STATE OF MICHIGAN

COURT OF APPEALS

RACHEL M. KALLMAN,

Plaintiff-Appellant,

v

JASON F. WHITAKER,

Defendant-Appellee.

UNPUBLISHED
November 26, 2013

No. 312457
Ingham Circuit Court
LC No. 10-000247-NI

Before: METER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

In this case under the no-fault act, MCL 500.3101 *et seq*., plaintiff appeals the trial court's order granting defendant's motion for a directed verdict and dismissing the case. We reverse and remand for further proceedings.

On May 23, 2001, plaintiff was the passenger in an automobile driven by her mother when the vehicle was rear-ended by a vehicle driven by defendant. Defendant admitted that the accident was caused by his negligence. The impact broke plaintiff's seat and crushed the trunk of the car into the backseat. Plaintiff, who was only 10 years old at the time, was rendered unconscious. When she regained consciousness, she complained of back pain and was transported by ambulance to the hospital. After a few hours she was released. Plaintiff was then asymptomatic until April of 2006. She testified that until then, she did not have any back pain or leg problems. She was able to run, play organized basketball, rollerblade, participate in chorale activities, attend church, and more. Plaintiff also suffered several injuries during this time period, including a broken finger, a broken arm and an injured big toe.

In April of 2006, plaintiff experienced "severe" leg pain while at church, but she dismissed it as "just being a kid" and perhaps she "pulled" something. The next day plaintiff slipped and fell while running through wet grass. After that, she had intermittent leg pain that became more consistent and severe. She eventually sought medical treatment. Plaintiff underwent unsuccessful physical therapy before her doctor scheduled an MRI to be performed in late September of 2006. However, in August 2006, before the MRI was conducted, plaintiff was involved in another car accident when her father rear-ended a car in front of them. She testified that she did not suffer any back pain from that incident and she did not go to the hospital.

On October 1, 2006, plaintiff started to experience lower back pain. In an effort to combat the pain, she received a number of injections that did not improve her condition. The

pain intensified to the point where she was hospitalized for six days in the spring of 2008. Shortly after the hospitialization, plaintiff received back surgery that was successful in eliminating her leg pain. However, plaintiff continued to experience back pain and eventually sought treatment with Joel Bez, D.O., a pain management specialist and anesthesiologist. Dr. Bez, who testified as an expert witness during the trial, stated that an MRI showed plaintiff had three herniated discs in her back and that her reported pain was consistent with the medical findings. Dr. Bez opined that the discs were herniated as a result of the 2001 accident. He also opined that it was not unusual for a child to be asymptomatic and that it was unlikely that plaintiff herniated three discs with a slip and fall, but that a slip and fall could "flip the switch on" and exacerbate a previous condition.

Plaintiff initiated this lawsuit against defendant in March 2010. Jury trial commenced on July 24, 2012, and at the conclusion of plaintiff's proofs, defendant moved for a directed verdict in his favor, which the trial court granted. This appeal followed.

Plaintiff argues that the trial court erred in granting defendant's motion for directed verdict where the court essentially disqualified plaintiff's expert as to causation and substituted its opinion, and where a question of fact was presented with respect to whether plaintiff's injuries were related to the 2001 accident. We agree.

The trial court's decision on a motion for a directed verdict is reviewed de novo. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011). "We review all the evidence presented up to the time of the motion in the light most favorable to the nonmoving party to determine whether a question of fact existed." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 455; 750 NW2d 615 (2008). When deciding a motion for directed verdict, the court must consider that the nonmoving party has the right to ask the jury to believe the case presented to it, however improbable it might seem. *Caldwell v Fox*, 394 Mich 401, 407; 231 NW2d 46 (1975), quoting *Detroit & Milwaukee R Co v Van Steinburg*, 17 Mich 99, 117 (1868). "A directed verdict is appropriate only when no factual question exists on which reasonable jurors could differ." *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

In this case, the trial court qualified Dr. Bez, plaintiff's expert, as an expert and admitted his testimony. Before Dr. Bez's testimony was presented, the trial court expressed skepticism about whether Dr. Bez would be able to render an opinion about the cause of the injuries because he was a pain management specialist and not an orthopedic surgeon. Nevertheless, Dr. Bez's testimony was admitted without objection. Dr. Bez opined that plaintiff's herniated discs were caused by the 2001 car accident. If the trial court viewed that testimony in the light most favorable to the nonmoving party, in this case plaintiff, then it would have been clear that there was sufficient evidence to go to the jury on the issue of causation. However, instead of viewing the evidence in the light most favorable to plaintiff, the trial court discounted Dr. Bez's testimony essentially because Dr. Bez was a pain management specialist and not an orthopedic surgeon and because Dr. Bez had not reviewed the plaintiff's pre-2006 medical records. But, the trial court should not weigh a witness's credibility when determining whether to qualify the witness as an expert, and "[t]he extent of a witness's expertise is usually for the jury to decide." *Surman v Surman*, 277 Mich App 287, 309-310; 745 NW2d 802 (2007). And, it is the jury's responsibility to "determine the credibility and weight of trial testimony." *King v Reed*, 278

Mich App 504, 522; 751 NW2d 525 (2008), quoting *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195, 555 NW2d 733 (1996). Accordingly, the trial court erred in taking this issue from the jury.[1]

The trial court also determined that a directed verdict was proper because there was insufficient evidence that plaintiff suffered serious impairment of body function resulting from the 2001 accident. We disagree.

