

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA ADAMS,

Plaintiff-Appellant,

v

MIKE MAURER,

Defendant-Appellee,

And

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,

Defendant.

UNPUBLISHED

August 19, 2004

No. 247980

LC No. 01-006755-NF

PAMELA ADAMS,

Plaintiff-Appellee,

v

MIKE MAURER and FARM BUREAU
GENERAL INSURANCE COMPANY OF
MICHIGAN,

Defendants-Appellants.

No. 250133

LC No. 01-006755-NF

Before: Fitzgerald, P.J., and Bandstra and Schuette, JJ.

PER CURIAM.

This consolidated appeal involves an auto negligence action as well as an action or first-party no-fault personal injury protection (PIP) benefits. In docket number 247980, plaintiff appeals by leave granted the order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Mike Maurer in the negligence action and allowing a setoff between the negligence action and the action for no-fault benefits. In docket number 250133, defendant Farm

Bureau General Insurance Company of Michigan¹ appeals as of right the portion of the order granting plaintiff's motion for entry of judgment that awarded costs to plaintiff as the prevailing party in the no-fault action. We affirm in part, reverse in part, and remand.

Plaintiff was a passenger in Maurer's car when Maurer lost control of the vehicle and hit a tree. Plaintiff was injured in the collision and underwent hospitalization and treatment for her injuries. On the date of the accident, plaintiff was not covered by a no-fault-insurance policy of her own. Therefore, plaintiff made claims for personal injury protection benefits from Maurer's insurer, Farm Bureau. Farm Bureau paid some, but not all, of plaintiff's claims. Plaintiff filed a complaint presenting two causes of action: a negligence claim against both Maurer and Farm Bureau and a claim for no-fault personal injury protection benefits against Farm Bureau.²

Maurer moved for summary disposition under MCR 2.116(C)(10), arguing that there was no genuine issue of material fact regarding plaintiff's injuries, and that those injuries, as a matter of law, did not amount to a serious impairment of a body function as required by MCL 500.3135. The court granted summary disposition in favor of Maurer and, because plaintiff rejected the case evaluation, awarded Maurer case evaluation sanctions under MCR 2.403(O) in the amount of \$6,809.54, payable to Farm Bureau.

Plaintiff's PIP claim against Farm Bureau continued to trial, with the jury delivering a verdict in favor of plaintiff in the amount of \$4,397.13 and the court awarding plaintiff taxable costs in the amount of \$3,439.38. The trial court entered a final order finding that plaintiff had prevailed in her no-fault action against Farm Bureau, but that Farm Bureau could setoff against the judgment the amount of the case evaluation sanctions payable to Farm Bureau in the negligence action. A final judgment was entered in favor of plaintiff in the amount of \$1,026.97.

Docket No. 247980

Plaintiff argues that the court erred by finding that plaintiff failed to establish a serious impairment of a body function for purposes of the negligence action. We disagree.

We review a trial court's grant of summary disposition de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999). In reviewing a motion for summary disposition granted under MCR 2.116(C)(10), we consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to determine if any genuine issue of material fact exists. *Id.* at 357-358. We resolve all legitimate inferences in favor of the nonmoving party. *Id.* at 358.

The no-fault act generally abolished tort liability with regard to the use of a motor vehicle. MCL 500.3135(3). A statutory exception to this general rule provides that tort liability remains for noneconomic loss if the injured person suffered "serious impairment of a body

¹ The PIP claim was raised against Farm Bureau alone.

² In December of 2002, the court severed the two causes of action for purposes of trial.

function.” MCL 500.3135(1). Whether a person suffered serious impairment of a body function is a question of law for the court to decide where there is an absence of an outcome-determinative genuine factual dispute regarding the nature and extent of the injuries. 500.3135(2)(a)(i), (ii).

The Legislature has defined serious impairment of body function 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). “Serious impairment of body function” contains the following components: an objectively manifested impairment, of an important body function, that affects the person’s general ability to lead his or her normal life. *Straub v Collette*, ___ Mich ___, ___ NW2d ___ (Nos. 124120, 124757, filed July 23, 2004), slip op p 12.

The trial court’s grant of summary disposition to Maurer is premised on the first component of the inquiry; that is, the court found that plaintiff did not have an objectively manifested impairment.³ “In order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis.” *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002).

Though the court noted that “the MRI objectively showed a bulging disc,” the court went further and opined:

However, Plaintiff must have an objectively manifested impairment. This case primarily involves soft tissue injuries and reports of pain and suffering. There is very little objective evidence to support the Plaintiff’s claim. The primary objective finding is an MRI finding. The MRI documents a bulging disc on the right side. However, that bulging right side disc would explain right-sided symptoms. Plaintiff’s symptoms are on the left side. There is no objective evidence to support the left sided symptoms.

