

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

MILDRED SELAK,

Plaintiff-Appellant,

v

No. 83650

CHARLES A. WALTERS and FRANK J. SELAK,

Defendants-Appellees.

Before: J.H. Gillis, P.J., and B.B. MacKenzie
and R. Robinson,* JJ.

PER CURIAM

Plaintiff appeals as of right the trial court's orders denying her motions for a new trial, but granting her motion for additur. We affirm the trial court's order denying plaintiff's motion for a new trial as to defendant Walters, but we reverse all of the trial court's orders as to defendant Selak and we remand this case to the trial court so that it may enter a verdict of no cause of action on his behalf. MCR 7.216(A)(7).

This action arose out of an automobile accident between a vehicle driven by defendant Frank Selak ("Selak"), who is also plaintiff's husband, and defendant Charles Walters ("Walters"). Plaintiff was a passenger in the back seat of Selak's vehicle. Walters was driving north on John R. Road and Selak was driving east on Hayes Road. There was a stop sign on Hayes Road at John R. Road. Hence Walters had the right-of-way. Selak claimed that he stopped at the stop sign, looked both ways, and, seeing nothing, proceeded into the intersection. After crossing the two southbound lanes of John R. Road, Selak "caught a glimpse of something" and was struck by Walters' vehicle where plaintiff was seated.

Plaintiff sued defendants, claiming that she had suffered a serious impairment of an important body function as a result of the accident. MCL 500.3135(1); MSA 24.13135(1). At

* Retired circuit judge, sitting on the Court of Appeals by assignment.

trial, plaintiff moved for a directed verdict on the serious impairment issue. Oakland County Circuit Court Judge George H. LaPlata denied plaintiff's motion and the case was submitted to the jury.

Oakland County Circuit Court Judge James S. Thorburn accepted the jury's verdict for Judge LaPlata. The jury found that Walters was not negligent, but it found that Selak was negligent and that his negligence was the proximate cause of plaintiff's injuries. The jury answered the remaining questions on its special verdict form as follows:

"The Clerk: Did plaintiff Selak suffer an injury that resulted in permanent serious disfigurement or serious impairment of body function?"

"The Foreperson: No.

"The Clerk: What is the total amount of plaintiff Selak's damages?

"The Foreperson: \$4,000."

Believing these two answers to be inconsistent, the parties agreed that the court should reinstruct the jury and supply it with a new special verdict form. However, before calling the jury back, the parties stipulated that the jury's verdict of no cause of action as to Walters was proper. Judge Thorburn then recalled the jury and told the jurors that he would give them a revised verdict form. He then instructed them to complete the form by redeliberating on their answers to each question. The jury returned to the jury room.

Once the jury had retired, Judge Thorburn called plaintiff's and defendant Selak's counsel to the bench and explained that Judge LaPlata's clerk had given the new jury verdict form to the jurors before they had returned to the courtroom for reinstruction. The jury had filled out that form. Nonetheless, the parties agreed that the jury could return a verdict pursuant to Judge Thorburn's instructions, provided that, the jury could be voir dired on the clerk's communication with them.

The jury returned again, finding Walters non-negligent and Selak negligent. However, this time, the jury found that plaintiff had suffered a serious impairment of body function. The jury again assessed plaintiff's damages at \$4,000.

The court entered a judgment of no cause of action in favor of Walters and a \$4,000 judgment against Selak. Plaintiff moved for a new trial, alleging that the trial court erred when it denied her motion for a directed verdict on the serious impairment issue and that she was entitled to a new trial because Judge LaPlata's clerk's contact with the jury had tainted it. In the alternative, plaintiff moved for additur. Judge LaPlata denied plaintiff's motion as to Walters. He also denied plaintiff's motion for a new trial as to Selak on the condition that Selak accept a \$4,000 additur. Selak accepted the additur and Judge LaPlata denied plaintiff's motion for a new trial. As noted above, plaintiff appeals as of right from these various orders.

MCL 500.3135(1); MSA 24.13135(1) provides:

"A person remains subject to tort liability for noneconomic loss 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."

We hold that once the jury returned a verdict finding that plaintiff had not suffered a serious impairment of a body function, Judge Thorburn should have entered a verdict for Selak because he was not subject to tort liability under MCL 500.3135(1); MSA 24.13135(1). The parties and the judge incorrectly agreed to resubmit this case to the jury on the serious impairment and damages issues. Hence, on remand, we order the trial court to enter a judgment of no cause of action as to Selak. MCR 7.216(A)(7).

We now address plaintiff's claim that the trial court improperly denied plaintiff's motion for a directed verdict on the serious impairment issue. We note that our resolution of

this issue affects the verdict as to Selak only because the jury found Walters non-negligent. Consequently, the verdict entered in Walters' favor remains intact because this alleged error would not change the outcome of this case as to him. See Knoper v Burton, 383 Mich 62, 68; 173 NW2d 202 (1970); Pelley v Peterbilt Motors Co, 133 Mich App 664, 667; 350 NW2d 787 (1984).

