STATE OF MICHIGAN

COURT OF APPEALS

AMADO C. ABRIGO,

Plaintiff-Appellant,

v

JEREMY LEE SCHULTZ,

Defendant-Appellee.

UNPUBLISHED
January 28, 2000

No. 213207
Ingham Circuit Court
LC No. 96-083288 NI

AMADO C. ABRIGO,

Plaintiff-Appellee,

v

JEREMY LEE SCHULTZ,

Defendant-Appellant.

No. 213254
Ingham Circuit Court
LC No. 96-083288 NI

Before: Talbot, P.J., and Gribbs and Meter, JJ.

PER CURIAM.

In Docket No. 213207, plaintiff appeals as of right the trial court's reduction of the jury's damages award by the amount of plaintiff's settlement with a third-party defendant and its determination of costs and interest. In Docket No. 213254, defendant appeals as of right the trial court's grant of partial summary disposition to plaintiff pursuant to MCR 2.116(C)(10). We affirm in part and reverse and remand in part.

Plaintiff alleged that he was seriously injured in an automobile accident on July 12, 1995. It was undisputed that plaintiff was stopped in traffic behind a car when he was rear-ended by a jeep driven by John Haberkorn. The jeep was immediately struck from behind by a car driven by defendant, which caused the jeep to hit plaintiff's vehicle a second time. Plaintiff testified that he had his right foot on the

brake and, with each impact, pressed harder on the brake to avoid hitting the car in front of him. Haberkorn admitted liability, settled with plaintiff prior to trial, and is not a party to this appeal.

Defendant first argues that the trial court erred in granting partial summary disposition for plaintiff on the issue of defendant's negligence. We disagree. This Court reviews a motion for summary disposition de novo. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In reviewing a motion brought pursuant to MCR 2.116(C)(10), the trial court must consider the documentary evidence in the light most favorable to the nonmoving party. *Id.*, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). Summary disposition is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 454-455.

Defendant testified that he was traveling about one car length behind Haberkorn's jeep at a speed of thirty to thirty-five miles per hour. He stated that traffic was "extremely busy" and that he was unable to avoid rear-ending the jeep when it suddenly stopped. Under these circumstances, a presumption arose that defendant was negligent, which could be rebutted by evidence that he encountered a sudden emergency not of his own making. See MCL 257.402(a); MSA 9.2102(a) and MCL 257.627(1); MSA 9.2327(1); *McKinney v Anderson*, 373 Mich 414, 419; 129 NW2d 851 (1964). Here, defendant failed to produce evidence that he was confronted with a sudden emergency that was either "unusual or unsuspected." *Vander Laan v Miedema*, 385 Mich 226, 231-232; 188 NW2d 564 (1971). Indeed, defendant admitted that he was closely following a vehicle in heavy traffic. He presented no evidence that the abrupt stop "vari[ed] from the every day traffic routine confronting the motorist" or should not have been reasonably expected under the circumstances that existed at the time of the accident. *Id.* at 232; *Hill v Wilson*, 209 Mich App 356, 360-361; 531 NW2d 744 (1995). Accordingly, the trial court did not err in granting summary disposition on the issue of defendant's negligence.

Defendant next argues that the trial court erred in granting partial summary disposition on the issue whether plaintiff's alleged aggravation of a preexisting degenerative joint disease, which caused constant pain in the low back and right leg, constituted a serious impairment of body function. Under the Michigan no-fault act, a person remains subject to tort liability for noneconomic damages caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1); MSA 24.13135(1); *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995).

Even assuming defendant is correct in contending that the trial court erroneously *applied* the post-tort reform standard for reviewing motions based on serious impairment, we conclude that summary disposition was proper under the standard set forth in *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986). *Lane v Kindercare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). To satisfy the threshold of "serious impairment of body function" under *DiFranco*, a plaintiff had to prove that (1) the injuries sustained in the accident impaired one or more body functions and (2) the impairment was serious. *Id.* at 39, 67. "The focus . . . is not on the injuries themselves, but on how the injuries affected a particular body function." *Id.* at 39. Considerations bearing on whether an impairment was serious included, "the extent of the impairment, the particular

body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors." *Id.* at 69-70. A comparison of the plaintiff's abilities and activities before and after the accident may be relevant insofar as it establishes the existence, extent, and duration of an impairment of body function. *Id*. at 68.

