

STATE OF MICHIGAN
COURT OF APPEALS

CAROLYN LILLIE HAIRE and GERALD
HAIRE,

UNPUBLISHED
January 19, 2001

Plaintiffs-Appellants,

v

No. 217072
Ingham Circuit Court
LC No. 97-085862-NI

BROOKE DALTON BAKER and KATHLEEN
ROEHM BAKER,

Defendants-Appellees.

Before: Kelly, P.J., and Whitbeck and Collins, JJ.

PER CURIAM.

Plaintiffs Carolyn and Gerald Haire appeal as of right from the trial court's denial of their motion for judgment notwithstanding the verdict (JNOV), new trial, or additur. We affirm.

Plaintiffs filed an automobile negligence personal injury suit under the Michigan No-Fault Act, MCL 500.3135; MSA 24.13135, on April 14, 1997,¹ ten months after an automobile collision with defendant Brooke Baker.² Plaintiffs alleged, among other things, that they received a number of injuries as a result of the accident and that these injuries resulted in serious impairment of body function as to both plaintiffs, as well as permanent serious disfigurement of Gerald Haire. Liability was not an issue, and the case proceeded to trial on the issue of damages only. With regard to Carolyn Haire, the jury found that her injuries did not meet the no-fault threshold requirement of serious impairment of body function and awarded her economic damages only, in the amount of \$27,000, discounted to a present value of \$25,714.29. The jury also found that Gerald Haire's injuries did not meet the no-fault threshold of serious impairment of body function or serious permanent disfigurement, and therefore found no cause of action on his claim for noneconomic damages. Plaintiffs moved for JNOV, new trial, or additur. They asserted that the verdict was against the great weight of the evidence with regard to both

¹ The Legislature amended § 3135, 1995 PA 222, effective March 28, 1996. Accordingly, the amended version of the statute applies in this case.

² Defendant Kathleen Baker is Brooke's mother and the owner of the car involved in the collision.

plaintiffs, that the court should have ruled that plaintiffs' injuries resulted in serious impairment of body function as a matter of law, and that the jury verdict of \$25,714.29 for economic damages was grossly inadequate. They further asserted that the court erred in admitting evidence that Carolyn was receiving payments from her no-fault insurance company. The trial court denied plaintiffs' motion.

Plaintiffs argue first on appeal that the trial court erred in failing to find that plaintiffs' injuries met the no-fault threshold requirements of MCL 500.3135; MSA 24.13135³ as a matter of law. Because plaintiffs agreed, prior to submission of the case to the jury, that the threshold issue presented a question of fact for the jury, they have waived this issue on appeal.

Under subsection 3135(2), the question whether a plaintiff met the no-fault injury threshold is a question of law for the court if the court finds either (1) that there is no factual dispute regarding the nature and extent of the plaintiff's injuries or (2) that there is a factual dispute concerning the nature and extent of the plaintiff's injuries, but the dispute is not material to the threshold determination.

At the close of proofs in this case, defendants moved for a directed verdict on the threshold question concerning both plaintiffs. Defendants argued that there existed no factual dispute concerning the nature and extent of plaintiffs' injuries, that those injuries were insufficient, as a matter of law, to meet the no-fault threshold requirements, and that therefore defendants were entitled to judgment as a matter of law. Plaintiffs, on the other hand, did not move for a directed verdict in their favor or take the position that the proofs supported a finding that the no-fault injury threshold *had been met* as a matter of law. Indeed, in response to the trial court's denial of defendants' motion for directed verdict, plaintiffs agreed that "there is a [sic] sufficient objective evidence to create a question for the jury." Not until their motion for new trial did plaintiffs argue that the court should have ruled on the threshold issue as a matter of law.

Plaintiffs cite *Kern v Blethen-Coluni*, 240 Mich App 333; 612 NW2d 838 (2000) in support of their argument that they may raise this issue for the first time in a motion for a new trial, despite their express agreement that a material factual dispute existed. In *Kern*, this Court considered the question whether the trial court erred in failing to find that the plaintiffs' injuries in that case met the no-fault threshold of serious impairment of body function as a matter of law. As in this case, the issue was raised for the first time in a motion for a new trial. However, there exists an important distinction between the *Kern* case and the case now before this Court. In *Kern*, the case was submitted to the jury "[b]y mistake, mutual to the parties and the court . . . regarding all issues including whether plaintiff sustained a threshold injury." *Id.* at 335. There is no indication in *Kern* that the lower court was aware of its obligation to determine whether a

³ The no-fault act provides, in pertinent part, as follows:

(1) A person remains subject to tort liability for noneconomic loss caused by his 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 24.3135(1) (Emphasis added).]

factual dispute existed, that the court ruled on a motion for directed verdict, or that the plaintiff in that case acknowledged that there was a material factual dispute warranting submission of the threshold question to the jury. Indeed, the case was one of the very first to be decided under the amended version of the no-fault statute, having been filed exactly 120 days after the March 28, 1996, effective date of the amendments. *Id.* at 335-336. There was confusion regarding application of the amended statute, as evidenced by the fact that the trial court inconsistently instructed the jury on both the pre-amendment and post-amendment versions of the law with regard to the threshold matter. *Id.* at 336.

Here, there is no evidence of confusion on the part of the parties or the court with regard to application of § 3135. The court's statements clearly indicate that it recognized that in the absence of a factual dispute, it was required to make the threshold determination. The court stated, however, that "there is a substantial question of fact as to both Plaintiffs regarding the threshold issue which the Court itself declines to determine one way or the other," and denied defendants' motion for directed verdict. As noted above, not only did plaintiffs not object to the court's finding that a material factual dispute existed with regard to the threshold issue, they affirmatively agreed with the court. Accordingly, they have waived this issue on appeal. See *Napier v Jacobs*, 429 Mich 222, 228; 414 NW2d 862 (1987), quoting *Taylor v Lowe*, 372 Mich 282, 284; 126 NW2d 104 (1964) ("counsel may not stand by, electing as we must assume to 'take his chances on the verdict of the jury' [citations omitted] and then raise questions which could and should have been raised in time for corrective action"); see also *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (explaining that waiver is the intentional relinquishment or abandonment of a known right and that once such right has been abandoned or relinquished, any error is extinguished).

Plaintiffs further contend that the court erred in denying their motion for new trial or additur because the jury's findings that neither plaintiff sustained a serious impairment of body function and that Gerald Haire did not suffer permanent serious disfigurement were against the great weight of the evidence, and the jury's award of only \$25,714.29 in economic damages for Carolyn Haire was grossly inadequate. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Settington v Pontiac General Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). Reversal of a jury verdict is warranted only when the verdict is manifestly against the clear weight of the evidence. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). The trial court may not substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. *Id.* This Court gives deference to the trial court's unique ability 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. *Id.* Likewise, we review a trial court's decision regarding additur for an abuse of discretion. *Settington, supra*. In determining whether additur is appropriate, the proper consideration is whether the jury award was supported by the evidence. *Id.* The trial court's inquiry is limited to objective considerations regarding the evidence adduced and the conduct of the trial. *Id.*

After careful review of the record, we conclude that the trial court did not err in finding that the jury's findings were not against the great weight of the evidence. The no-fault act

defines “serious impairment of body function” as “an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.” MCL 500.3135(7); MSA 24.13135(7).

Here, the parties presented conflicting evidence both with regard to whether Carolyn Haire’s physical and psychological symptoms were due to the automobile accident or to other events or stresses in her life, and whether her physical and psychological problems adversely affected her ability to live her normal life. Not only did the medical testimony conflict, but Carolyn Haire herself presented contradictory testimony. With regard to Gerald Haire, testimony concerning the effect of his injuries on his ability to lead his normal life also was conflicting. As the trial court noted in its opinion denying plaintiffs’ motion for new trial, attorneys for both sides relied on video depositions of experts, which allowed the jury the opportunity to witness the facial expressions, voices, and overall responses of the experts. The trial court found that the jury’s implied determination that defendants’ witnesses were more credible was supported by competent evidence and thus should not be set aside. The jury is in the best position to make such credibility determinations. *Ellsworth, supra*. Further, the jury observed photographs of Gerald Haire’s scars resulting from the accident and also were able to view those on his head while he was testifying. In disfigurement cases based on physical observation, this Court must grant great deference to the trial court on what is essentially a factual conclusion about the severity of an injury. *Williams v Payne*, 131 Mich App 403, 412; 346 NW2d 564 (1984), overruled on other grounds, *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986). We find no abuse of discretion in the trial court’s determination that the verdict was not against the great weight of the evidence.

The award of \$25,714.29 for economic damages is supported by the evidence as well. Again, conflicting evidence was presented with regard to Carolyn Haire’s ability to work and the sort of work she would be able to perform. It follows logically that if the jury did not believe that Carolyn Haire’s injuries from the accident had lasting, serious effects, then they would not believe that those injuries would prevent her from returning to work in the near future. The trial court did not abuse its discretion in denying plaintiffs’ motion for additur.

Plaintiffs argue next that the trial court erred in admitting evidence that Carolyn Haire was receiving \$3,000 from her insurance carrier for wage loss for the first three years following the accident. Plaintiffs contend that the evidence was inadmissible as a payment from a collateral source and that it improperly influenced the jury. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 613-614; 580 NW2d 817 (1998). We find no abuse of discretion in the trial court’s admission of the challenged evidence. The information was relevant to show a source of stress in Carolyn Haire’s life. The source of the payment was carefully excluded by the trial court and was not introduced by the defense;

indeed, it was plaintiffs' counsel that elicited the source on cross-examination of one of Carolyn Haire's doctors.

Affirmed.

/s/ Michael J. Kelly
/s/ William C. Whitbeck
/s/ Jeffrey G. Collins