

STATE OF MICHIGAN  
COURT OF APPEALS

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CHERYL DAVEY and RANDALL DAVEY,

Plaintiffs-Appellees,

v

BEVERLY M. STARR and CHAD YAODES,

Defendants-Appellants.

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UNPUBLISHED

June 17, 2003

No. 237235

Calhoun Circuit Court

LC No. 00-000982-NI

Before: Jansen, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendants appeal as of right from the judgment entered by the trial court. This case arises from an automobile accident involving the principal plaintiff Cheryl Davey (hereinafter “plaintiff”).<sup>1</sup> We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendants argue that the trial court erred by denying their motion for a directed verdict on the ground that there was no evidence that plaintiff suffered a serious impairment of body function as she was required to present in order to prevail in this action.<sup>2</sup> We disagree. The trial court’s decision on a motion for a directed verdict is reviewed de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). In reviewing a trial court decision on a motion for a directed verdict, we examine the evidence and all reasonable inferences from it in a light most favorable to the nonmoving party. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998); *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). A motion for a directed verdict should be granted only if the evidence so viewed fails to establish a claim as a matter of law. *Clark v Kmart Corp*, 465 Mich 416, 418-419; 634 NW2d 347 (2001).

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<sup>1</sup> The trial court dismissed Randall Davey’s consortium claim, and this dismissal has not been appealed.

<sup>2</sup> Defendants set forth the standard of review for this issue as if it involves review of a summary disposition motion. However, in their argument, they discuss evidence presented at trial. Thus, it is clear that their argument should be treated as a claim that the trial court erred by denying their motion for a directed verdict.

The no-fault act generally abolishes tort liability arising from the use of a motor vehicle. MCL 500.3135(3). However, MCL 500.3135(1) provides that tort liability remains, in pertinent part, for noneconomic loss from the use of a motor vehicle that results in “serious impairment of body function.” That phrase is statutorily defined 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). For an impairment to be objectively manifested, there must be a medically identifiable injury or condition which has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002). In determining whether an injury constitutes impairment of an important body function, a court should consider the extent of the injury, the treatment required, the duration of the disability, the extent of residual impairment and the prognosis for eventual recovery. *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). In assessing the extent of the injury, a court may compare the plaintiff’s lifestyle before and after the injury. *May v Sommerfield (After Remand)*, 240 Mich App 504, 506; 617 NW2d 920 (2000). An injury need not be permanent to be an impairment of an important body function. *Kern, supra*, 240 Mich App 341.

We conclude that plaintiff presented evidence of a serious impairment of an important body function. An important body function “is a function of the body that affects the person’s general ability to live a normal life”. *Kern, supra*, 240 Mich App 340, citing *Cassidy v McGovern*, 415 Mich 483, 505; 330 NW2d 22 (1982). This Court in *Kern, supra*, indicated that, while *Cassidy, supra*, had been overruled by *DiFranco v Pickard*, 427 Mich 32; 398 NW2d 896 (1986), the Legislature in adopting the current statutory provisions regarding serious impairment of body function had “overturned the Supreme Court’s *DiFranco* decision by codifying the tort threshold injury standards of *Cassidy*.” *Kern, supra*, 240 Mich App 338. Accordingly, the discussion of what constitutes an “important body function” in *Cassidy, supra*, is controlling. In this regard, the *Cassidy* Court stated:

Recovery for pain and suffering is not predicated on serious pain and suffering, but on injuries that affect the functioning of the body. Leo Cassidy’s injuries were not general aches and pains, but rather two broken bones. Thus, his injuries fall within the classification “impairment of body function.” [*Cassidy, supra*, 415 Mich 505.]

This Court has also set forth a non-exhaustive list of factors to consider when determining whether the impairment of an important body function is "serious" within the meaning of MCL 500.3135. *Miller v Purcell*, 246 Mich App 244, 247; 631 NW2d 760 (2001); *Kern, supra*, 240 Mich App 341. These factors include "extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery." *May (After Remand), supra*, 240 Mich App 506. Further, as our Supreme Court recently explained: "Although a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one's *general* ability to lead his normal life." *Kreiner v Fischer*, \_\_\_ Mich. \_\_\_; 661 NW2d 234 (2003) (emphasis in original).

