

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

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JOANN DAVIS and CHARLES DAVIS,

Plaintiffs-Appellants,

v

ROBERT A. COLE, Personal Representative of  
the Estate of THOMAS FREDERICK COLE,  
Deceased,

Defendant-Appellee.

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UNPUBLISHED  
November 30, 2001

No. 226215  
Calhoun Circuit Court  
LC No. 98-003200-NI

Before: O’Connell, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Plaintiffs<sup>1</sup> appeal as of right, following a jury trial, from a judgment of no cause of action entered February 9, 2000. We affirm.

Plaintiff was injured following an automobile accident involving defendant’s decedent on January 6, 1997. Plaintiff filed the instant action in January 1999, alleging that the decedent’s negligence caused her to suffer serious impairment of body function. Following the submission of her proofs, plaintiff moved for directed verdict, arguing that pursuant to MCL 500.3135(2)(a), the trial court was required to determine as a matter of law whether plaintiff suffered serious impairment of body function because factual disputes did not exist on this issue. The trial court denied plaintiff’s motion in a bench ruling on January 13, 2000. After the jury returned with a verdict of no cause of action, plaintiff advanced the same legal argument in motions for judgment notwithstanding the verdict (JNOV) and new trial. The trial court denied these motions in a bench ruling on February 28, 2000, holding that genuine factual disputes existed with regard to the nature and extent of plaintiff’s injuries.

On appeal, plaintiff first argues that the trial court erred in denying her motion for directed verdict and JNOV. Specifically, plaintiff contends that factual disputes did not exist

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<sup>1</sup> Plaintiff Charles Davis’ claim against defendant is for loss of consortium only. Hereinafter, “plaintiff” will refer to plaintiff Joann Davis.

with regard to whether she suffered a serious impairment of body function and that the trial court should have determined the issue as a question of law.

This Court reviews de novo a trial court's rulings concerning motions for directed verdict and JNOV. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000); *Thomas v McGinnis*, 239 Mich App 636, 643; 609 NW2d 222 (2000).

The appellate court is to review the evidence and all legitimate inferences in the light most favorable to the nonmoving party. Only if the evidence so viewed fails to establish a claim as a matter of law, should the motion be granted. [*Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000).]

Pursuant to Michigan's no-fault act, MCL 500.3101 *et seq.*, a plaintiff injured in an automobile accident may recover noneconomic losses if he has suffered death, serious impairment of body function, or permanent serious disfigurement. *Churchman v Rickerson*, 240 Mich App 223, 226; 611 NW2d 333 (2000). The governing statute, MCL 500.3135(2)(a), provides in pertinent part:

The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of a body function. . . .

In *May v Sommerfield*, 239 Mich App 197, 202-203; 607 NW2d 422 (1999), this Court held that the plain language of subsections 3135(2)(a)(i) and (ii) required the trial court to undertake the following factual inquiry.

In determining the "nature" of plaintiff's injuries, the trial court should make appropriate findings concerning whether there is a factual dispute with respect to whether plaintiff has an "objectively manifested" impairment and, if so, whether "an important body function" is impaired. In determining the "extent" of plaintiff's injuries, the trial court should make appropriate findings concerning whether there is a factual dispute with respect to whether the impairment affects plaintiff's "general ability to lead his . . . normal life." [*Id.*, quoting MCL 500.3135(2)(a)(i) and (ii).]

In *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000), this Court recognized that absent "outcome-determinative genuine factual dispute[s], the issue of threshold injury is now a question of law for the court." Likewise, in *Miller v Purcell*, 246 Mich App 244, 247; 631 NW2d 760 (2001), this Court recently held:

Before the statutory amendments [of 1995 PA 222], the question whether a plaintiff suffered the serious impairment of a body function had been reserved to the trier of fact whenever the evidence would cause reasonable minds to differ regarding the answer. As a result of the legislative amendments, the issue whether a plaintiff suffered a serious impairment of body function should be submitted to the jury only when the trial court determines that an “outcome-determinative genuine factual dispute” exists. [(internal quotation marks and citations omitted).]

Viewing the record evidence in the light most favorable to defendant, we agree with the trial court that “outcome-determinative genuine factual dispute[s]” existed with regard to the nature and extent of plaintiff’s injuries. Hence, the trial court was precluded from determining as a matter of law whether plaintiff suffered the serious impairment of body function. As this Court explained in *May*, *supra* at 203, questions concerning the nature of an individual’s injuries require the trial court to evaluate whether factual disputes exist regarding whether an injury is “objectively manifested.” See also *Kern*, *supra* at 341. This Court has previously construed this requirement to mean that the injury must be “subject to medical measurement.” *Williams v Payne*, 131 Mich App 403, 409; 346 NW2d 354 (1984); see also *Shaw v Martin*, 155 Mich App 89, 93; 399 NW2d 450 (1987).<sup>2</sup> We share the trial court’s view that the evidence, viewed in the light most favorable to defendant, reveals outcome-determinative factual disputes on this issue.

