STATE OF MICHIGAN

COURT OF APPEALS

THEODORE SHEPARD and BONNIE SHEPARD,
husband and wife,

Plaintiffs-Appellants,

v No. 105910

WILLIAM CARR and CHRISTINE WILHELM,
jointly and severally,

Defendants-Appellees.

Before: Maher, P.J., and Holbrook, Jr. and Sawyer, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a jury verdict in their action for third-party benefits arising from a 1983 automobile accident which found that plaintiffs' injuries did not constitute a serious impairment of a bodily function or a permanent serious disfigurement. On appeal, plaintiffs assign error to a series of evidentiary limitations and remarks made by defense counsel during argument. We reverse and remand for a new trial.

Plaintiff Theodore Shepard was struck head-on, while en route to work on April 16, 1983, by a car driven by defendant William Carr and owned by defendant Christine Wilhelm. The accident occurred when defendant Carr, traveling in the opposite direction from Mr. Shepard, crossed over the center line of the highway and collided with Mr. Shepard.

Plaintiffs first assign error to the trial court's ruling that, as a matter of law, Mr. Shepard's concurrent disability precluded him from having his excess economic claim submitted to the jury. Plaintiffs argue this was improper usurpation of the province of the jury since the defendants had presented no testimony or evidence to suggest that Mr. Shepard was concurrently disabled during the six months he was rendered incapable of working by the surgery upon the ankle injury he sustained in the accident. We disagree.

In making their motion for a directed verdict as to the plaintiffs' economic loss claim, defendants relied upon the admissions made by plaintiffs relative to a work-related back injury suffered by Mr. Shepard in 1986. By plaintiffs' own admissions, the back injury was unrelated to the April 1983 collision. It was during this period of disability, which continued up until the time of trial, that plaintiff underwent surgery for his ankle.

In McDonald v State Farm Mutual Ins Co, 419 Mich 146, 151-152; 350 NW2d 233 (1984), our Supreme Court held that where a person suffers an unrelated injury after an automobile accident and is rendered unable to work, eligibility for first-party no-fault work benefits ceases. The Court held that the work loss provisions were intended to compensate only actual loss of income and not the loss of earning capacity. In Ouellette v Kenealy, 424 Mich 83; 378 NW2d 470 (1985), the Court relied on its ruling in McDonald and held that in a third-party tort action seeking economic work loss damages, only actual loss of income is recoverable. Damages are not recoverable for the loss of earning capacity. Id., p 88.

We find no error then in the trial court's granting defendants' directed verdict motion on plaintiffs' economic loss claim. Plaintiffs suffered no actual loss of income from work during the six months he was recovering from ankle surgery since he was concurrently disabled as the result of a work-related back injury.

Plaintiffs next assert that the trial court abused its discretion by accepting defendants' partial admission of liability on the day of trial and by rejecting plaintiffs' offer of proof as to the witnesses it intended to call on the issues of both liability and damages. We agree.

During the pretrial conference in this matter, defendants made no mention of the possibility that they would make a partial admission on the issue of liability. Plaintiffs thereafter prepared for trial and scheduled six witnesses as to

liability and damage issues. At the start of trial, defendants made a partial admission of liability and in accepting the admission, the trial court ruled plaintiffs could not now present these six witnesses since their testimony could possibly touch upon the liability issue. The trial court rejected plaintiffs' offer to create a special record to demonstrate the relevancy and admissibility of the proposed testimony. Plaintiffs were effectively limited to presenting the damages claim alone even though the jury would ultimately be asked to determine whether or not plaintiffs had met the threshold by its proofs.

Among the reasons for conducting a pretrial conference is the desire to simplify and narrow the issues in the case as well as the desire to avoid traps and surprises at trial. Jamison v Lloyd, 51 Mich App 570, 573; 215 NW2d 763 (1974), lv den 392 Mich 771 (1974). It would seem that defendants' partial admission of liability, coming as it did without warning at the beginning of trial and forcing plaintiffs to drastically revise their trial approach, is precisely the type of surprise pretrial conferences are intended to guard against.