There was evidence presented that plaintiff sustained an objectively manifested injury to her neck that affected "an important body function," and constituted a serious impairment because her general ability to lead her normal life was affected. It is undisputed that plaintiff had a pre-existing neck condition, and that the automobile accident caused an increase in neck pain. Plaintiff’s physician testified in regard to this, and defendants do not dispute this. There was

evidence that as result of the automobile accident plaintiff suffered a “herniated disc at C5-6.” This herniated disc at C5-6 was not found or mentioned prior to the accident. In addition, this injury goes beyond general aches and pains, as it is a herniated disc in the spine. See *Cassidy, supra*, 415 Mich 505. The “movement of one's back is an important body function.” *Shaw v Martin*, 155 Mich App 89, 96; 399 NW2d 450 (1986). The objective manifestations of a back injury can be established through x-rays indicating an abnormal spine. See *Kreiner v Fischer (On Remand)*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 225640, released 6/3/03) slip op, p 4 n 4, citing *Sherrell v Bugaski*, 140 Mich App 708, 711; 364 NW2d 684 (1984). Here, a magnetic resonance imaging (MRI) examination revealed the herniated discs. A MRI is an objective test. *Id.* Thus, there is evidence of the necessary impairment of an important body function because plaintiff's claim is predicated on more than just pain and suffering, and, specifically, on an impairment of the functioning of her body.

Further, there is evidence, when viewed in a light most favorably to plaintiff, that the impairment affected plaintiff's general ability to lead her normal life. This Court, interpreting a Supreme Court remand order, indicated “when considering a person's ‘general’ ability to lead his or her normal life, the focus must be on multiple aspects of the person's life, i.e., home life, relationships, daily activities, recreational activities, and employment, and not solely on one area of the person's life such as employment.” *Id.* at slip op, p 6. In determining whether a factual dispute exists with regard to the extent of plaintiff's injuries, it is appropriate to compare plaintiff's lifestyle before and after the accident. *May (After Remand), supra*, 240 Mich App 506. Plaintiff testified that her daily routine changed after the accident. At the time of the accident plaintiff had not been employed since 1992. However, plaintiff testified that she was helping her sister remodel her house, took care of horses, did house work, and helped her parents out with farm work; all of which was adversely affected by injuries she suffered in the automobile accident. As a result of the accident, plaintiff testified that she could not have relations with her husband, could not sleep at night, could not fix her hair the way she wanted, could not lift bails of hay, and had trouble getting in and out of a car. Plaintiff also indicated there were social and fun activities she could not participate in as a result of the accident. Prior to the accident, plaintiff testified that she would ride her horse on a daily basis and that she could not do this following the accident. Additionally, plaintiff testified that there was a time period of approximately ten days following the accident where she “did nothing,” and “sat mostly in a chair,” as a result of the accident. Thus, there was evidence that the injuries affected plaintiff's general ability to lead her normal life. Accordingly, the trial court properly denied defendants' motion for a directed verdict with regard to whether there was evidence presented that plaintiff's injuries could be classified as an impairment of the functioning of her body.<sup>3</sup>

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<sup>3</sup> We need not consider whether this case should have been decided by the trial court rather than ever having been submitted to a jury under the requirements of MCL 500.3135(2) because defendants have waived this issue on appeal. Defendants did not include this issue in the "Statement of Questions Presented" in their brief on appeal. MCR 7.212(C)(5). Thus, defendants' have waived appellate review based on their failure to include an issue in the statement of questions presented. *Grand Rapids Employees Independent Union v Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999). However, as discussed above, evidence was presented that raised a proper jury question with regard to the seriousness of plaintiff's