At trial, plaintiff testified that she was involved in two different automobile accidents before the accident giving rise to this appeal in January 1997. Specifically, plaintiff indicated that she was rear-ended by another driver in 1981. As a result of that accident, plaintiff had to undergo a cervical bone fusion because of a ruptured disk in her lower neck. Similarly, in March of 1986 or 1987,<sup>3</sup> plaintiff was rear-ended again, and suffered soft tissue damage. Following the second accident, plaintiff experienced neck pain, and visited two different pain clinics to treat the problem. According to plaintiff, after four weeks of treatment at a pain clinic in Plainwell, Michigan, the pain subsided and she was able to return to work. Although she underwent surgery to correct carpal tunnel syndrome on both wrists in 1990 and 1991, plaintiff testified that she did not experience pain until the automobile accident in January 1997.

Following the automobile accident in January 1997, plaintiff experienced persistent shoulder and neck pain. As a result, she engaged in physical therapy and underwent surgery in February 1998. According to plaintiff, even after surgery in 1998 she experienced “tremendous”

<sup>2</sup> In *DiFranco v Pickard*, 427 Mich 32, 73-74; 398 NW2d 896 (1986), our Supreme Court criticized the *Williams* Court’s holding that to be objectively manifested, an injury must be subject to medical measurement. See also *Kallio v Fisher*, 180 Mich App 516, 519-520; 448 NW2d 46 (1989) (Murphy J., dissenting). However, as the *Kern* Court recently observed, the 1995 legislative amendments to the no-fault act effectively overruled *DiFranco* and signified a return to the standards first articulated in *Cassidy v McGovern*, 415 Mich 483; 330 NW2d 22 (1982) and adopted by its progeny. *Kern*, *supra* at 338. Thus, in *Kern*, the Court indicated that because “the Legislature has returned to the standards of *Cassidy*,” that case and its progeny are instructive in evaluating cases where § 3135 is implicated. *Id.* at 342.

<sup>3</sup> During her trial testimony plaintiff could not recall the exact year of the second automobile accident.

neck and shoulder pain, and had difficulty sleeping. Although plaintiff returned to work following the January 1997 accident, and after her surgery in 1998, she stated that she decided to retire in the spring of 1999 from her job as a shipping supervisor because she was not getting enough rest due to her pain. Further, plaintiff and her husband both testified that she was unable to perform tasks around the family farm because of her pain, and that when she returned home from work she had difficulty walking. Marilyn Morgan, plaintiff's coworker, also testified that plaintiff worked less overtime hours following the accident in January 1997, and that plaintiff frequently experienced pain at work.

Plaintiff also presented the testimony of Mark Noffsinger, M.D.,<sup>4</sup> her orthopedic surgeon, who examined plaintiff for the first time in October 1997 and diagnosed her as suffering from post-traumatic impingement syndrome, a condition that occurs when "a significant blow to the shoulder . . . will force the upper arm bone into the shoulder and irritate the rotator cuff and the bursa of the shoulder." Noffsinger initially treated plaintiff with cortisone injections and anti-inflammatory medication, but after plaintiff returned in December 1997 complaining of pain, Noffsinger recommended surgery<sup>5</sup> on her shoulder. Following surgery, Noffsinger noted that plaintiff's bursa, "the fluid-filled sac that normally acts as a shock absorber cushion between the bone and rotator cuff, was extremely thick and scarred." According to Noffsinger, plaintiff also had a great deal of spurring on her shoulder bone, as well as torn cartilage in her shoulder joint.

In response to plaintiff's counsel's inquiries, Noffsinger testified that plaintiff also had a tear of the anterior labrum, consistent with the application of significant force. According to Noffsinger, plaintiff's complaints of pain and discomfort were attributable to the combination of her preexisting neck problem and preexisting bone spurs. Noffsinger testified that when he last treated plaintiff on June 16, 1999, she was still experiencing pain and discomfort, but that with continued therapy her overall prognosis was favorable.

John Huntington, M.D., an orthopedic surgeon who conducted an independent examination of plaintiff, also testified on her behalf.<sup>6</sup> Huntington initially testified that plaintiff suffered from an aggravation of preexisting problems, but that her pain and discomfort could be attributed to the January 1997 accident. However, Huntington testified that although plaintiff complained of pain in her neck and shoulder when he examined her in August 1997, the reports and x-rays provided by plaintiff that he relied on when examining her did not reveal any objective evidence of any injury to plaintiff. Specifically, Huntington stated that he did not find any objective indication of grating in plaintiff's neck, or weakness in her upper extremities. According to Huntington, other than limited motion in her neck consistent with a bone fusion, and limited motion in her shoulder that was "secondary to pain [in plaintiff's neck] and not specifically to any injury in the shoulder itself," his examination did not reveal any other objective signs of injury.

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<sup>4</sup> Noffsinger's June 28, 1999, video deposition was played for the jury.

<sup>5</sup> According to Noffsinger, the surgery he recommended is called subacromial decompression.

<sup>6</sup> Huntington's July 14, 1999, deposition was read to the jury.

At trial, defendant presented the deposition testimony of Dennis Jewitt, M.D.,<sup>7</sup> a neurologist who examined plaintiff on two different occasions. Jewitt first examined plaintiff on January 31, 1997. According to Jewitt, after physically examining plaintiff, he could not discern an objective neurological reason for plaintiff's complaints of pain. After reviewing plaintiff's x-rays, an MRI<sup>8</sup> and performing a electromyogram (EMG), the results of which were normal, Jewitt concluded that he could not "find anything at that point that [he] could use to clearly explain her symptoms at least in terms of some type of ongoing neurologic process or problem."<sup>9</sup> Jewitt also testified that after examining plaintiff's "nerves, muscles and extremities . . . he did not find any evidence of an abnormality involving the nervous system." In sum, Jewitt indicated that he could not find any evidence of a new injury relating to the January 1997 automobile accident and that he subsequently referred plaintiff to physical therapy.

Viewing the record evidence in the light most favorable to defendant, we believe that genuine outcome-determine factual disputes existed regarding the nature of plaintiff's injuries. *May, supra* at 197; MCL 500.3135(2)(a)(i). Specifically, Jewitt's and Huntington's testimony created an outcome-determinative factual dispute concerning whether plaintiff's injury was objectively manifested. In *Miller, supra*, this Court quoted with approval the following passage from our Supreme Court's decision in *Cassidy v McGovern*, 415 Mich App 483, 505; 330 NW2d 22 (1982):

Another significant aspect of the phrase "serious impairment of body function" is that it demonstrates the legislative intent to predicate recovery for noneconomic loss on *objectively manifested injuries*. *Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body.* [*Miller, supra* at 249 (emphasis supplied).]

A review of Jewitt's and Huntington's testimony in the light most favorable to defendant confirms that factual disputes existed with regard to the nature of plaintiff's injuries. Further, pursuant to *May, supra* at 203, factual disputes existed with regard to whether an important body function of plaintiff's was impaired. "An important body function is a function of the body that affects the person's general ability to live a normal life." *Kern, supra* at 340. In the instant case, plaintiff presented evidence suggesting that her ability to continue her normal life activities following the accident was circumscribed as a result of her injuries. See *May v Sommerfield (After Remand)*, 240 Mich App 504, 506; 617 NW2d 920 (2000). However, the substance of Jewitt's testimony was that plaintiff did not suffer a new injury as a result of the January 1997 accident that affected her general ability to lead a normal life. Because outcome-determinative factual disputes existed on the nature and extent of plaintiff's injuries, the trial court properly

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<sup>7</sup> Jewitt's January 4, 2000, video deposition was played for the jury.

<sup>8</sup> According to the record, the x-rays and MRI were performed following the accident in January 1997.

<sup>9</sup> Jewitt indicated that he reviewed plaintiff's x-rays which revealed only evidence of a prior cervical fusion and minor degenerative changes attributed to "wear and tear" over time.

found that it was precluded from determining the issue of serious impairment of body function as a matter of law.

Plaintiff also argues that the trial court abused its discretion in denying her motion for a new trial where the jury's verdict was against the great weight of the evidence. According to plaintiff, the jury's conclusion that she did not suffer a serious impairment of body function was contrary to the record evidence.

With respect to a motion for a new trial, the trial court's function is to determine whether the overwhelming weight of the evidence favors the losing party. This Court's function is to determine whether the trial court abused its discretion in making such a finding. This Court gives substantial deference to the conclusion of a trial court that a verdict was not against the great weight of the evidence. [*Severn v Sperry Corp*, 212 Mich App 406, 412; 538 NW2d 50 (1995).]

See also *Morinelli*, *supra* at 261.

We are not persuaded that the trial court abused its discretion in denying plaintiff's motion for a new trial. During its lengthy bench ruling, the trial court determined that the jury's conclusion on the issue of serious impairment of body function hinged on an assessment of the witnesses' credibility. We may only reverse the trial court's denial of plaintiff's motion for new trial if its denial was "so palpably and grossly violative of fact and logic that it evidence[d] not the exercise of will but perversity of will, not the exercise of judgment, but defiance thereof, not the exercise of reason, but rather of passion or bias." *Bean v Directions, Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000), quoting *Marrs v Bd of Medicine*, 422 Mich 688, 694; 375 NW2d 321 (1985). As discussed above, the record evidence is conflicting with respect to the extent and nature of plaintiff's injuries. Consequently, the jury's conclusion that plaintiff did not sustain a serious impairment of body function required a credibility determination. "Assessing credibility and weighing testimony is the prerogative of the trier of fact," *Kelly v Builders Square, Inc*, 465 Mich 29, 40; 632 NW2d 912 (2001), and this Court will not review anew questions involving the credibility of witnesses. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998); see also *Pachuczynski v Detroit United Railway*, 202 Mich 594, 596; 168 NW 418 (1918) (In reviewing a trial court's decision on a motion for new trial, reviewing court may not "invade the province of the jury"). On this record, we are unable to conclude that the trial court abused its discretion in denying plaintiff's motion for a new trial.

Affirmed.

/s/ Peter D. O'Connell  
/s/ David H. Sawyer  
/s/ Michael R. Smolenski