

STATE OF MICHIGAN
COURT OF APPEALS

HOLLY ROY,

Plaintiff-Appellee,

and

KEITH ROY,

Plaintiff,

v

DANNY THOMAS and LORI THOMAS,

Defendants-Appellants.

UNPUBLISHED

July 31, 2001

No. 222220

Ingham Circuit Court

LC No. 98-088036-NI

Before: Neff, P.J., and Fitzgerald and R. J. Danhof*, JJ.

PER CURIAM.

Defendants appeal as of right from the trial court's entry of judgment against them following a jury verdict awarding plaintiff \$135,000 for injuries she sustained in an automobile accident involving plaintiff Holly Roy and defendant Danny Thomas.¹ We affirm.

I

On August 19, 1996, plaintiff was injured in an automobile accident when she and her daughter were stopped in traffic and plaintiff's vehicle was rear-ended by defendant Danny Thomas' vehicle. Plaintiff was transported to the hospital, with complaints of a headache, neck pain, and dizziness. An x-ray examination of plaintiff's neck was normal. She was provided a cervical collar and released with instructions to follow up with her doctor if her condition did not improve. When her pain and dizziness continued after three days, plaintiff was examined by her

¹ Because the parties stipulated to a dismissal of plaintiff Keith Roy's claims, we refer to a singular plaintiff, Holly Roy, in this opinion.

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

physician and diagnosed with musculoskeletal injuries. She was treated with anti-inflammatory medication, muscle relaxers, warm packs, and physical therapy.

Plaintiff continued to experience pain and dizziness over the next several months. Her primary physician referred her to an ear, nose, and throat specialist and subsequently to an orthopedic specialist, who diagnosed plaintiff with cervical acceleration injury—or whiplash. Plaintiff was ultimately diagnosed with fibromyalgia, a chronic pain syndrome with no known cause or cure.

Plaintiff filed an action against defendants for tort liability, claiming that her injuries caused her constant pain, dizziness, and fatigue, and that the injuries interfered with her ability to live her normal life. Following a trial, the jury concluded that plaintiff had suffered a serious impairment of a body function and awarded \$135,000 in damages.

II

Defendants first contend that the trial court erred in denying their motions for directed verdict and for judgment notwithstanding the verdict (JNOV) because plaintiff did not establish the threshold injury to recover in tort. We review de novo a trial court’s denial of a motion for directed verdict and a trial court’s decision on a JNOV motion. *Forge v Smith*, 458 Mich 198, 204; 580 NW2d 876 (1998); *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). In deciding a motion for a directed verdict, a court must view the evidence and all reasonable inferences in a light most favorable to the nonmoving party to determine whether a prima facie case was established. *Locke v Pachtman*, 446 Mich 216, 222-223; 521 NW2d 786 (1994). Likewise, in considering a motion for JNOV, a court must consider the evidence and all reasonable inferences in the light most favorable to the nonmoving party, and the motion should be granted only when there was insufficient evidence presented to create an issue for the jury. *Pontiac School Dist v Miller Canfield Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997).

A

Under the no-fault act, MCL 500.3101 *et seq.*, a plaintiff injured in an automobile accident may recover noneconomic losses only in circumstances involving death, serious impairment of a body function, or permanent serious disfigurement. MCL 500.3135(1); *DiFranco v Pickard*, 427 Mich 32, 37; 398 NW2d 896 (1986); *Churchman v Rickerson*, 240 Mich App 223, 226; 611 NW2d 333 (2000). The 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); *May v Sommerfield*, 239 Mich App 197, 201; 607 NW2d 422 (1999).

When no material factual dispute exists with regard to the nature and extent of a plaintiff’s injuries, a trial court must decide as a matter of law whether the plaintiff’s injuries satisfy the tort liability threshold under the no-fault statute. MCL 500.3135(2)(a); *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). However, where there is an outcome-determinative genuine factual dispute, the issue whether plaintiff suffered a serious

impairment of body function should be submitted to the jury. *Miller v Purcell*, ___ Mich App ___; ___ NW2d ___ (Docket No. 221473, issued 6/1/01), slip op p 2.

B

The trial court properly submitted the issue of serious impairment of body function to the jury because there were genuine factual disputes concerning whether plaintiff's injuries were objectively manifested and whether they affected her general ability to lead her normal life. At trial, plaintiff presented testimony from three treating physicians, all of whom testified regarding the nature and extent of plaintiff's injuries. This testimony indicated that plaintiff had muscle spasms, decreased range of motion in turning her head, and multiple "trigger points,"² an objective manifestation of fibromyalgia, likely related to plaintiff's injuries from the automobile accident. These conditions had persisted for 2 ½ years after the accident, could be expected to persist in the future, and had resulted in restrictions on plaintiff's activities.

To the contrary, defendants presented testimony from a physician who examined plaintiff and testified that he found no objective indications of injury and that plaintiff's physical examination was essentially normal, other than her complaint of tenderness in her neck area. According to defendants' witness, he found no evidence whatsoever of any pathology, no spasm or other abnormalities. Further, plaintiff's range of motion in her back and arms was full and normal. His opinion was that plaintiff was not restricted in any activities. Because he found no evidence of injury, there would be no reoccurrence of any initial injury for the rest of plaintiff's life.

Given the evidence, the trial court properly denied defendants' motions for directed verdict or for JNOV. To meet the threshold of § 3135, plaintiff had to show 1) an objectively manifested impairment, 2) of an important body function, 3) that affects her general ability to lead her normal life. MCL 500.3135(7); *Miller, supra* at 3-4. The parties do not dispute that movement of the neck, shoulders, and back are important body functions. See *Mekler v Bigham*, 147 Mich App 716, 720; 383 NW2d 95 (1985). Thus, only elements one and three are at issue.

1

The evidence was sufficient to establish an objectively manifested impairment. Three physicians testified by deposition that plaintiff's impairment was indicated by objective findings upon physical examination.

Plaintiff's initial osteopathic physician, Dr. Linda Fisher-Williams, diagnosed plaintiff's condition as cervical, dorsal myositis, inflammation of the muscles of the upper back and neck, and testified that plaintiff's musculoskeletal injuries were consistent with injury from a rear-end collision. Fisher-Williams testified that her diagnosis was based on objective findings. Plaintiff

² According to plaintiff's physician, Dr. Flood, trigger points are "discreet areas where the tissue tension itself is much greater ... like there is a knot in the tissue," which is tender or painful.

had a decreased range of motion, indicated by a passive range of motion test, and generalized muscle spasm. This Court has recognized that a passive range of motion test and muscle spasm are objective manifestations of injury. *Franz v Woods*, 145 Mich App 169, 175-176; 377 NW2d 373 (1985). Plaintiff was experiencing neck pain, headaches, and vertigo, or dizziness, and her complaints of injury to her neck and shoulder were consistent with Fisher-Williams' findings on physical examination. In Fisher-Williams' opinion, plaintiff's complaints of neck and shoulder pain were the result of a medically identifiable injury. See *DiFranco, supra* at 75 (plaintiff must show a medically identifiable injury). Evidence at trial indicated that Fisher-Williams' findings of muscle spasms and vertigo were confirmed by the ear, nose, and throat specialist upon his examination of plaintiff.

Fisher-Williams' testimony was consistent with the deposition testimony of two other physicians who treated plaintiff during the 2 ½-year period following the accident. Dr. John Flood, an orthopedic specialist in spine disorders, testified that upon examination he found muscle spasm in plaintiff's neck, limited extension because of neck pain, and multiple trigger points. He testified that spasms and trigger points are objective findings. Based on the duration of her problems, there was a high probability that they would continue.

In December 1996, plaintiff changed her primary care physician. Plaintiff's second physician, Dr. Mary Sharp, a family practice physician who treated plaintiff through the time of trial, noted in examining plaintiff that "[s]ince the accident, she has had problems with intermittent dizziness, headaches and tons of right neck and arm pain with intermittent severe spasms." Her physical examination of plaintiff revealed palpable spasm, a muscle tone different than normal muscle tone that a physician can feel, and soft-tissue swelling in the area between plaintiff's neck, right shoulder and mid-back. Sharp subsequently diagnosed plaintiff with fibromyalgia, a chronic pain syndrome primarily characterized by severe sleep disorder, a depressive disorder, and musculoskeletal pain. Sharpe testified that her diagnosis was based on, among other things, objective findings of muscle spasms and trigger points present both above and below plaintiff's waist, as documented in a chart of trigger point activity. Sharpe had earlier diagnosed plaintiff with post-whiplash injury, and she indicated that fibromyalgia syndrome sometimes sets in after a severe musculoskeletal injury, such as whiplash. She stated that chronic pain syndrome, such as fibromyalgia, can result in varying levels of dysfunction, and that plaintiff has experienced memory problems, which is not uncommon in fibromyalgia. Sharpe opined that plaintiff's condition may be lifelong. It was Sharpe's opinion that plaintiff's problems were directly related to the automobile accident.

Additionally, defendants' witness, Dr. William Gonte, testified that muscle spasms are an objective finding, "[i]f present and evaluated by an appropriate physician" and that trigger points could be seen as objective, "if they correspond correctly and appropriately to what you're looking for." Plaintiff testified that she experiences muscle tightening, burning sensations and pain, dizziness, and headaches, and takes several daily medications; the muscle spasms produce a constant "jumping" sensation. She suffers from sleep loss. Plaintiff has seen numerous doctors and has had a range of medical treatment, including physical therapy and trigger point injections, over the course of two years. The testimony concerning the objective manifestation of plaintiff's impairment was sufficient to preclude a directed verdict or JNOV on this basis.

Likewise, there was sufficient evidence concerning whether plaintiff's impairment affected her general ability to lead her normal life, although this issue was also in dispute. Sharpe testified that activity-lifestyle management is complicated for persons afflicted with fibromyalgia because their condition could worsen with too little, too much, or the wrong kinds of activity. Sharpe testified that she had cautioned plaintiff against repetitive activity, heavy lifting and excessive fatigue.

Plaintiff testified that she had modified her lifestyle because of her physical problems: keeping written records to compensate for memory loss; foregoing activities such as bowling, swimming, and extended motorcycle trips with her husband; and minimizing household tasks and gardening. Plaintiff testified that she still experiences pain, dizziness, headaches, and sleep loss; consequently, she must limit or adjust her activities. She testified that she has curtailed her daycare business, which she had operated for twenty years prior to the accident, reducing the number of children from ten or twelve to three. Although her doctors had recommended staying more active, and her activity level had progressively increased, she still could not do many things that she could do before the accident. Further, both plaintiff and her daughter testified that for several months after the accident, plaintiff could do little physical activity, such as laundry, cleaning or caring for the children in daycare, tasks which plaintiff's daughter had to do for her. Further, there was ample evidence that plaintiff's injuries required extensive medical treatment.

On the other hand, defendants presented evidence that plaintiff was not limited in her activities. Defendants admitted a videotape of plaintiff washing a car, carrying a bucket of water, and lifting her husband's golf clubs into the car. Defendants also elicited plaintiff's testimony that she could perform some tasks such as laundry and vacuuming. This evidence created a genuine factual dispute, warranting presentation of this question to the jury.

III

Defendants also contend that the trial court abused its discretion when it admitted into evidence deposition testimony from Dr. Flood concerning the permanency of plaintiff's injuries. We find no abuse of discretion in the admission of this testimony. See *Chmielewski v Xermac, Inc.*, 457 Mich 593, 614; 580 NW2d 817 (1998). Dr. Flood opined that there was a high probability that plaintiff's condition would continue for a protracted period of time, in light of the fact that she was still being treated for neck and shoulder pain more than two years after the accident. Given Dr. Flood's expertise as an orthopedic specialist, we cannot conclude that his opinion should have been excluded on the ground that it was purely speculative. See *Phillips v Deihm*, 213 Mich App 389, 402; 541 NW2d 566 (1995).

IV

Finally, defendants assert that the trial court erred in denying his motion for remittitur because the award of \$135,000 was excessive. A trial court's decision regarding remittitur is reviewed for an abuse of discretion. *Palenkas v Beaumont Hospital*, 432 Mich 527, 533; 443 NW2d 354 (1989). We conclude that the jury award was supported by the evidence. *Weiss v*

Hodge (After Remand), 223 Mich App 620, 637; 567 NW2d 468 (1997). We find no abuse of discretion.

Affirmed.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Robert J. Danhof