Under *DiFranco*, the question whether a plaintiff had satisfied the threshold for a serious impairment of body function was ordinarily one for the trier of fact:

> The question whether the plaintiff suffered a serious impairment of body function must be submitted to the trier of fact whenever the evidence would cause reasonable minds to differ as to the answer. This is true even when there is no material factual dispute as to the nature and extent of the plaintiff's injuries. [*Id.* at 38.]

However, where reasonable minds could not differ concerning the seriousness of the injury, the threshold issue was one of law for the court. *Id.* at 51-52.

The elderly plaintiff presented a doctor's report indicating that in the few days following the accident, he began experiencing low back pain, which caused him to seek the help of the physician. Plaintiff's subsequent treatment consisted of a "TENS" unit, physical therapy, a lumbosacral girdle and medications without clinical improvement. The report further stated that, before the accident, plaintiff could perform normal activities, including climbing stairs, taking walks of more than one mile, doing all indoor and outside housework and dancing on a weekly basis. More than two years after the accident, however, plaintiff continued to complain of constant low back and right leg pain, was unable to walk more than one block, and could not wash dishes, cook, or dance. Defendant's expert did not contest plaintiff's functional limitations, acknowledged that his symptoms were real, and that he needed further treatment; however, he believed the symptoms stemmed from problems associated with plaintiff's right hip and did not appear to be related to the accident. Based on the evidence presented, we conclude that reasonable minds could not differ regarding whether plaintiff suffered a serious impairment and agree with the trial court's decision to limit the issue at trial to causation and damages.

Defendant next argues that the trial court abused its discretion in excluding a medical record indicating that plaintiff injured his right knee in a 1990 automobile accident because it was relevant to the issues of causation and damages. This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Lagalo v Allied Corp (On Remand)*, 233 Mich App 514, 517; 592 NW2d 786 (1999).

After a thorough review, we find no abuse of discretion. As noted, plaintiff alleged that the accident aggravated a preexisting degenerative joint disease which caused constant low back and right leg pain. The trial court correctly refused to introduce evidence of the 1990 knee injury unless defendant could produce medical evidence linking the knee injury to plaintiff's current symptoms. Because defendant failed to do so, the trial court was within its discretion in excluding the evidence as irrelevant. MRE 401; See also *Joba Construction Co, Inc v Burns & Roe, Inc*, 121 Mich App 615, 632; 329 NW2d 760 (1982) NW2d 373 (1995). Regardless, any error in the exclusion of the

evidence was harmless because the trial was fraught with testimony concerning plaintiff's preexisting ailments, including the fact that he suffered from advanced arthritis in both knees. MCR 2.613(A).[1]

Finally, defendant argues that the trial court abused its discretion in admitting a photograph of plaintiff's vehicle after repairs had begun. Again, we disagree.

The photograph was offered to show the extent of the damage to the rear of plaintiff's vehicle, which plaintiff testified was accurately and fairly depicted. Contrary to defendant's contention, the extent of damage to the vehicle tended to show the degree of impact and was therefore relevant to the issues of causation and noneconomic damages. MRE 401; see also *McMiddleton v Otis Elevator Co*, 139 Mich App 418, 423; 362 NW2d 812 (1984). Nor do we find the fact that the photograph depicted the vehicle with missing parts to have caused any possible prejudice to defendant within the meaning of MRE 403. On voir dire by defense counsel, plaintiff explained that only the rear of the car had been affected as a result of the accident and that it was the repair shop that had removed the parts in order to fix the vehicle. See *Knight v Gulf & Western Properties, Inc*, 196 Mich App 119, 133; 492 NW2d 761 (1992) (photographs are admissible despite changes, as long as someone testifies with regard to the extent of the changes). Moreover, in response to defendant's objection, the trial court noted in open court that "the jury will understand from [plaintiff] that the doors and the trunk lid were on [after the accident]." Therefore, the trial court did not abuse its discretion in admitting the photograph.

Plaintiff argues that the trial court erred in offsetting the amount of his pretrial settlement with defendant Haberkorn against the jury verdict award. We agree.

Prior to tort reform, a release given to a codefendant for the same injury "reduce[d] the claim against the other tortfeasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever is greater." MCL 600.2925d; MSA 27A.2925(4) (former subsection (b)); see also *Brewer v Payless Stations, Inc*, 412 Mich 673, 679; 316 NW2d 702 (1982). Tort reform legislation eliminated this principle and now requires that liability among tortfeasors be apportioned by the trier of fact according to percentage of fault, regardless of whether the person is, or could have been, named as a party to the action. MCL 600.2957(1); MSA 27A.2957(1). Thus, "*unless otherwise agreed by all parties to the action*", the court must instruct the jury to answer special interrogatories and apportion the percentage of total fault of all persons that contributed to the injury, including any person who has been released from liability, regardless of whether that person was or could have been named as a party to the action. MCL 600.6304(1)(b); MSA 27A.6304(1)(b) (emphasis added). The court must then determine the award of damages to the plaintiff and enter judgment against each party who was not released from liability before trial. MCL 600.6304(3); MSA 27.6304(3).

Here, the new tort reform legislation favorable to defendant was in effect at the time plaintiff filed the present action. MCL 600.2925d; MSA 27A.2925(4) as amended (statutory and historical notes); see also MCL 600.2956; MSA 27A.2956; MCL 600.6304(4); MSA 27A.6304(4). Based on the record before us, we cannot conclude that the parties "agreed" to waive its application and to use the pre-tort reform standard the trial court applied as defendant claims. Indeed, defendant never mentioned the issue of setoff before or during trial and, instead, raised the issue for the first time in a post-trial

motion for setoff in which he exclusively cited the court to the pre-tort reform standard. We therefore hold that the trial court erred in applying the pre-tort reform standard to resolve the set off issue. However, because defendant failed to introduce any evidence whatsoever of Haberkorn's comparative negligence, there is no evidence of comparative negligence that the jury could have set off against defendant.[2] Accordingly, we reverse and remand for reinstatement of the original jury verdict amount.

Plaintiff also argues that the trial court erred in disallowing certain costs pursuant to MCR 2.625(A)(1) without explanation. We deem this issue abandoned because it is not sufficiently briefed. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 717; 591 NW2d 676 (1998). Plaintiff fails to specify which costs were improperly disallowed and does not provide any rationale or statutory authority that would have justified the imposition of each unspecified cost. *Beach v State Farm Mut Auto Ins Co*, 216 Mich App 612, 621; 550 NW2d 580 (1996) (because "[t]he power to tax costs is . . . wholly statutory" . . . "the prevailing party cannot recover costs were there exists no statutory authority for awarding them"). It is well settled that a party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim, and then search for authority to sustain or reject it. *Palo Group Foster Care, Inc v Department of Social Services*, 228 Mich App 140, 152; 577 NW2d 200 (1998). In any event, a thorough review of the record persuades us that the trial court sufficiently justified its reasons for failing to award certain costs on the record, *Blue Cross & Blue Shield v Eaton Rapids Comm Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997), and was within its discretion in denying them. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 566 NW2d 528 (1996), aff'd 458 Mich 582; 581 NW2d 272 (1998).

We affirm in Docket No. 213254. In Docket No. 213207 we reverse and remand in part for entry of an order reinstating the original jury verdict and recalculation of interest pursuant to MCL 600.6013; MSA 27A.6013. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Roman S. Gribbs
/s/ Patrick M. Meter

[1] To the extent defendant argues that the trial court abused its discretion in excluding evidence of other prior injuries, we deem this issue abandoned because it is not adequately briefed. *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 717; 591 NW2d 676 (1998). Defendant merely states his position and refers this Court to "some of the records" without supporting argument or rationale. A party may not merely announce a position and leave it to this Court to discover and rationalize a basis for the claim. *Id*. We therefore decline to address this issue.

[2] After a thorough review, we find no record support for defendant's claim (made without citation to the record) that the trial court precluded him from introducing evidence as to Haberkorn's comparative fault.