

STATE OF MICHIGAN
COURT OF APPEALS

CHARLOTTE REID,

Plaintiff-Appellant,

v

DIANNA LEGHORN,

Defendant-Appellee,

and

STATE FARM MUTUAL AUTO INSURANCE
COMPANY,

Defendant.

UNPUBLISHED

December 28, 2001

No. 224481

Wayne Circuit Court

LC No. 97-728113-NI

Before: K.F. Kelly, P.J., and Hood and Doctoroff, JJ.

PER CURIAM.

This action arises out of a motor vehicle accident in which defendant Dianna Leghorn's¹ vehicle collided into the rear of plaintiff's vehicle. Plaintiff filed suit against defendant for negligence. The case proceeded to trial and a jury determined that defendant was negligent and that her negligence was the proximate cause of plaintiff's injuries, but that plaintiff did not suffer a serious impairment of a body function. Plaintiff now appeals as of right, asserting that the trial court should have granted her motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, granted her a new trial because the verdict was against the great weight of the evidence. Plaintiff also challenges the trial court's ruling prohibiting her from submitting a claim for excess wage loss to the jury. We affirm.

Initially, plaintiff argues that the trial court violated MCR 2.610(B)(3) when ruling on her post-trial motions. MCR 2.610(B)(3) requires the trial court to indicate a concise reason for denying the motion, but it does not require formal findings of fact and conclusions of law. *Badalamenti v Beaumont Hosp*, 237 Mich App 278, 283; 602 NW2d 854 (1999). Here, the

¹ Defendant State Farm Mutual Auto Insurance Company is not a party to this appeal. For the purpose of this opinion, the term defendant will refer exclusively to Dianna Leghorn.

record reflects that the trial court denied plaintiff's motion and handwrote on the post-trial motion praecipe that it was denying the motion because the verdict was "not against great weight of evidence because [the] jury had opportunity to hear all testimony and judge [the] credibility of plaintiff and . . . evidence showed minor impact." The court's stated reasons on the praecipe were sufficient to satisfy MCR 2.610(B)(3), and we disagree with plaintiff's argument that the trial court failed to comply with the rule.

Plaintiff next argues that the trial court erred in denying her motions for JNOV or for a new trial. A trial court's decision to grant or deny a motion for JNOV is reviewed de novo. *Barrett v Kirtland Community College*, 245 Mich App 306, 311; 628 NW2d 63 (2001).

In reviewing a decision on a motion for JNOV, this Court must view the testimony and all legitimate inferences in the light most favorable to the nonmoving party. If reasonable jurors honestly could have reached different conclusions, the jury verdict must stand. Only if the evidence fails to establish a claim as a matter of law is JNOV appropriate. [*Id.* at 311-312 (citations omitted).]

By contrast, we review a trial court's decision on a new trial motion for an abuse of discretion. *Morinelli v Provident Life and Accident Ins Co*, 242 Mich App 255, 261; 617 NW2d 777 (2000).

In deciding 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. . . . Substantial deference is given to the trial court's conclusion that the verdict was not against the great weight of the evidence. [*Id.* (citations omitted).]

The trial judge is not allowed to sit as the "thirteenth" juror and grant a new trial on the basis of a disagreement with the jurors' assessment of credibility. *In re Ayres*, 239 Mich App 8, 23-24; 608 NW2d 132 (1999).

Here, a review of the record reveals that the trial court properly denied plaintiff's post-trial motions. MCL 500.3135(7), as amended, 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." Factors to consider when determining whether the impairment of an important body function is serious within the meaning of the statute, include, but are not limited to, the extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery. *Miller v Purcell*, 246 Mich App 244, 248; 631 NW2d 760 (2001). In addition, the phrase serious impairment of body function demonstrates the Legislature's intent to predicate recovery for noneconomic loss on objectively manifested injuries. *Id.* at 249. Recovery of noneconomic damages is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body. *Id.*

Here, plaintiff was not entitled to JNOV. When the evidence and inferences are viewed in a light most favorable to defendant, reasonable jurors could honestly have reached different conclusions regarding whether plaintiff suffered serious impairment of a bodily function. The accident at issue was undisputedly a low speed accident, causing minimal damage to the vehicles involved. Further, plaintiff failed to seek any medical treatment until four days after the accident. Defendant's expert testified that plaintiff suffered soft tissue injuries that would have

resolved within a matter of months. The early CT scan and EMG showed no signs of injury, and there was testimony that the disc narrowing shown on the CT scan was not unusual for a woman of plaintiff's age.

In addition, plaintiff's chiropractor, Robert Kazma, admitted that the MRI report showed normal alignment of the cervical vertebrae and that the cord was normal. Although there was a disc herniation at L-4, it was not compressive. Kazma concluded that plaintiff had serious abnormalities related to the accident, however, he admitted that he was unfamiliar with some of the medical terminology used in the radiologist's report, he did not have a full history of plaintiff's previous injury to her lower back, and he never reviewed the records of the first doctor who treated plaintiff. Similarly, the testimony of plaintiff's psychologist Robert Cornette was lacking in credibility. Although Cornette did not have a full and accurate history on plaintiff, he concluded that all of her psychological problems stemmed from the automobile accident, the details of which were entirely unfamiliar to him. Plaintiff's motion for JNOV was appropriately denied.

We also conclude that the trial court did not abuse its discretion in denying the motion for new trial. Plaintiff's argument was based on her claim that the verdict was against the overwhelming weight of the evidence. We disagree and give substantial deference to the decision of the trial court in this regard. *Morinelli, supra* at 261. Although there was evidence to support plaintiff's claim that she had an objectively manifested injury to her back and neck that severely limited her ability to function, this evidence was disputed. Kazma testified that plaintiff had objective muscle spasms, limited range of motion, abnormal CT results in 1997, and abnormal MRI results in 1999 that evidenced nerve impingement. Kazma also testified that plaintiff required extensive treatment, that her condition had not resolved, and that, in his opinion, she was permanently disabled. However, Kazma interpreted the objective medical evidence differently than the radiologists who interpreted and reported the results of the CT and MRI scans. Kazma also admitted that he did not fully understand the medical terms used in the MRI report, casting doubt on his interpretation of that report. In addition, Kazma reached different conclusions than the two doctors who performed independent medical examinations. Further, defendant's experts provided evidentiary support for defendant's theory that plaintiff suffered soft tissue injuries that were not disabling and that she could continue normal activities. Plaintiff failed to demonstrate that the jury's verdict was against the great weight of the evidence.

Finally, plaintiff argues that the trial court improperly precluded the jury from deciding the issue of excess wage loss damages. We disagree. Whether the trial court erred in refusing to allow plaintiff to amend her complaint and present this claim to the jury is reviewed for an abuse of discretion. *Cremonte v Michigan State Police*, 232 Mich App 240, 248-249; 591 NW2d 261 (1998).

Near the end of the first day of trial, plaintiff's counsel asked plaintiff how much money she was making at the time of the accident. Defendant objected on the grounds of relevance. In response, plaintiff indicated that there was a claim for excess wage loss. The trial court decided to allow the answer regarding income and indicated that the issue of excess wage loss would be discussed at a later time. Plaintiff subsequently admitted her 1996 W-2 form into evidence without objection. At the close of the proofs, defense counsel stated that he reviewed the complaint and final pretrial order and there was no claim for wage loss damages alleged against defendant. Defendant argued that the case was a conventional no-fault claim for noneconomic

damages, she was never alerted to the fact that excess wages were being sought, and she was prejudiced by the inadequate notice. Plaintiff's counsel tried to convince the court that defendant should have known that excess wage loss was an issue in the case. The trial court did not allow the issue to go to the jury, finding that the issue was never properly raised before trial.

MCR 2.118(C)(2) provides:

If evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, amendment to conform to that proof shall not be allowed unless the party seeking to amend satisfies the court that the amendment and the admission of the evidence would not prejudice the objecting party in maintaining his or her action or defense on the merits. The court may grant an adjournment to enable the objecting party to meet the evidence.

In *Cremonte, supra*, the trial court allowed the plaintiff to amend his complaint after five days of trial, finding that the plaintiff raised the issues of race and gender discrimination during opening argument without objection by the defendant. *Id.* at 246. The trial court also determined that the defendant was prepared to defend against claims of race and gender discrimination and thus, the plaintiff was allowed to amend his complaint to add those claims. *Id.* at 246. This Court disagreed with the trial court's analysis:

The trial court's statement that MCR 2.118(C)(2) "takes a liberal approach" toward amendments was clearly incorrect as a matter of law. As noted above, our Supreme Court has made it clear that MCR 2.118(C)(2) establishes strict requirements that must be met by the party requesting amendment. Otherwise, the amendment "shall not be allowed." The trial court compounded its error by asking defendant to establish the nature and extent of any prejudice, when the court rule clearly places that burden entirely on the party requesting amendment, in this case, plaintiff. [*Id.* at 248 (citations omitted).]

Further, prejudice may be found when the moving party seeks to add a new claim or a new theory of recovery on the basis of the same set of facts, after the close of discovery, and the opposing party shows that he did not have reasonable notice, from any source, that the moving party would rely on the new claim or theory at trial. *Lown v JJ Eaton Place*, 235 Mich App 721, 726 n 3; 598 NW2d 633 (1999).

In this case, defendant was not on notice that the wage loss damages were being sought. Defendant argued, and plaintiff does not dispute, that the issue was not raised in the final pretrial order or at mediation or during settlement conferences. It is also undisputed that a claim for excess wage loss damages was not pleaded against defendant in the complaint. The fact that wages and other financial matters were discussed during discovery was insufficient to give defendant reasonable notice that plaintiff was pursuing an excess wage loss claim against her because there was a claim for wage loss pending against the insurer.² Similarly, the fact that there was testimony that plaintiff's disability was permanent did not put defendant on notice that

² Count II of the complaint was pleaded against plaintiff's no-fault insurer for wage loss benefits.

plaintiff was seeking excess wage losses because the nature and extent of plaintiff's injuries was related to the issue of serious impairment of a bodily function and, thus, to the recovery of noneconomic damages.

Further, defendant was clearly prejudiced by plaintiff's last-minute claim. Defendant argued that if she knew she was defending against excess wage loss damages, she would have offered evidence on the value of excess wage loss and would have offered expert testimony about plaintiff's ability to be rehabilitated to perform some work and mitigate her damages. Instead, defendant limited her presentation at trial to defending against claims that she was negligent and that plaintiff suffered a serious impairment of bodily function. Under the circumstances, the trial court did not abuse its discretion in refusing to allow plaintiff to add the issue of excess wage loss at trial.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Harold Hood

/s/ Martin M. Doctoroff