As a result of this admission, plaintiffs were precluded from calling six witnesses, witnesses they assert would have conclusively proven that Mr. Shepard did, in fact, suffer a serious impairment of bodily function, thus meeting the threshold requirement. Whether these six witnesses could have actually proven such impairment is a matter of conjecture since the trial court saw fit to deny plaintiffs' offer of proof through a separate record. What is crystal clear, however, is that absent the testimony of the six witnesses, the jury found no serious impairment of a bodily function.

From our review of the record, we conclude it was an abuse of the trial court's discretion to accept defendants' partial admission of liability and to deny plaintiffs the opportunity to create a special record to demonstrate the relevancy and admissibility of the testimony of the liability/damages witnesses.

Plaintiffs also assign error to the trial court's exclusion of two damages witnesses and all of the photographic evidence on the grounds they were not exchanged as required by the pretrial summary and order. We agree.

The imposition of sanctions for failure to comply with the discovery order is a matter within the trial court's discretion. Absent an abuse of that discretion, this Court will not reverse a trial court's decision concerning the exclusion of evidence for failure to comply with the discovery order. Dixon v W W Granainger, Inc, 168 Mich App 107, 117; 423 NW2d 580 (1987).

Our review of the record leads us to conclude that the trial court did abuse its discretion in excluding this evidence. The photos in question were police photos, listed on plaintiffs' exhibit list at pretrial but never exchanged on the belief they were equally within the purview of both parties and defendants were well aware of them. Moreover, the two damages witnesses were known and available to defendants for some two years since their identities were revealed at the time of Mr. Shepard's deposition.

MCR 2.401 gives the trial court the authority to modify the pretrial conference summary at trial to prevent manifest injustice. The witnesses and photographic evidence did not surprise defendants at trial since defendants were well aware of the witnesses and the photographs. By excluding them, the trial court appeared to favor form over substance and in so doing, was manifestly unjust to plaintiffs.

Plaintiffs next assign error to comments made by defense counsel during his opening and closing arguments. Specifically, plaintiffs argue it was reversible error for the trial court to permit defendants to inject the question of insurance by arguing plaintiffs had received funding from a collateral source, to call upon the jury to speculate as to the Legislature's intent in enacting the threshold provision and characterized defendants as real people who could not live with a heavy personal judgment against them. We agree.

In his opening remarks, defendants' counsel argued that plaintiffs were not entitled to recover for no-fault first party benefits from the defendants:

> Mr. Rensberry told you that fault is not involved in this case. He has also told you there is no hospital bills at all. There are no medical bills. They are not suing for any of those. You won't see any. They are not suing for lost wages for three full years after the accident, April 16, '83, for three years on. They are not suing for replacement services, services that could be performed for Mr. Carr [sic] by his wife or his children at home helping him out, cutting the grass and doing things like that for three full years. They are not suing for nursing services. All those things are not involved. They are not part of an automobile case anymore. They are all addressed elsewhere under our law.
>
> This is basically a lawsuit for pain and suffering, this mental anguish that we are talking about. I think at the conclusion of the case they probably won't even by suing for this twelve thousand dollar lost wages that they are talking about because I think they will be honest enough to say that he is not working because of his back problem and not because of the accident.
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> MR. RENSBERRY: Your Honor, I am going to object. He is going into questions of law and also arguing. It is improper.
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> THE COURT: All right. Please refrain from argument.
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> MR. GRIFFIN: (CONTINUING) I think the evidence will show that the lost wages they are claiming now are not related to the auto accident. They are related to his work accidents. I think the evidence will show he has claimed with his employer that it is because of work accidents and not because of this automobile accident that he can't work, so I think the evidence will show that there is no economic losses. There is no out of pocket losses here at all, no medical bills, no hospital bills, and really no lost wages and no services.

Since medical bills, hospital bills and the like were not even at issue in this suit, they were clearly not a proper subject for argument. The danger of prejudice to plaintiffs lies in the fact that the jury may have concluded that such damages were not claimed because plaintiffs never suffered such damages or the jury may have surmised that plaintiffs recovered these damages from a collateral source, an insurance company, and might therefore choose to reduce any recovery they would award to plaintiffs accordingly. Whatever the jury may have surmised from these remarks, the fact remains the remarks were improper argument.

In his closing argument, counsel reiterated the lack of medical bills, hospital bills, doctor bills, wage losses and replacement services, stating:

> The only thing that is sued for is pain and suffering and we have this law that sets the standard of when pain and suffering can be recovered. I think you have to try to figure out why we do have that law. What is the purpose of that law? Well, I think the purpose is the Legislature wanted to compensate somebody in an automobile accident and if they are put in a wheelchair for the rest of their life, for someone's automobile accident who is rendered blind.

We find such speculation as to the Legislature's intent to be improper argument as well. It was never the Legislature's intent to limit recovery of non-economic damages to only the catastrophically injured. While the serious impairment threshold is significant, it is not an extraordinarily high obstacle to recovering such damages. DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986). Therefore, it was clearly improper to suggest to the jury that the Legislature intended that only those individuals rendered wheelchair bound or blind should recover non-economic damages.

Defense counsel concluded his argument by asking the jurors not to get carried away in rendering a judgment against the two defendants:

> These are real people. They are good people and they are average people so don't get carried away. Please don't get carried away.

The effect of such argument was to once again inject the question of insurance, or in this instance the lack of it, into the jury's decision making process.

The law regarding reference before the trier of fact to available insurance coverage was succinctly summarized by this Court in Cacavas v Bennett, 37 Mich App 599, 604; 194 NW2d 924 (1972), lv den 387 Mich 767 (1972), as follows:

> By statute, reference to available insurance coverage is not to be made by any party. MCL 500.3030; MSA 24.13030. It has been repeatedly held that it is reversible error to intentionally interject the subject of insurance if the sole purpose is to inflame the passions of the jury so as to increase the size of the verdict. (Citations omitted.) On the other hand, it is not reversible error if the subject is only incidentally brought into the trial, is only

> casually mentioned, or is used in good faith for purposes other than to inflame the passions of the jury. (Citations omitted.)

We find it equally reversible to allude to the lack of insurance coverage in an attempt to thereby inflame the jury's passion to keep the size of the verdict low.

We hold that the impropriety of defense counsel's argument and the trial court's failure to respond to plaintiffs' timely objections thereto mandate reversal.

Plaintiffs also argue the trial court erred in issuing a discovery order granting defendants' request for information relating to plaintiffs' counsel's record of past client referrals and payments made to Dr. Steven Newman, one of plaintiffs' expert witnesses. Plaintiffs assert the order required the production of irrelevant and immaterial information and was unduly burdensome. We disagree.

A trial court's decision to grant or deny a discovery motion will be reversed on appeal only if there has been an abuse of that discretion. Eyde v Eyde, 172 Mich App 49, 54; 431 NW2d 402 (1988), lv den 432 Mich 857 (1989). The general rule is that any document which is relevant and not privileged is freely discoverable. MCR 2.302(B)(1).

We believe that the information concerning the number of referrals and payments made by plaintiffs' counsel to Dr. Newman was relevant in regards to any bias or prejudice that may have existed with Dr. Newman towards plaintiffs' counsel. Nor do we believe that counsel's records of these referrals and payments were privileged under MCL 600.2157; MSA 27A.2157. We therefore find that there was no abuse of the trial court's discretion in compelling the discovery of this information.

Lastly, plaintiffs argue the trial court engaged in a pattern of behavior reflecting a predisposition and a bias in favor of defendants, to the prejudice of plaintiffs.

Our review of the record does not reveal a bias in favor of defendants so as to deny plaintiffs a fair and impartial

trial. West v Livingston Road Comm, 131 Mich App 63, 67; 345 NW2d 608 (1983), lv den 419 Mich 880 (1984).

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard M. Maher
/s/ Donald E. Holbrook, Jr.

Judge David H. Sawyer, J., concurs in result only.