mich App 680, 685; 671 NW2d 95 (2003), rev'd on other grounds 471 Mich 109 (2004), or a passive range-of-motion test, *Shaw v Martin*, 155 Mich App 89, 96; 399 NW2d 450 (1986). "Subjective complaints that are not medically documented are insufficient." *Kreiner*, 471 Mich at 132.

Plaintiff underwent spinal fusion surgery a few months before the accident. After the accident, plaintiff had low-back pain and her increased pain since the fusion surgery was causally connected to the accident. A CT scan and an EMG test showed no abnormalities unrelated to the prior surgery. Dr. Fischgrund testified that the plaintiff's mobility appeared compromised. He referred plaintiff to the pain specialist, Dr. Sessa. A straight-leg raising test was positive, meaning that when Dr. Sessa pushed plaintiff's leg upward, plaintiff experienced pain. According to Dr. Sessa, the straight-leg raising test is partially objective in nature, as he is able to see a patient's reaction as the leg is raised. Such a test appears equivalent with the passive range of motion test approved of in *Shaw*,155 Mich App at 96. Furthermore, it was also evident that plaintiff walked with a stiff gait.

As stated above, an injury need not be verifiable through actual testing in order to be objectively manifested. Rather, *Netter* explicitly states that an injury is objectively manifested where it is "visually apparent." *Netter*, 272 Mich App at 305. Based in part on his observations of plaintiff's mobility, Dr. Sessa concluded that that plaintiff had "joint irritation in her back" and "back pain with radicular symptoms." Therefore, the serious impairment that plaintiff suffered was objectively manifested in the form of limited mobility. Consequently, the trial court did not err in granting plaintiff's motion for a new trial regarding her non-economic claim.

Additionally, defendant asserts on appeal that the trial court erred in granting a new trial regarding plaintiff's economic claim. "Notwithstanding any other provision of law, tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle" remains for

"[d]amages for allowable expenses, work loss, and survivor's loss as defined in sections 3107 to 3110 in excess of the daily, monthly, and 3-year limitations contained in those sections." MCL 500.3135(3)(c). A plaintiff may recover economic damages for work loss under § 3135(3)(c) even if she does not meet the statutory threshold for serious impairment of body function under § 3135(1). *Cochran v Myers*, 146 Mich App 729, 731; 381 NW2d 800 (1985). Work-loss benefits payable by the insurer as part of personal protection insurance benefits consist of "loss of income from work an injured person would have performed during the first 3 years after the day of the accident if he or she had not been injured." MCL 500.3105(1); MCL 500.3107(1)(b). Thus, assuming plaintiff could establish negligence on the part of defendant's agent, she could recover actual lost income in excess of the three-year limitation. *Ouellette v Kenealy*, 424 Mich 83, 87; 378 NW2d 470 (1985).

The amount of the plaintiff's damages is an issue of fact to be decided by the trier of fact. *McManamon v Redford Twp*, 273 Mich App 131, 141; 730 NW2d 757 (2006). The plaintiff has the burden of proving her damages "with reasonable certainty." *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). "Although damages based on speculation or conjecture are not recoverable, damages are not speculative merely because they cannot be ascertained with mathematical precision." *Ensink v Mecosta Co Gen Hosp*, 262 Mich App 518, 525; 687 NW2d 143 (2004) (citations omitted). "It is sufficient if a reasonable basis for computation exists, although the result be only approximate." *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). But where economic damages are capable of precise calculation, they "must be proved with reasonable certainty, and are not to be inferred or fixed arbitrarily by the jury." *Shaw-Walker Co v Fitzsimons*, 148 Mich 626, 630; 112 NW 501 (1907).

The evidence showed that at the time of the accident, plaintiff worked full time as a manager at a Wendy's restaurant. She left that job for a clerical position and, at the time of trial, earned $10.50 an hour for a 40-hour week. Plaintiff testified that but for the accident, she would have stayed at Wendy's because "I had good benefits, I had four weeks vacation pay, sick days, personal days, I made my own schedule. . . . [T]hey matched a certain percent of 401. I don't have any of that, you know, I make like a third of what I made." This statement is both vague, in that plaintiff estimated her current income at about a third of her unstated prior income, and ambiguous, in that plaintiff did not specify whether the one-third estimate reflected a straight reduction in income or reduced income and a loss of other fringe benefits, which are not recoverable as work-loss damages. *Krawczyk v Detroit Auto Inter-Ins Exch*, 418 Mich 231, 235-236; 341 NW2d 110 (1983). Accordingly, plaintiff's testimony was insufficient to prove her economic damages with reasonable certainty and thus the visiting judge properly granted defendant's motion for a directed verdict on plaintiff's claim for economic damages.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens