STATE OF MICHIGAN

COURT OF APPEALS

GILBERTO GARZA,

Plaintiff-Appellant,

v No. 94751

EDWARD C. LEVY COMPANY d/b/a CLAWSON CONCRETE COMPANY,

Defendant-Appellee.

Before: Holbrook, Jr., P.J., and MacKenzie and N. A. Baguley*, JJ.

PER CURIAM

Plaintiff appeals by right the August 1, 1986, judgment entered by the Wayne Circuit Court in accordance with the jury verdict rendered in favor of defendant.

This case arises out of the injuries sustained by plaintiff Gilberto Garzo on January 2, 1979, while he was employed as a labor foreman for Darin & Armstrong. Because the only issue on appeal concerns whether the no-fault insurance act, MCL 500.3101 et seq.; MSA 24.13101 et seq., was properly applied to this case, the facts are narrowly limited to that issue.

Defendant Clawson Concrete Company delivered concrete to a building site in Romulus where plaintiff was working. Apparently, after a concrete truck delivers concrete, the cement truck driver is supposed to wash parts of the truck. On cold days, as a result of the washing, the swivel on the chute of the cement truck freezes. It is the truck driver's duty to spray hot water on the swivel on the chute to unfreeze it.

On January 2, 1979, plaintiff directed the first concrete truck of that day [one of defendant's concrete trucks] to a place where cement was needed. When plaintiff was ready, he signaled to the cement truck driver to "give me the cement." Plaintiff testified that the truck driver let the cement come out

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*Circuit judge sitting by assignment on the Court of Appeals.

too fast and, so, plaintiff tried to move the chute on the cement truck in order to direct the cement to another area so that it would not pile up in one spot. But, the chute was frozen and would not move. As a consequence, plaintiff fell and was injured.

Plaintiff claimed that the cement truck driver was negligent in that he did not spray hot water on the chute to unfreeze it and that his injuries were the result of the driver's negligence. After hearing the testimony, the jury returned a special verdict, finding no negligence on the part of the cement truck driver. The trial judge subsequently entered a judgment of no cause of action in favor of defendant in accordance with the jury verdict.

Prior to trial, over plaintiff's objection, the trial judge ruled that the no-fault insurance act, MCL 500.3101 et seq.; MSA 24.13101 et seq., applied to this case. Hence, again over plaintiff's objection, the trial judge instructed the jury under SJI 36.01 on serious impairment of a body function. On appeal, plaintiff claims that that was error.

The sole issue on appeal is whether the no-fault insurance act was properly applied to this case. This issue , we feel, we need not decide since even if it was not properly applied and further even if the trial judge erroneously instructed the jury relative thereto, any such error would be harmless because the jury, by finding no negligence on the part of defendant, never even reached the instruction. See Heck v Henne, 238 Mich 198, 205; 213 NW 112 (1927)[a court may not plant error upon instructions and rules the jury never had occasion to consider]. See also Peden v Carpenter, 352 Mich 604, 610; 90 NW2d 647 (1958); Rotter v Detroit United Railway, 217 Mich 686, 689; 187 NW 271 (1922); Shepard v Barnette, 4 Mich App 243, 245; 144 NW2d 685 (1966). See especially Johnson v White, ___ Mich ___ (Docket No. 79469, Rel'd 3/7/88) [Supreme Court refused to vacate a jury verdict for failure to give a properly requested, accurate and applicable jury instruction where there was no

opportunity for the instruction to have been considered during the jury's deliberations]. The special verdict form indicated that the jury was not to answer any further questions if it found that defendant was not negligent. Hence, because the jury found that defendant was not negligent, it did not consider the no-fault question of whether plaintiff suffered serious impairment of a body function under plaintiff's non-economic loss claim. Hence, even if it was error to rule that this was a no-fault case warranting jury instructions thereon regarding serious impairment, the error would be harmless.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie
/s/ Norman A. Baguley