STATE OF MICHIGAN

COURT OF APPEALS

ANNA MARY DeWITT,

Plaintiff-Appellant,

v

JUNE ALICE BARES,

Defendant-Appellee.

OCT 28 1987

No. 82224

BEFORE: Beasley, P.J., and R.M. Maher and M.E. Dodge*, JJ.

PER CURIAM

Plaintiff appeals as of right from the November 28, 1984 order of the Ottawa Circuit Court entering judgment upon a jury verdict of no cause of action and the December 5, 1984 order of the circuit court denying her motion for a new trial. The facts underlying plaintiff's claim have been stipulated to as follows.

At about 8 p.m. on July 1, 1981, plaintiff's car was struck by defendant's car at the intersection of 20th Street and Diekema Road in Holland, Ottawa County. After the accident, plaintiff, accompanied by her minister, walked the few blocks from the accident scene to her home. Later that night, plaintiff presented herself at the Holland Community Hospital's emergency room complaining of left shoulder, rib, and knee pain. X-ray examination revealed undisplaced fractures of the third and fourth ribs. Plaintiff was treated and released.

On April 12, 1982, plaintiff filed her complaint in the circuit court seeking damages for noneconomic loss, MCL 500.3135(1); MSA 24.13135(1), pursuant to the no-fault act, MCL 500.3101 et seq.; MSA 24.13101 et seq. Plaintiff alleged, inter alia, that defendant's negligence caused her to sustain injuries

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*Circuit Judge, sitting on the Court of Appeals by assignment.

resulting in a serious impairment of body function. Plaintiff's case was tried before a jury on July 17-19, 1984, after the trial court denied defendant's motion for summary disposition.

At trial, defendant admitted negligence. She did not assert comparative negligence. She did contest plaintiff's claim that plaintiff had sustained a serious impairment of body function.

Plaintiff testified about her injuries and their effect on her. She claimed that she continued to experience chest pain and shortness of breath from her injuries. Furthermore, she had to greatly curtail her work at Carini's Blueberry Farm. She was never hospitalized, not did she have surgery performed for these injuries. Before the accident, she was in good health.

Several physicians testified at trial, either by deposition or in person. Drs. McNitt, Goris, and Townsend agreed that the initial pain caused by fractured ribs can be "exquisite." All agreed the pain generally subsides within several weeks. Only McNitt thought plaintiff's continued chest pain was related to her automobile accident injuries. Goris, who had examined plaintiff on September 4, 1981, diagnosed plaintiff as having a cerebral vascular insufficiency. In October, 1981, plaintiff underwent a left carotid endarterectomy by Dr. Sugiyama after testing revealed a 50% narrowing at the origin at the left carotid artery.

Dr. Gary Gurden, a neurologist, had examined plaintiff on March 31, 1981 before her automobile accident. Based on his examination, Gurden concluded that plaintiff had suffered a minor cerebral vascular accident. Gurden re-examined plaintiff in September, 1981 after her automobile accident. Plaintiff complained of loss of balance which she attributed to the automobile accident. Gurden, however, opined that plaintiff's problem was the result of an old stroke.

Plaintiff's medical records were introduced at trial. These records revealed that plaintiff had been hospitalized for a myriad of medical problems both before and after the accident. Plaintiff had undergone a hysterectomy for pelvic cancer, followed by radiation treatment before the accident. She also had a partial gastric resection for persistent ulcer disease, a cholecystectomy, an appendectomy, and cataract surgery. Various doctors testified that plaintiff suffered from extreme anxiety. Apparently at trial, plaintiff could not remember many of these medical problems. Additionally, after having reviewed plaintiff's medical records, Dr. Townsend opined that "the undisplaced fractures of [plaintiff's] ribs were but a minor disruption in comparison to the major medical calamities that have caused, and continue to cause, [plaintiff] significant medical problems."

