

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL F. COX,

Plaintiff-Appellant,

October 12, 1993

v

No. 147789

LC No. 90011875 NI

ORVILLE WEBSTER and MELODEE
LYNN WEBSTER,

Defendants-Appellees.

Before: Shepherd, P.J., and Holbrook, Jr. and MacKenzie, JJ.

PER CURIAM.

Plaintiff appeals as of right the September 10, 1991 judgment of no cause of action following a jury verdict in favor of defendants in a suit brought under the no-fault act, MCL 500.3135(1); MSA 24.13135(1). We affirm.

This case arises from an automobile accident in which plaintiff was injured when he was involved in a rear-end collision caused by defendant Melodee Lynn Webster's vehicle while plaintiff was waiting to make a left turn at an intersection in White Cloud on May 13, 1987. On April 26, 1990, plaintiff brought suit against defendant Melodee Lynn Webster and defendant Orville Webster, the owner of the vehicle that Melodee Lynn Webster was driving. Plaintiff alleged that defendant Melodee Lynn Webster negligently operated her vehicle at a high rate of speed so that she could not stop her car in time to avoid hitting plaintiff's stopped vehicle. As a result of the accident, plaintiff alleged that he suffered serious impairment of body function. Specifically, plaintiff stated that he suffered a whiplash injury to his neck, which caused his head to remain tilted forward and to the right due to the congenital underdevelopment of his cervical vertebrae.

After a trial, the jury found that although defendant Melodee Lynn Webster was negligent in driving her vehicle into the rear of plaintiff's car, plaintiff had not suffered serious impairment of body function. On September 10, 1991, the trial court entered a judgment of no cause of action against plaintiff. Subsequently, on September 27, 1991, plaintiff moved for a judgment notwithstanding the verdict and for a new trial, which the trial court denied on December 3, 1991. On appeal, plaintiff asserts that the jury verdict that plaintiff had not suffered serious impairment of body function was against the great weight of the evidence and that the trial court erred in refusing to grant plaintiff's motion for a mistrial.

A new trial may be granted if the verdict is against the great weight of the evidence or contrary to law. MCR 2.611(A)(1)(e); Constantineau v DCI Food, Inc., 195 Mich App 511, 514; 491 NW2d 262 (1992). The decision whether to grant or deny a new trial is within the trial court's discretion, and will not be reversed absent an abuse of discretion. Id.

In DiFranco v Pickard, 427 Mich 32, 38; 398 NW2d 896 (1986), the Supreme Court held that the issue of whether the plaintiff suffered a serious impairment of body function is a factual dispute that must be submitted to the trier of fact whenever the evidence presented would cause reasonable minds to disagree. The findings of the trier of fact should not be disturbed unless they are against the great weight of the evidence. Id., p 39; Beard v Detroit, 158 Mich App 441, 449; 404 NW2d 770 (1987).

After reviewing the record, we believe that the jury verdict that plaintiff had not suffered a serious impairment of bodily function was not against the great weight of the evidence. The record shows that although plaintiff did not seek medical treatment immediately after the accident, he went to the White Cloud...

Medical Center the following morning complaining of neck pain. At the clinic, plaintiff was examined by James Hilbrand, a physician's assistant to Dr. Gunnell. Hilbrand observed that plaintiff's head was tilted to the right. Plaintiff also told him that his neck was hurt and that he had a limited range of motion in his neck, but Hilbrand could find no medical reason for plaintiff's condition, as x-rays of plaintiff's cervical spine showed no evidence of fracture. Hilbrand prescribed an anti-inflammatory muscle relaxer, which was approved by Dr. Gunnell, and recommended a program of physical therapy.

Subsequently, Hilbrand saw plaintiff on two occasions in May and June, 1987. Because plaintiff said that he was still suffering from muscle spasms in his neck, the physician's assistant referred him to Dr. Hamati, an orthopedic surgeon, who examined plaintiff on June 9, 1987. In his deposition testimony, Dr. Hamati stated that plaintiff's injury could be understood as a whiplash type injury. After reviewing x-rays, Dr. Hamati noted that plaintiff had a "severe scoliosis of his neck to the right side" and found that plaintiff had a limited range of motion with severe muscle spasms in his neck.

Dr. Hamati then referred plaintiff to Dr. Helle, a neurosurgeon, who examined plaintiff once in October and again in early November, 1987. In his deposition testimony, Dr. Helle stated that plaintiff had sustained a whiplash injury and that he also had torticollis or an abnormal curvature of the neck. Dr. Helle also noted that plaintiff was not able to move his head, which tilted to the right. Dr. Helle took x-rays, which revealed no fractures. Dr. Helle also performed an EMG, which revealed that there was no problem with plaintiff's nerves. Dr. Helle then ordered CAT scans of the cervical vertebrae C-1 to C-7, which were taken by Dr. Melrose, a radiologist, in December, 1987. After reviewing the CAT scans, Dr. Helle noticed that there was a congenital abnormality at the base of plaintiff's skull involving the incomplete development of several vertebrae, a condition termed hypoplasia. In Dr. Helle's opinion, plaintiff was more susceptible to a whiplash type injury because of the incomplete development of the bones in the right side of his neck. Dr. Helle stated that the accident stretched the supporting soft tissue structure -- the ligaments, tendons, and joint capsules -- that caused inflammation. Plaintiff then developed muscle spasms in his neck, which caused his head to tilt to the right. Dr. Helle believed that it was possible that plaintiff's neck might become "frozen" in that position, but that with physical therapy the condition might be relieved over time. Dr. Helle, nevertheless, acknowledged that the reliability of the CAT scans was reduced somewhat because plaintiff's head was tilted when the CAT scans were taken, but opined that the congenital abnormality ought to appear on all subsequent CAT scans.

Dr. Helle's deposition testimony that there was a congenital abnormality at the base of plaintiff's cervical spine was confirmed by Dr. Melrose, the radiologist who took the CAT scans. In his deposition, Dr. Melrose also stated that any subsequent CAT scans should reveal the same congenital condition, but that it was possible that the congenital defect that he saw on the CAT scans was caused by plaintiff's head tilting to the right during the examination.

Dr. Helle last saw plaintiff on January 4, 1988. Afterwards, plaintiff was referred to Dr. Gunnell's clinic for continued physical therapy and medical treatment.

During March, July and August, 1988, plaintiff was treated and observed by another physician's assistant, Steve DeHaan, who testified that plaintiff's head was tilted to the right and that plaintiff told him that he continued to have neck pain. Although DeHaan could find no explanation for the condition, he believed that plaintiff's neck problem was involuntary. In addition, Terrance Westcott, the physical therapist who gave plaintiff physical therapy periodically from May, 1987 through October, 1988, testified that plaintiff showed some improvement during this time, but that plaintiff had a limited range of movement, suffered from muscle spasms and continually guarded his neck. There was also testimony by plaintiff, his friends and his mother that while plaintiff's condition improved over the years, plaintiff still tilted his head to the right and suffered neck pain.

In response to plaintiff's claim that he suffered a serious impairment of body function arising from the automobile accident, defendants offered the testimony of Kevin Heemstra, plaintiff's former supervisor at Fuller Communications, Inc.; where plaintiff was employed on a crew burying telephone cable during June and July of 1990. Although plaintiff performed heavy manual labor, including shoveling and raking, Heemstra

testified that he never noticed anything unusual about plaintiff's neck or posture. Heemstra also stated that after plaintiff was terminated from the position, he saw plaintiff in town and never noticed that plaintiff tilted his head to the right.

Defendants also offered the deposition testimony of Dr. Peter Herkner, an orthopedic surgeon, who examined plaintiff at the request of his no-fault carrier on November 3, 1988. After reviewing the CAT scans of Dr. Melrose, along with the CAT scans taken by Dr. Quick, a radiologist, Dr. Herkner testified that he could find no orthopedic basis to explain why plaintiff tilted his neck to the right. Dr. Herkner also testified that plaintiff was not suffering from any neurological disease nor any congenital defect. However, Dr. Herkner stated that when he distracted plaintiff during the examination, plaintiff demonstrated greater motion in his neck.

Dr. Herkner's testimony that plaintiff was not suffering from a congenital defect was confirmed by Dr. Quick, who testified by deposition that his CAT scans of plaintiff did not show any congenital abnormality.

Defendants also introduced the deposition testimony of Dr. Edward C. Haupt, an orthopedic surgeon, who examined plaintiff on March 19, 1991. Although Dr. Haupt found that plaintiff had a restricted range of motion in his neck, he found nothing abnormal and could not explain plaintiff's symptomatology. Haupt also stated that while plaintiff's head was very rigid and tilted forward about ten degrees, it was his opinion that plaintiff was not disabled and could do any job that a person with his physical characteristics could perform.

Finally, defendants closed their proofs by presenting the testimony of Michael Glinski and Steve Kovich, private investigators employed by defendants to watch plaintiff prior to the trial. Both Glinski and Kovich testified that they never observed plaintiff holding his head tilted to the right, but that plaintiff moved his head with a normal range of motion. Glinski also testified that he watched plaintiff at lunch on the first day of the trial, July 18, 1991, and that plaintiff never tilted his head at lunch but resumed tilting his head immediately before entering the courtroom and kept his head tilted throughout the trial. At trial, the jury also viewed surveillance video tapes of plaintiff, which Glinski and Kovich took on June 4 and 5 and July 17 and 18, 1991. The tapes showed that plaintiff did not tilt his head to the right and that he appeared to have a normal range of motion in his neck. In particular, one video tape shows plaintiff ostensibly perform a "head check" while backing up his vehicle, which plaintiff had previously testified that he could not perform. On rebuttal, plaintiff stated that he had swivel seats installed in his car to enable him to make such a maneuver.

Although conflicting evidence was presented in this case on the issue of whether plaintiff had suffered serious impairment of body function, the jury verdict was not against the great weight of the evidence. We note that in determining whether the evidence was overwhelming, this Court gives deference to the trial court's opportunity to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. Beard, supra, p 452. In this case, the medical experts were in conflict about the nature of plaintiff's neck problem. Although plaintiff's theory that his neck tilted to the right was based upon the opinion of Drs. Helle and Melrose that plaintiff had a congenital defect, defendants' medical experts, Drs. Herkner and Quick, disagreed with that finding and opined that the CAT scans did not reveal a congenital defect. Moreover, Drs. Herkner and Haupt could not explain orthopedically why plaintiff tilted his head, although Dr. Herkner observed that plaintiff exhibited a greater range of motion in his neck when he was distracted during the examination.

In addition to the conflicting medical testimony, there was also conflicting lay testimony on the issue of serious impairment of body function. While plaintiff, his friends and mother testified that plaintiff had only a limited range of motion in his neck, defendants introduced the testimony of plaintiff's former supervisor and two private investigators that plaintiff did not tilt his head to the right or have a limited range of motion in his neck. Most significantly, their testimony was confirmed by the surveillance video tapes, which showed that plaintiff did not tilt his head and that he appeared to have a normal range of motion in his neck. Given that the evidence on the record was sufficiently strong to warrant the verdict, it can hardly be said that the jury verdict was against the great weight of the evidence.

However, a much closer question is presented whether the trial court erred by denying plaintiff's motion for a mistrial. Whether to grant or deny a mistrial is within the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion resulting in a miscarriage of justice. Schutte v Celotex Corp, 196 Mich App 135, 142; 492 NW2d 773 (1992). Since the conduct of a trial is within the control of the presiding judge, there must be some proof of prejudice to establish an error warranting reversal. Id

In this case, plaintiff alleges that a mistrial should have been declared because defense counsel questioned plaintiff regarding a doctor's report about an automobile accident in which plaintiff was involved in January, 1991. In the accident, plaintiff hurt his right leg and hip, requiring emergency treatment at Gerber Memorial Hospital. A report was prepared by Dr. Gezon, the attending physician. Specifically, plaintiff argues that a mistrial should have been declared because defense counsel was allowed to question plaintiff regarding the contents of Dr. Gezon's report even though the report was never admitted into evidence.

In this case, defense counsel's intentional attempt to introduce the contents of the report was in direct defiance of the trial court's order that the report could not be introduced. In this regard, we reject defendants' argument that their counsel could refer to the contents of the report because the trial court only told him that he could not introduce the document without Dr. Gezon. At best, defendants' excuse is disingenuous, as it rests upon an illusory distinction between a document and the contents thereof. In our view, the trial court would have been justified in declaring a mistrial and imposing sanctions on defense counsel for improper behavior.

As it was, the trial court decided not to grant a mistrial but instead issued a curative instruction requesting that the jury disregard the answer. Given that credibility was a crucial issue in this case, we are not persuaded that the curative instruction could remove the adverse effect to plaintiff's claim that his neck problem was a serious impairment of bodily function, since defense counsel was obviously seeking to portray plaintiff as a liar and malingerer.

Notwithstanding, we are not convinced that the trial court's denial of the motion for mistrial on the first day of a three-day trial constituted an abuse of discretion resulting in a miscarriage of justice. In view of the evidence against plaintiff's claim, particularly the surveillance video tapes showing that plaintiff did not tilt his head and that he appeared to have normal motion in his neck, we do not believe that the jury would have returned a different verdict had defendants not adverted to the report. Cf. Lapinskas v Quick, 17 Mich App 733; 170 NW2d 318 (1969). Under the circumstances of this case, no miscarriage of justice occurred because the evidence in support of defendants' claim was sufficiently strong to offset the prejudicial effect of their counsel's blatant attempt to show that plaintiff was a liar by referring to a document not admitted into evidence. However, we hasten to add that had the evidence been more evenly balanced, we would not have hesitated to rule that an abuse of discretion had occurred.

Affirmed.

/s/ John H. Shepherd
/s/ Donald E. Holbrook, Jr.
/s/ Barbara B. MacKenzie