When there is no material factual dispute as to the nature and extent of a plaintiff's injuries, courts are to decide as a matter of law whether there has been a serious impairment of body function under Michigan's no-fault act. Cassidy v McGovern, 415 Mich 483, 488; 330 NW2d 22 (1982), reh den 417 Mich 1104 (1983); Argenta v Shahan, 135 Mich 477, 487-489; 354 NW2d 796 (1984), rev'd on other grounds 424 Mich 83 (1985). In considering the serious impairment issue where one party moves for a directed verdict, the trial court should view the evidence in the light most favorable to the nonmoving party. Argenta, supra. Although serious impairment of a body function must be determined on a case-by-case basis, a plaintiff's injuries must affect an important body function, must be objectively manifested, and must be serious. Cassidy, supra, 504-505; Williams v Payne, 131 Mich App 403, 409; 346 NW2d 564 (1984). The seriousness of an injury is measured by an objective standard which looks to the effects of the injury on a person's general ability to lead a normal life. Cassidy, supra, 505. An injury need not be permanent to be serious, but permanency is relevant. Cassidy, supra, 505-506; Guerrero v Schoolmeester, 135 Mich App 742, 747; 356 NW2d 251 (1984), lv den 422 Mich 880 (1985). Serious impairment must also be considered in light of the other two requirements of the no-fault act, namely, death and permanent serious disfigurement. Cassidy, supra, 503.

In this case, plaintiff suffered an undisplaced fracture of her right scapula, a small cortical break in her second left rib, and a straddle fracture in four areas of her

pubic bone. Plaintiff was hospitalized from December 24, 1981 until January 7, 1982. She was in intensive care for the first three days and a catheter was inserted because plaintiff was unable to go to the bathroom on her own. Upon discharge from the hospital, a walker was prescribed for plaintiff. Plaintiff claimed she used the walker until May of 1982. Plaintiff also claimed that she had trouble going to the bathroom, doing her household chores and that she only travelled to her doctor's office during this time. Plaintiff's fractures healed themselves within four months and within nine weeks of the accident, plaintiff had an excellent range of motion in her arms, shoulder and hip. These injuries were undisputed by defendant.

The remainder of plaintiff's injuries were contested by defendants. Defendants claimed that plaintiff's subsequently discovered knee injury and breast tumor were unrelated to the accident, while plaintiff claimed that these injuries were related to the accident. Plaintiff also claimed that she still had pain in her shoulder which restricted her ability to perform housework, as well as, overhead work. However, plaintiff's medical records indicated that she had a normal range of motion in her shoulder nine weeks after the accident and that plaintiff had told one doctor that she could perform all household duties and overhead work within eight months of the accident. As noted above, where there is a dispute as to the nature and extent of a plaintiff's injuries, the question of whether the plaintiff has suffered a serious impairment of body function should be left for the jury. Cassidy, supra, 488.

Nonetheless, plaintiff claims that her non-disputed injuries entitled her to a directed verdict on the serious impairment issue. Plaintiff relies on Cassidy, supra, to support her claim. In Cassidy, supra, 491-493, the plaintiff had two broken bones in his lower right leg. The fractures in both bones were complete and the plaintiff had to wear four different casts

over a 7-month period. The plaintiff was hospitalized for 18 days and while in the casts, the plaintiff had to use a walker because of dizzy spells. X-rays taken nine months after the accident showed that the plaintiff's fractures had healed well; however, the plaintiff was still limping 16 months after the accident and complained of pain, which may have been the result of scar tissue. Twenty months after the accident, the plaintiff returned to normal. Our Supreme Court held that, as a matter of law, the plaintiff had suffered a serious impairment of an important body function. Cassidy, supra, 505.

In this case, plaintiff suffered three undisplaced (as opposed to complete) fractures which healed themselves with bedrest in a four-month period. Plaintiff was hospitalized for 13 days and used a walker for two months, according to her doctor, or for five months, according to plaintiff. Taking the evidence in the light most favorable to Selak, plaintiff suffered no residual effects from the accident. See Argenta, supra. Hence we hold that the trial court correctly denied plaintiff's motion for a directed verdict because plaintiff's non-disputed injuries were insufficient to be serious as defined by Cassidy and because plaintiff's remaining injuries were in dispute. Cassidy, supra; Argenta, supra.

Plaintiff also argues that she is entitled to a new trial because of the improper communication between Judge LaPlata's clerk and the jury. This communication occurred only after the jury had returned its original verdict. Given that we have found this original verdict was proper and that a judgment of no cause of action should have been entered in favor of Walters and Selak, we need not address this claim. Knoper, supra; Pelley, supra.

Hence we affirm the judgments of the trial court as to defendant Walters, but we reverse the judgments of the trial court as to defendant Selak and we remand this case to the trial

court for entry of a judgment of no cause of action on his
behalf. MCR 7.216(A)(7).

Affirmed in part; reversed in part; remanded.

/s/ John H. Gillis
/s/ Barbara B. MacKenzie
/s/ Richard Robinson