At the close of proofs, counsel argued the case to the jury. Defendant's counsel began his argument by stating:

> "Initially, I want to say to you that the case is a very simple case. I never heard plaintiff's counsel mention the most important words in this case and that is one of the issues that you will be asked to answer before you get any further. The first question is whether or not there was a serious impairment of an important body function, because that's the whole issue in this case. I never heard those words mentioned. It's not just a case -- we are not wasting your time. We said the accident was our fault. It is not just a case of jumping a quantum leap and what are the damages, because, as I will tell you in a moment, the law changed in 1973. What we have been talking about and what I am attempting to prove is to show that this, as I said in the beginning, is a minor automobile accident with minor injuries. A lot of other things happened to Mrs. DeWitt unrelated to the auto accident, plain and simple."

He then argued the medical evidence and stressed to the jury that it must find plaintiff's automobile accident injuries resulted in a serious impairment of body function.

On July 19, 1984, the jury returned its verdict in favor of defendant. The jury found that defendant's negligence was the proximate cause of an injury to plaintiff, but that the injury plaintiff suffered did not result in a serious impairment of body function.

On August 14, 1984, plaintiff filed a motion for new trial pursuant to GCR 1963, 527.1(5) [now MCR 2.611(A)]. Plaintiff filed an amended motion for new trial, pursuant to GCR 1963, 527.1(1), (2) and (9) [now MCR 2.611(A)], which the trial court heard on the same date. The trial court denied plaintiff's motion in an order dated November 28, 1984, from which plaintiff now appeals.

On appeal, as she did in the trial court, plaintiff alleges two[1] bases for granting a new trial: (1) that defense counsel, in his closing argument, impermissibly asked the jury to step into plaintiff's shoes; (2) that defense counsel cited several facts in his closing remarks which were not in evidence. Objectionable comments made by counsel which are designed to and which undoubtedly influenced the jury improperly and unfairly during trial are grounds for a new trial. Willoughby v Lehrbass, 150 Mich App 319, 333-334; 388 NW2d 688 (1986). Furthermore, a new trial may be ordered by appellate courts even in the absence of a timely objection if the objectionable remarks denied the opposing party a fair trial. Reetz v Kinsman Marine Transit Co, 416 Mich 97, 103; 330 NW2d 638 (1982).

The first alleged error of defense counsel was his attempt to place the jurors in plaintiff's shoes in the course of their deliberations. On four occasions, defense counsel asked the jurors whether they would trade the specific injuries incurred by plaintiff in the automobile accident, fractured ribs, for various other physical maladies suffered by plaintiff. Those maladies included cancer, cerebral vascular insufficiency and heart disease. Defense counsel's strategy in this regard appears to have been twofold: (1) to contrast plaintiff's injuries resulting from the automobile accident with her other, more severe ailments, thereby encouraging the jury to conclude that the former was not a "serious impairment of body function" as required by plaintiff's theory;[2] and (2) to suggest to the jury

that the true source of plaintiff's continuing pain was ailments not related to the automobile accident.

Plaintiff correctly cites Clark v Grand Trunk W R Co, 367 Mich 396, 400-401; 116 NW2d 914 (1962), for the proposition that attempts to appeal to the sympathies of jurors which are not at issue in the case are improper closing argument. However, we do not believe that defense counsel's argument can be so categorized. First, what constituted a "serious impairment of body function" at the time of trial was a hotly-contested legal issue. Prior to Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), a number of opinions of this Court had held that the phrase was capable of common understanding and therefore was essentially a fact question for the jury at trial. See, e.g., Earls v Herrick, 107 Mich App 657; 309 NW2d 694 (1981), Abraham v Jackson, 102 Mich App 567; 302 NW2d 235 (1980). Cassidy overruled that authority, holding that the meaning of the phrase was an issue of law to be interpreted by the trial court.[3] However, Cassidy left little guidance for the bench and bar as to the meaning of "serious impairment of body function," thus prompting considerable confusion and engendering widely disparate opinions of this Court. Compare, Burk v Warren, 105 Mich App 556; 307 NW2d 89 (1981), with Range v Gorosh, 121 Mich App 1; 328 NW2d 128 (1982). Given the great uncertainty as to the meaning of the phrase at the time of trial, we decline to say that the remarks of counsel were improper. Indeed, the catastrophic illness standard employed by defense counsel was essentially that adopted in some of this Court's own opinions. See Gorosh, supra, at 7. Thus, while we do not condone defense counsel's attempts to instruct the jury on a question of law, Bourke v North River Ins Co, 117 Mich App 461; 324 NW2d 52 (1982), we do not believe that they denied plaintiff a fair trial.

We also find no error insofar as these remarks are construed as an attempt to persuade the jury that the source of

plaintiff's pain was one or more of plaintiff's other maladies not resulting from the automobile accident. That portion of the statute under which plaintiff sought recovery, MCL 500.3135(1); MSA 24.13135(1), clearly conditions recovery upon a causal relationship between the injury and the automobile accident. We believe that, insofar as defense counsel's remarks were an attempt to persuade the jury that the accident was not the cause of her pain, they were entirely proper.

Next, plaintiff argues that defense counsel improperly cited several facts which were not in evidence. First, in the course of his discussion of Dr. Townsend's testimony, defense counsel remarked:

> "Dr. Townsend -- his deposition was taken by me in this case -- but he felt it was important that he come in live and be able to demonstrate and give his reasons why as opposed to having another deposition read which maybe would get a little boring after a while."

Plaintiff does not explain what prejudice she might have suffered from this statement, though we are inclined to believe that it might have bolstered the credibility of Dr. Townsend to some extent. However, the credibility of Dr. Townsend is not a substantive issue in this case. Indeed, we consider the issue to be so collateral and the remark so oblique that we cannot believe it denied plaintiff a fair trial.

As plaintiff points out, defense counsel also remarked:

> "I had no questions of the minister, because he said the woman complains. I have known her to be a truthful person. She says her ribs hurt. He is not a doctor. He can't say whether it is emphysema. He can't say exactly what causes her problems. You can't, just like the therapist said, 'I know I heard some sounds, and she had tenderness there, but I am not a doctor. I don't know what the cause of those problems are.' In fact, when I first got in the case we first had objections generally for Mrs. DeWitt's heart and cardiac problems. That's why it is very important to look and see exactly what is a serious impairment. There is no problem that a heart condition is a serious impairment of a body function. I wouldn't stand up here and argue that it wasn't. The point is whether or not these three ribs that were fractured on July 1st of 1981 are a serious impairment of a body function."

Plaintiff has pointed out that the emphasized portion of this argument states facts unsupported by evidence of record.

However, defendant again fails to point to any particular prejudice she may have suffered from the remark. In fact, the remark is not entirely intelligible, though it might be construed as an attempt to inform the jury that plaintiff had previously alleged heart problems as well as chest pain resulting from the accident. That information might, in turn, be used to infer that plaintiff was not credible. However, even viewed from this perspective, we can only conclude that the remark was again an oblique reference to a collateral issue. Again, we do not believe that it rises to the level of denying plaintiff a fair trial.

The third statement of facts not in evidence arose near the opening of defense counsel's remarks:

> "The issues in this case are not negligence. They are not Mrs. DeWitt's medical bills. They have all been taken care of. It's not wage loss. She has been compensated for that. Those are not issues in this case. The fact that she had a rib fracture in this case, that is not being fought or disputed."

Plaintiff argues that the emphasized portion of these opening remarks was an attempt to cite facts not in evidence so as to evoke the jury's sympathy for the defendant by suggesting that her insurance carrier had already made substantial payments to plaintiff. We have some difficulty in reading the statement in the manner suggested by plaintiff. It does not, in fact, state by whom the bills were paid. Instead, the statement merely narrows the issues before the jury to the question of serious impairment of body function. This was in fact the sole issue before the jury. Thus, while we cannot condone defense counsel's remarks, neither can we find any significant prejudice to plaintiff which was caused by them.

In short, whether the remarks of defense counsel are viewed in isolation or in total, in their full context, we do not believe that plaintiff was denied a fair trial. The defense put forth ample evidentiary support for its position and plaintiff's medical theory was hazy at best. We believe that the jury not

only might have, but did in fact properly return its verdict of no cause of action based upon the evidence of record.

Affirmed.

/s/ William R. Beasley
/s/ Richard M. Maher
/s/ Michael E. Dodge

[1] A third basis raised in the trial court, that the verdict was against the great weight of the evidence, has not been raised by plaintiff on appeal.

[2] See MCL 500.3135(1); MSA 24.13135(1).

[3] Cassidy was later overruled in DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986), though the latter has no application to this case because of its limited, retroactive application. See DiFranco, supra, at 75.