Under the no-fault act, one is subject to tort liability stemming from 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. 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(5). "Whether a plaintiff has suffered a 'serious impairment of body function' is a threshold question that the trial court should decide as a matter of law unless "there is a material factual dispute regarding the nature and extent of the person's injuries . . . ." *Chouman v Home Owners Ins Co*, 293 Mich App 434, 441; 810 NW2d 88 (2011), quoting *McCormick v Carrier*, 487 Mich 180, 193-194; 795 NW2d 517 (2010).

Here, there is a material factual dispute about the nature and extent of plaintiff's injuries. Specifically, Dr. Bez testified that plaintiff suffered from three herniated discs caused by the 2001 accident. Defendant's expert, Dr. Burkhardt, indicated that plaintiff had one herniated disc and multiple bulging discs but could not relate anything with regard to her back to the 2001 accident. In other words, this threshold issue could not be determined as a matter of law. Therefore, the question is whether there was sufficient evidence for plaintiff to establish "(1) an objectively manifested impairment (2) of an important body function that (3) affects the person's general ability to lead his or her normal life." *McCormick*, 487 Mich at 195.

There was sufficient evidence of the first requirement. Specifically, Dr. Bez testified that a MRI showed plaintiff suffered from three herniated discs that were caused by the 2001 car accident. Defendant does not contest that an MRI is objective evidence. Instead, he argues that there were no objectively manifested symptoms because plaintiff was asymptomatic from the date of the accident until 2006. However, the plain language of the statute does not include a temporal requirement, see MCL 500.3135.

Regarding the second requirements, in *Chouman*, this Court stated that "we can conceive of no serious dispute that the spine is an extremely important part of every person's body." 293

[1] We note that the trial court expressly indicated that Dr. Bez's testimony was admitted and that there was no motion to strike the testimony because it was unreliable. See *Gilbert v Daimler Chrysler Corp*, 470 Mich 749, 779-780; 685 NW2d 391 (2004) (holding that the trial court must ensure that expert testimony admitted at trial is reliable, including the data underlying the expert's theories and the methodology by which the expert draws conclusions). Thus, we can only address this issue in terms of whether there was sufficient evidence on the record for a reasonable jury to find that defendant's negligence caused plaintiff's injury.

Mich App at 444. Coextensively, the movement of the back is an important body function. See, e.g., *Netter v Bowman*, 272 Mich App 289, 306; 725 NW2d 353 (2006). And in this case, the parties do not dispute that the second requirement has been established.

Finally, viewing the evidence in the light most favorable to plaintiff, there was also sufficient evidence to at least raise a question of fact as to whether plaintiff's impairment affected her general ability to lead her normal life. "[T]he common understanding of to 'affect the person's ability to lead his or her normal life' is to have an influence on some of the person's capacity to live in his or her normal manner of living." *McCormick*, 487 Mich at 202. "Determining the effect or influence that the impairment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the incident." *Id*.[2] In making the comparison, it is important to note the person's ability to lead his or her normal life must only be "*affected*, not destroyed." *Id*. (emphasis in original).

In this case, the evidence clearly showed that plaintiff's ability to lead her normal life was affected. Before the onset of symptoms, plaintiff was able to play basketball and run. Now she is unable to do either without pain. She testified that she is also unable to assist in family chores or even dress herself at times without severe pain. "[T]here is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected." *Id*. at 203. Therefore, defendant's arguments that plaintiff can still pursue her chosen profession, work, and attend school fulltime are without merit. It is sufficient that some aspect of plaintiff's general ability to lead her normal life was affected. Finally, "the statute does not create an express temporal requirement as to how long an impairment must last in order to have an effect on 'the person's general ability to live his or her normal life.'" *Id*. Similarly, there is no temporal requirement for *when* a person's ability to lead his or her normal life must be affected. Thus, to the extent that defendant argues plaintiff presented insufficient evidence to submit her case to the jury because she was asymptomatic for over five years, his argument is unpersuasive.

Finally, plaintiff requests that we remand to a different trial judge because the original judge "prejudged" her case and is biased against her. Plaintiff points to two incidents as indicative of bias and prejudgment of the case: (1) the trial judge "advocated" for defendant when he suggested that plaintiff's expert could not offer an opinion about causation because he was not an orthopedic surgeon, and (2) the trial judge stated that "[e]ven if I chose to let it go to the jury, I would grant a judgment notwithstanding a verdict in this matter." This Court "may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication." *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). However, nothing on this record suggests that the

[2] We note that there was no testimony about plaintiff's normal life before the incident; however, we believe that it is sufficient to compare plaintiff's life before the impairment started affecting her life. In other words it is sufficient to compare plaintiff's life before the onset of back pain and after the onset of back pain.

trial court would have difficulty setting aside its previous views or that reassignment is advisable to preserve the appearance of justice. Accordingly, disqualification is unnecessary.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro