# STATE OF MICHIGAN

# COURT OF APPEALS

ALEXANDER NOWYORKAS, JR.,

Plaintiff-Appellee,

v

FARM BUREAU MUTUAL INSURANCE,

Defendant-Appellant.

UNPUBLISHED
May 24, 1996

No. 168726
LC No. 92-007118

Before: Doctoroff, C.J., and Michael J. Kelly and Markey, JJ.

PER CURIAM.

Defendant appeals of right from the September 14, 1993 order of Washtenaw County Circuit Court entering judgment on jury verdict for plaintiff in the amount of $84,725.46 plus interest and costs.

## I FACTS

Plaintiff was involved in a motor vehicle accident on June 26, 1990. He testified at trial that he hit his head and left shoulder against unyielding objects causing severe injuries. In his complaint plaintiff alleged that the accident caused a C7 disc herniation and aggravation of a preexisting rotator cuff tear. He claimed wage loss, replacement services and medical expenses. Before and since the accident, he was self-employed as a certified master auto mechanic and operated his own auto repair facility. He also testified that he was something of a professional fisherman and won cash or cash equivalent prizes worth between seventeen and twenty-five thousand dollars in 1989. The principal underlying dispute between plaintiff and his no-fault carrier, defendant, involved a preexisting shoulder disability for which he had been receiving medical treatment since February of 1990. He claimed that before the accident he received injections for his shoulder pain but was physically able to do his job; after the accident his shoulder pain increased. He attributed neck pain from a ruptured disc to the accident. He had disc surgery and was out of work for four to five months. After intermittent work he then had a shoulder operation on January 15, 1992, and returned to work full time in May of 1992. Defendant agreed to pay for the treatment for the neck, but not for the shoulder. A partial settlement was reached when the parties agreed on wage loss payment for the neck injury. The partial wage loss was computed at $10 an hour and the court agreed that evidence of that settlement and wage loss payments for the neck injury would be suppressed. The trial court entered an order March 3, 1993 on defendant's motion in limine precluding evidence of the compromise and settlement. It was a bare bones order entered by the pretrial judge and, defendant argues, was violated by a different visiting judge, who presided over the trial.

On appeal defendant raises four issues, only one of which requires reversal. We mention the violation of the in limine order only to caution the trial court. On retrial, the court should not allow questioning as to the fact, manner or determination of the wage loss for the time period that plaintiff was disabled due to the cervical injury or the amount thereof, or any other information thereon. These matters were appropriately suppressed and testimony concerning them simply interjected needless error in the proceedings which should be avoided on retrial.

The critical issue is the error committed by charging the jury under SJI2d 50.11 that if the jurors were unable to separate damages for injuries caused by the automobile accident from those which were preexisting, "then the entire amount of plaintiff's damages must be assessed against the defendant." This instruction relieved plaintiff of his burden of proof as prescribed by the no-fault act. Williams v DAIIE, 169 Mich App 301; 425 NW2d 534 (1988), held that an injury which could not be attributed to a single identifiable event was excluded from coverage under the no-fault act. The application of SJI2d 50.11 is incompatible with that mandatory requirement. The trial court's modification and delivery of SJI2d 50.11 is reversible error.

We note that plaintiff claims a similar instruction was approved in *Yax v Aetna Casualty & Surety Co*, an unpublished per curiam opinion of the Court of Appeals (Docket #124153, issued 6/5/91). The argument is without merit both because the *Yax* Court approved a modified version of SJI2d 50.10, not SJI2d 50.11, and because the unpublished opinion is nonprecedential. The instruction here was likely to mislead and confuse the jury with respect to the applicable law; the error was appropriately preserved by objection and we must reverse. The question of causation was hotly contested at trial. Plaintiff admits that there was substantial evidence that he experienced problems with his left shoulder before the accident. Since the result might well have been different had the erroneous instruction not been given, the error cannot be harmless.

The issues as to attorneys fees and mediation sanctions are mooted by our reversal.

Reversed.

/s/ Martin M. Doctoroff
/s/ Michael J. Kelly
/s/ Jane E. Markey