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Defendants' final issue on appeal is that the trial court erred in instructing the jury on SJI2d 50.11. We disagree. On appeal, claims of instructional error are generally reviewed de novo. *Jackson, supra*, 252 Mich App 647. When requested by a party, in a civil case, a standard jury instruction must be given if it is applicable and accurately states the law. MCR 2.516(D)(2), *Jackson, supra*, 252 Mich App 657. The determination whether an instruction is accurate and applicable based on the characteristics of a case is in the sound discretion of the trial court, whether an instruction is supported by evidence is entitled to deference, and a determination based upon a legal issue is a question of law reviewed de novo. *Jackson, supra*, 252 Mich App 657; *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *Clark v Kmart Corp (On Remand)*, 249 Mich App 141, 151; 640 NW2d 892 (2002). Jury instructions should be reviewed in their entirety, rather than extracted piecemeal to establish error in isolated portions. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000); *Bachman v Swan Harbour Association*, 252 Mich App 400, 424; 653 NW2d 415 (2002). Reversal is not required unless the failure to do so would be inconsistent with substantial justice. MCR 2.613(A), *Case, supra*, 463 Mich 6. There is no reversible error if, on balance, the theories of the parties and the applicable law were adequately and fairly presented to the jury. *Murdock v Higgins*, 454 Mich 46, 60; 559 NW2d 639 (1997); *In re Flury Estate*, 249 Mich App 222, 226; 641 NW2d 863 (2002).

The jury was instructed with regard to SJI2d 50.11 as follows:

If an injury suffered by the Plaintiff is a combined product of both a pre-existing injury and the affects of the Defendant's negligent conduct, it's your duty to determine and award damages caused by Defendant's conduct alone. You must separate the damages caused by Defendant's conduct from the condition which the pre-existing – which was preexisting if it's possible to do so. However, if, after careful consideration, you are unable to separate the damages caused by Defendant's conduct from those which are pre-existing, then the entire amount of Plaintiff's damages must be assessed against the Defendant.

Defendants' argue that the reading of SJI2d 50.11 is incompatible with the threshold requirements of MCL 500.3135 and SJI2d 36.11 because it relieves plaintiff from the burden of proving a definite identifiable injury. However, prior to the SJI2d 50.11 instruction, the jury was properly instructed pursuant to SJI2d 36.11 that:

In order to recover damages for these non-economic losses, Plaintiff has the burden of proof on each of the following elements: First, that the Plaintiff was injured; and second, that Plaintiff's injury resulted in serious impairment of body function. If you decide that both elements have been proved, then plaintiff is entitled to recover damages for non-economic loss that you determine the Plaintiff has sustained as a result of the injury.

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(...continued)

injury.

Now, as I said, one of the elements the Plaintiff must prove in order to recover non-economic loss damages in this case is that she sustained a serious impairment of bodily function. Serious impairment of body function means an objectively manifested impairment of an important body function that affects the Plaintiff's general ability to lead her normal life. . . .

Subsequently, the jury was also instructed pursuant to SJI2d 50.01 that "If you find that the Plaintiff is entitled to damages . . ."

We find no error in the trial court's giving SJI2d 50.11. Prior to the trial court instructing on SJI2d 50.11, it instructed the jury with regard to SJI2d 36.11 and SJI2d 50.01, clearly, instructing the jury that prior to any kind of award of damages it must find that plaintiff suffered an injury that resulted in serious impairment of bodily function. It is undisputed, and was a significant part of defendants' defense, that plaintiff suffered from back problems prior to injuries she suffered as a result of the automobile accident. Defendants' argument at trial was that the injuries suffered by plaintiff were a result of the prior accident, and that there was not a significant change in plaintiff's back injury following the car accident. SJI2d 50.11 is a standard jury instruction that was applicable. Error only exists when the instructions are extracted piecemeal. See *Case, supra*, 463 Mich 6. Therefore, the trial court did not abuse its discretion in determining that the instruction was applicable, and there was no error as the instructions given, when read in their entirety, were consistent with Michigan law.

Affirmed.

/s/ Kathleen Jansen  
/s/ Kirsten Frank Kelly  
/s/ Karen Fort Hood