

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SANDRA K. POWELL,

Plaintiff-Appellant,

v

BETTY JOSEPH,

Defendant-Appellee.

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UNPUBLISHED

September 28, 1999

No. 209761

Genesee Circuit Court

LC No. 96-044914 NI

Before: Gribbs, P.J., and O'Connell and R.B. Burns,\* JJ.

PER CURIAM.

Following a jury trial, plaintiff appeals as of right from a judgment entered in favor of defendant. The jury returned a special verdict finding that defendant proximately caused plaintiff's injuries, but that plaintiff had sustained neither a serious impairment of body function nor a permanent disfigurement under MCL 500.3135(1); MSA 24.13135(1), and that she was not entitled to excess wage loss damages pursuant to MCL 500.3135(2)(c); MSA 24.13135(2)(c); MCL 500.3107(1)(b); MSA 24.13107(b). We affirm.

Plaintiff first argues on appeal that the trial court erred in denying her motion for a new trial on the basis of allegedly improper remarks by defense counsel during closing argument. Plaintiff contends that defense counsel wrongfully injected the issue of insurance coverage; claimed that defendant would be unable to pay a judgment rendered against her; pointed to defendant's age in an attempt to elicit sympathy for defendant; and impermissibly commented on plaintiff's counsel's decision to use a peremptory challenge during jury voir dire.

We review a trial court's decision on a motion for a new trial for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 538; 564 NW2d 532 (1997). As the trial court noted, plaintiff did not object to the comments, request curative instructions, or move for a mistrial at the time the comments were made. Therefore, our review of this issue is precluded unless failure to do so would result in a miscarriage of justice or unless the statements were so prejudicial that they could not have been cured by a timely objection and curative instruction. *Snell v UACC Midwest, Inc*, 194 Mich

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\* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

App 511, 517; 487 NW2d 772 (1992); see also *Janda v Detroit*, 175 Mich App 120, 131; 437 NW2d 326 (1989), citing *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 102-103; 330 NW2d 638 (1982).

We hold that our failure to review this issue will not be manifestly unjust. Further, any prejudice to plaintiff resulting from the alleged comments concerning insurance was cured by the court's instructions that a party's insured status had no bearing on the issues in the case, that the jury must not be influenced by sympathy or prejudice regarding a parties' age, and that the attorney's statements were not evidence. The trial court did not abuse its discretion in denying plaintiff's motion for a new trial on the basis of allegedly improper comments by defense counsel.

Plaintiff next argues that the trial court erred in failing to grant a new trial because the jury's verdict was against the great weight of the evidence. Plaintiff contends that the jury's determination that her neck injuries did not constitute a serious impairment of body function was not supported by the record. We disagree. This Court reviews a trial court's decision on a motion for a new trial on the ground that the verdict was against the great weight of the evidence for an abuse of discretion. *Bordeaux v Celotex Corp*, 203 Mich App 158, 170; 511 NW2d 899 (1993). A verdict may be overturned on appeal only if it was "manifestly against the great weight of the evidence." *Watkins v Manchester*, 220 Mich App 337, 340; 559 NW2d 81 (1997). This Court gives substantial deference to a trial court's conclusion that the verdict is not against the great weight of the evidence. *Id.*; *Phinney, supra* at 525.

Under the Michigan no-fault act, a person remains subject to tort liability for noneconomic damages 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. MCL 500.3135(1); MSA 24.13135(1); *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995). Because plaintiff's lawsuit was filed on March 13, 1996, before the effective date of the 1995 amendment to the noneconomic loss provision, *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), is the controlling authority in this matter.