In response to defendant’s motion for summary disposition, plaintiff produced medical records indicating that an x-ray, a CT scan, and an MRI all detected an impairment.⁴ Further,

³ The parties do not seem to dispute the second component of the inquiry, i.e., that plaintiff’s impairment was to an “important body function.”

⁴ A CT scan of the chest was taken and indicated that there was a 5% to 10% right lung collapse in the apex representing a pneumothorax. A cervical spine study showed arthritic changes for C5-C6-C7 vertebral bodies and degenerative disc changes at C6-C7 level. An examination by plaintiff’s doctor indicated mild hypertrophy of the uncovertebral joints on the right side at C5-6 and C6-7 with associated mild neural foraminal bony encroachment as well as moderate degenerative disc disease at C6-7. An MRI given the same day revealed moderate disc narrowing at C6-7 and a mild degree of anterior angulation of the cervical spine; a small right posterior disc protrusion or herniation, near the medial aspect of the right C5-6 neural foramen as well as small asymmetric spurs along the right posterior disc at C5-6. Also, mild to moderate compromise of the right C5-6 neural foramen was evident. Finally, discovered was mild spinal stenosis was discovered at C6-7 (eccentric to the right) as well as mild to moderate generalized bulging of the disc, more prominent along the right posterior disc.

medical testimony was presented that showed that disc pain does not necessarily correlate with pain on the same side as the injury. This evidence was sufficient to establish an objectively manifested impairment. See *Sherrell v Bugaski*, 140 Mich App 708, 711; 364 NW2d 684 (1984) (objective manifestations of a back injury can be established through x-rays indicating an abnormal spine).

The third component of the inquiry requires a determination of whether the impairment affected plaintiff's general ability to lead her normal life. Although the trial court did not address this component, this Court may address an unpreserved issue if the question is one of law and all the necessary facts are before the Court. *Miller v Inglis*, 223 Mich App 159, 168; 567 NW2d 253 (1997).

In *Straub*, *supra* at slip op pp 23-24, the Court stated:

In order to be able to maintain an action for noneconomic tort damages under the no-fault act, the "objectively manifested impairment of an important body function" that the plaintiff has suffered must affect his "general ability" to lead his normal life. Determining whether the impairment affects a plaintiff's "general ability" to lead his normal life requires considering whether the plaintiff is "generally able" to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.

Thus, determining whether a plaintiff is "generally able" to lead his normal life requires considering whether the plaintiff is, "for the most part" able to lead his normal life. *Straub*, *supra* at slip op p 24. The Court further stated in *Straub*, *supra* at slip op pp 24-25:

In addition, to "lead" one's normal life contemplates more than a minor interruption in life. . . . [T]he objectively manifested impairment of an important body function must affect the *course* of a person's life. Accordingly, the effect of the impairment on the course of a plaintiff's entire normal life must be considered. Although some aspects of a plaintiff's normal life may be interrupted by the impairment, if, despite these impingements, the course of trajectory of the plaintiff's normal life has not been affected, then the plaintiff's "general ability" to lead his normal life has not been affected and he does not meet the "serious impairment of body function" threshold.

The starting point in analyzing whether an impairment affects a person's "general" i.e., overall, ability to lead his normal life should be identifying how his life has been affected, by how much, and for how long."

"In determining whether the course of 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." *Straub*, *supra* at slip op p 27. The court must then "engage in an objective analysis regarding whether any difference between plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Id.* at slip op pp 27-28.

One month before the accident plaintiff began employment with a painting company and performed the tasks of spackling, sanding, and painting new drywall. She worked thirty to forty hours per week. Prior to this employment, plaintiff was unemployed back to January of 2001. Between October of 2000 and January of 2001, plaintiff worked in a machine shop and prior to that, plaintiff worked for a magazine company where she packed orders. Plaintiff believed that her employment would have continued if she had not been injured.

Plaintiff explained that a number of individuals helped her with routine housework, including her boyfriend with whom she lived. Before the accident she would share in chores such as laundry, washing dishes, or cutting the grass, but after the accident others performed these functions. Plaintiff stated that she had others drive her around and that it “hurt to drive.” However, plaintiff also testified that she did not have a vehicle and even if not injured would have relied on others to drive her around. Before the accident, plaintiff played pool and enjoyed dancing, riding motorcycles, swimming, canoeing, fishing, and accompanying others on hunting trips. After the accident, plaintiff continued to engage in most of these activities.

Looking at plaintiff’s life as a whole, before and after the accident, and the nature and extent of her injuries, we conclude that her impairment did not affect her overall ability to conduct the course of her normal life. Although she is unable to work full-time as a painter, the evidence suggests that steady work is not a key component of plaintiff’s normal life. Before the accident, plaintiff held her current job for one month, and prior to that was unemployed for six months. More important is the fact, according to plaintiff’s testimony, that her six-month unemployment was not occasioned by an inability to work or being laid off or fired, but rather plaintiff voluntarily chose not to work, explaining that “the guy I was seeing told me I didn’t have to work at the time.” The record reveals that plaintiff continued to engage in most of the same activities she did before the accident with the exception of working. However, coupled with the fact that plaintiff was employed for only a month prior to the accident, voluntarily choosing not to work for the six months prior thereto, we conclude that there was no effect on plaintiff’s general ability to lead her normal life. Because plaintiff failed to establish that her impairment affected her general ability to conduct the course of her normal life, she did not satisfy the “serious impairment of body function” threshold for recovery of noneconomic damages. Accordingly, the trial court properly granted summary disposition of the negligence action in favor of defendants.

Plaintiff also argues that Farm Bureau was not entitled to setoff against the PIP benefits awarded in the no-fault action the case evaluation sanctions awarded to Farm Bureau in the negligence action. “Setoff” is a legal or equitable remedy that may occur when two entities that owe money to each other apply their mutual debts against each other. *Walker v Farmers Ins Exchange*, 226 Mich App 75, 79; 572 NW2d 17 (1998). Absent a statutory mandate, authorizing a setoff in a particular circumstance, setoff is a matter of equity. *Id.* Because none of the statutory setoff provisions are applicable in this case, equity controls. A trial court’s decision whether to grant equitable relief is reviewed de novo. *Webb v Smith (After Second Remand)*, 224 Mich App 203; 568 NW2d 378 (1997).

In *Walker*, the insured sued the no-fault insurer in 1992 for nonpayment of no-fault medical and wage-loss benefits. *Id.* at 77. Before trial, the insurer agreed to pay the insured’s outstanding medical expenses, and a trial was conducted on plaintiff’s claim for wage loss. On this claim, the jury returned a verdict of no cause of action, and the trial court ordered the insured

to pay the insurer \$8,629.12, plus interest, as an offer of judgment sanction pursuant to MCR 2.305.

In 1995, the insured brought suit seeking a declaration regarding the no-fault insurer's obligation to pay future no-fault personal protection benefits. The insurer did not dispute its obligation to pay PIP benefits to the plaintiff, but sought to offset against its obligation to pay the plaintiff's PIP benefits for medical expenses the full amount of its judgment against the plaintiff. The plaintiff filed an affidavit claiming that, because she was indigent and her injury precluded her from working, she would "be forever unable to obtain necessary medical treatment and supplies to enable [her] to work" unless defendant agreed to pay her medical expenses without a setoff. *Id.* at 77. This Court held that equity would not permit an insurer to setoff against personal injury protection benefits otherwise payable to its insured attorney fees awarded it in a prior action. *Id.* at 82. The Court reasoned that:

First and most importantly, the setoff sought by defendant is at odds with the overall goals and objectives of the no-fault act. Authorizing no-fault insurers to reduce PIP benefits by the outstanding unrelated debts of their insured would thwart the legislative goal of providing "assured, adequate, and *prompt* reparation for certain economic losses. (Emphasis added). . . . The potential for such a setoff would likely inhibit the swiftness and certitude of no-fault benefits, because insurers would have an incentive to thoroughly investigate all outstanding obligations before providing needed benefits to their insureds. The goals of the act could be impeded further because claimed setoffs could lead to contentious litigation regarding the legitimacy of claimed debts. [*Id.* at 82-83.]

In light of the holding in *Walker*, we conclude that Farm Bureau must pay PIP benefits without a setoff for plaintiff's liability for case evaluation sanctions. However, in this case only \$4,397.13 of plaintiff's \$7,836.51 judgment represents PIP benefits. The remaining \$3,439.38 represents taxable costs awarded to plaintiff under MCR 2.625(A)(1). Therefore, though *Walker* precludes a setoff against the judgment for PIP benefits, further examination is required to determine whether Farm Bureau is entitled to a setoff against the taxable costs awarded by the court.

Generally, a judgment may be satisfied by setoff of a mutual claim. *Mahesh v Mills*, 237 Mich App 359, 361; 602 NW2d 618 (1999). MCL 600.6008 specifically authorizes the setoff of mutual executions and the courts have taken this to mean that equitable setoff is an appropriate method of satisfying judgments. *Id.* at 361, citing *Franklin, supra* at 533; *Wells v Elsam*, 40 Mich 218, 219-220 (1879) (relying on a prior version of the execution setoff statute).

Plaintiff does not provide an argument as to why it would be inequitable to allow Farm Bureau to setoff from its obligation to pay taxable costs a judgment against plaintiff in favor of Farm Bureau for case evaluation sanctions. The policy concerns in *Walker* do not apply here. Accordingly, we find that Farm Bureau is entitled to setoff from its obligation to pay taxable costs of \$3,439.38 by plaintiff's case evaluations sanctions judgment debt of \$6,809.54.

Therefore, two different judgments should be entered, one in favor of plaintiff for \$4,397.13,⁵ and one in favor of defendant for 3,370.16.⁶

Docket No. 250133

Farm Bureau argues that the trial court erred in awarding plaintiff taxable costs following the jury trial in the action for no-fault PIP benefits. We disagree.

The determination of whether a party is a "prevailing party" under MCR 2.625 is a question of law that is reviewed de novo. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 521; 556 NW2d 528 (1996). Similarly, the interpretation and application of court rules presents a question of law subject to review de novo. *Peters v Gunnell, Inc*, 253 Mich App 211, 225; 655 NW2d 582 (2002).

The prevailing party in an action is entitled to the taxable costs of litigation unless prohibited by statute or court rule, or unless the trial court directs otherwise for reasons stated in writing and filed in the action. MCR 2.625(A)(1); *McMillan v Auto Club Ins Ass'n*, 195 Mich App 463, 466; 491 NW2d 593 (1992). Here, the court determined that plaintiff was the prevailing party and therefore allowed taxable costs under the court rule.

The court rules provide specific rules for determining who is the prevailing party:

(1) *Actions With Several Judgments*. If separate judgments are entered under MCR 2.116 or 2.505(A) and the plaintiff prevails in one judgment in an amount and under circumstances which would entitle the plaintiff to costs, he or she is deemed the prevailing party. Costs common to more than one judgment may be allowed only once.

(2) *Actions With Several Issues or Counts*. In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.

Defendant argues that "because plaintiff received a jury verdict of \$4,397.13, and defendants received case evaluation sanctions of \$6,809.54, each party prevailed only in part and defendants prevailed over all (sic)." Defendant's argument, however, does not consider the court rules governing the determination of whether a party is a prevailing party.

This action involved two separate counts or causes of action. Under the rule, "the party prevailing on each issue or count may be allowed costs for that issue or count." MCR 2.625(B)(2). "Costs are to be allowed to the prevailing party with reference to each different

⁵ The amount of the award for PIP benefits.

⁶ The \$6,809.54 for case evaluation sanctions, less the offset for taxable costs of \$3,439.38.

cause of action.” *Klinke, supra*, quoting 3 Martin, Dean & Webster, Michigan Court Rules Practice, pp 723-724. This Court explained how to determine whether multiple causes of action are present:

The rule does involve a problem of interpretation, depending upon the definition used for "cause of action". For example, if a plaintiff joins together claims for negligence and breach of warranty, relating to a single injury, is there only a single cause of action in the case, or has the plaintiff stated different causes of action? If there is only a single cause of action, plaintiff can prevail on one theory, lose on the other, and still be the prevailing party on the entire record. But if these are different causes of action, within the meaning of MCR 2.625(B)(2), the plaintiff will be allowed costs only as to the cause upon which he prevailed, and the defendant will recover costs upon the other cause of action.

Traditionally the definition of "cause of action" in Michigan has been broad and functional, in terms of the transaction or occurrence giving rise to the claim for relief. See Authors' Comment to MCR 2.203. Thus, where alternative theories or claims might be stated, if they arise out of the same transaction or occurrence, there is only a single cause of action, even though each alternative claim or theory might involve technically different liabilities and duties and slightly different factual elements. This definition of cause of action appears to serve the purposes of MCR 2.625(B)(2). Thus, in the example stated above, there is only a single cause of action in the case. If recovery by the plaintiff on any one of the claims would bar a recovery on all of the other claims, it should be concluded that there was only a single cause of action for purposes of allowing costs. If, however, recovery on one of the claims would not bar recovery on the others, different causes of action are involved, within the meaning of MCR 2.625(B)(2), and costs should be allowed to the prevailing party in each cause. [*Klinke, supra*, 519-520, quoting Michigan Court Rules Practice, *supra*, pp 723-724.]

Here, plaintiff presented two distinct causes of action: a negligence action against Maurer and Farm Bureau, and an action for no-fault PIP benefits against Farm Bureau. Therefore, it need only be determined whether plaintiff was a prevailing party with regard to her claim for no-fault PIP benefits alone.

The jury awarded plaintiff damages in the amount of \$4,397.13. Although plaintiff requested damages in the amount of \$30,000, the “fact that plaintiff did not obtain the total amount of damages sought does not prohibit him from being the prevailing party under MCR 2.625(B)(2).” *McMillan, supra* at 466. Because plaintiff was the prevailing party in the action for no-fault PIP benefits, the trial court did not err in awarding plaintiff taxable costs under MCR 2.625.

Affirmed in part, reversed in part, and remanded. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Bill Schuette