In order to satisfy the threshold of "serious impairment of body function" under *DiFranco*, a plaintiff had to prove that (1) the injuries sustained in the accident impaired one or more body functions and (2) the impairment was serious. *DiFranco, supra* at 39, 67. "The focus . . . is not on the injuries themselves, but on how the injuries affected a particular body function." *Id.* at 39. Considerations bearing on whether an impairment was serious included, "the extent of the impairment, the particular body function impaired, the length of time the impairment lasted, the treatment required to correct the impairment, and any other relevant factors." *Id.* at 69-70. Generally, medical testimony was needed to establish the existence, extent and permanency of an impairment. *Id.* at 39, 67. The impairment need not have been permanent to be considered serious. *Id.* at 69-70; *Richards v Pierce*, 162 Mich App 308, 314; 412 NW2d 725 (1987). The question whether a plaintiff satisfied the no-fault threshold is ordinarily one for the trier of fact. *DiFranco, supra* at 38.

After a thorough review, we hold that the jury's verdict was not manifestly against the weight of the evidence. As the trial court noted, the present case was fraught with conflicting medical opinions

and diagnoses regarding plaintiff's condition which required the jury to assess the credibility of several doctors and plaintiff. Contrary to the testimony of plaintiff and the two medical witnesses she called, defendant introduced the testimony of several doctors, many of whom found no evidence to substantiate plaintiff's claim that she sustained cervical fracture. In addition, while plaintiff's neurosurgeon testified that plaintiff was developing a disk problem as a result of the accident and described her condition as chronic, several defense experts concluded that plaintiff's cervical spine was normal and "very healthy," and that plaintiff was not suffering from a continuing disability. On this record, there were clearly factual issues for the jury, and reasonable minds could have differed as to whether plaintiff suffered a serious impairment of body function. Moreover, because issues of credibility are within the jury's province, *Temborious v Sklatkin*, 157 Mich App 587, 601; 403 NW2d 821 (1986), and where the evidence did not manifestly favor plaintiff, we conclude that the jury's verdict on this issue was not against the great weight of the evidence.

We also reject plaintiff's claim that the jury was confused on the issue of substantial impairment of body function because they believed that the impairment had to be permanent to be serious. The parties informed and the court instructed the jury on this point of law numerous times during trial.

Plaintiff also argues that the verdict was against the great weight of the evidence on the issues whether the scar on her forehead constituted a permanent serious disfigurement<sup>1</sup> and whether she was entitled to excess wage loss damages pursuant to MCL 500.3135(2)(c); MSA 24.13135(2)(c); MCL 500.3107(1)(b); MSA 24.13107(1)(b). However, because plaintiff failed to raise these issues in conjunction with her motion for a new trial, they have not been preserved for appellate review. *Hyde v University Bd of Regents*, 226 Mich App 511, 525; 575 NW2d 36 (1997); *DeGroot v Barber*, 198 Mich App 48, 54; 497 NW2d 530 (1993).

Finally, plaintiff contends that the trial court abused its discretion in denying her motion for a new trial on the ground that the jury verdict was inconsistent and contradictory. We disagree. The jury returned with an initial verdict awarding plaintiff \$2,500 in noneconomic damages even though it found that plaintiff had failed to meet the threshold requirements for the recovery of such damages. Before the jury could proceed with the remainder of the verdict, the trial court apprised the jury of the inconsistency and sent it back to the jury room to follow the instructions on the verdict form. Thereafter, the jury returned and rendered its final verdict in which it eliminated the previous award of noneconomic damages in accordance with its finding that plaintiff had failed to meet the threshold requirements for the recovery of noneconomic damages. Thus, while the initial verdict was inconsistent, that inconsistency was made known to the jury and resulted in a final and legally consistent verdict. Therefore, the trial court did not abuse its discretion in denying plaintiff's motion on this basis.

Affirmed.

/s/ Roman S. Gribbs  
/s/ Peter D. O'Connell  
/s/ Robert B. Burns

<sup>1</sup> At trial, the jury was specifically instructed that the injury forming the basis for the “permanent serious disfigurement” threshold for recovery of non-economic damages under the no-fault act was the scar on plaintiff’s forehead.