

STATE OF MICHIGAN
COURT OF APPEALS

PAMELA WILLIAMS,

Plaintiff-Appellant,

v

THOMAS JOHN KUZMAK,

Defendant-Appellee.

UNPUBLISHED

April 25, 2006

No. 258946

Macomb Circuit Court

LC No. 2002-005753-NI

Before: Markey, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

In May 2002, plaintiff's vehicle was struck from behind by a vehicle driven by defendant. At trial, defendant admitted that he caused the accident, but a jury found that plaintiff was not injured in the accident. Thereafter, the trial court entered an order of no cause of action and denied plaintiff's post trial motion for judgment notwithstanding the verdict (JNOV) or a new trial. Plaintiff appeals as of right from the orders of the trial court denying her motions for JNOV or a new trial and for the reasons stated below, we affirm the decisions of the trial court.

Plaintiff sought noneconomic damages for a serious impairment of body function under Michigan's no-fault act, MCL 500.3101 *et seq.* Plaintiff argues that all of the evidence indicated that she suffered an injury and therefore the trial court erred in denying her motion for JNOV because there was no evidence to support the jury's verdict that plaintiff was not injured. Plaintiff contends there was no dispute she suffered some injury even if the jury believed it did not rise to the level of a serious impairment of body function. To support this contention, plaintiff relies on the testimony of Dr. Mallah who stated that although he could not say with 100 percent certainty that his diagnosis of fibromyalgia was related to the 2002 accident, he believed it was and he never testified that plaintiff was not injured. Furthermore, the testimony of Dr. Morton was that plaintiff suffered from cervical thoracic strain and pelvic malalignment, both of which were based on objective findings. Plaintiff characterizes the testimony of Dr. Morton to this court to be read that even if Dr. Morton did not know if the 2002 accident was the primary or an aggravating cause of plaintiff's pelvic malalignment, she stated that something happened to plaintiff on May 18, 2002, and that should be sufficient for a finding that an injury occurred. Plaintiff also told Dr. Taylor that she had neck and back pain as a result of the 2002 accident and he never testified that she was not injured in the accident. Plaintiff further contends that defense counsel admitted in his closing argument that plaintiff suffered an injury. Finally plaintiff contends that because no expert testified that plaintiff was not injured, the jury's verdict is not supported by the evidence and plaintiff was entitled to JNOV.

This Court reviews de novo a trial court's decision on a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). JNOV should be granted only when there was insufficient evidence presented to create an issue for the jury. *Merkur Steel Supply, Inc v Detroit*, 261 Mich App 116, 123; 680 NW2d 485 (2004). When deciding a motion for JNOV, the trial court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Id.* at 123-124. If the evidence is such that reasonable jurors could disagree, JNOV is improper. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

To determine whether the evidence established that plaintiff was injured, we must first determine what constitutes evidence of an injury. The no-fault act does not define bodily injury. In the context of liability insurance contracts, the term "bodily injury" is generally understood to mean hurt or harm to the human body, contemplating actual physical harm or damage to a human body. *Farm Bureau Mut Ins Co of Michigan v Hoag*, 136 Mich App 326, 334-335; 356 NW2d 630 (1984). Black's Law Dictionary defines "injury" as "[p]hysical pain, illness or any impairment of physical condition." Black's Law Dictionary, p 786 (6th ed). Here, however, plaintiff sought recovery for a "serious impairment of body function" under the no-fault act, which requires that impairment be objectively manifested. MCL 500.3135(7). In this context, it was incumbent on plaintiff to prove harm to her body that was objectively manifested.

Much of the evidence on this case involved subjective complaints, which could not be objectively verified. Contrary to the contentions of plaintiff, Dr. Mallah admitted that there were no objective findings to support his diagnosis of fibromyalgia, and Dr. Taylor testified that he could not find an objective basis for plaintiff's complaints. Dr. Morton, on the other hand, testified that her diagnosis of pelvic malalignment was based on objective findings, but her diagnosis of cervical thoracic sprain was not. Dr. Morton testified that the 2002 accident could have exacerbated a pre-existing pelvic malalignment or caused a new malalignment, however she could not state for sure which one was the case. Dr. Morton did testify that she believed that the accident played some role in plaintiff's increase in symptoms.

Plaintiff presented a credible question of fact as to whether she was injured in the 2002 accident. However presentation of a credible case does not nullify a jury verdict. It is solely within the province of the jury to decide questions of fact. Accordingly, because evidence at trial created a question of fact for the jury regarding the issue of injury, the trial court properly denied plaintiff's motion for JNOV. *Foreman, supra* at 136.

Plaintiff also asserts that defense counsel admitted in his closing argument that plaintiff was injured. A statement made by a party's counsel, in the course of trial, is considered a binding judicial admission only "if it is a distinct, formal, solemn admission made for the express purpose of, inter alia, dispensing with the formal proof of some fact at trial." *Ortega v Lenderink*, 382 Mich 218, 222-223; 169 NW2d 470 (1969); *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 364; 503 NW2d 915 (1993). In this case, defendant's expert, Dr. Taylor, testified that he could not find an objective basis for plaintiff's complaints. Additionally, defendant prepared the jury instructions, which plaintiff approved, and the instructions and verdict form (which the parties also approved) both required the jury to determine whether plaintiff was injured. Considered against this backdrop, it is apparent that defense counsel's remarks during closing argument, suggesting that plaintiff may have experienced a temporary

neck or back strain, were not intended to absolve plaintiff from her burden of proving that she was injured.

Plaintiff also argues that the jury's verdict was against the great weight of the evidence and, therefore, the trial court erred in denying her motion for a new trial. This Court reviews for an abuse of discretion a trial court's decision regarding a motion for new trial. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). "This Court gives substantial deference to a trial court's determination that the verdict was not against the great weight of the evidence." *Campbell v Sullins*, 257 Mich App 179, 193; 667 NW2d 887 (2003). Further, this Court will not substitute its judgment for that of the fact-finder unless the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id.*

Here, the best objective finding that plaintiff was injured was Dr. Morton's testimony that her pelvic malalignment was as a possible result of the accident. The jury was free to accept or reject Dr. Morton's testimony. *Detroit/Wayne Co Stadium Auth v Drinkwater, Taylor, & Merrill, Inc*, 267 Mich App 625, 658-659; 705 NW2d 549 (2005). The jury apparently determined that the accident did not cause or exacerbate plaintiff's symptoms, or that plaintiff's symptoms were related to a pre-existing condition, which was the result of an earlier car accident in 2001. Considering that no other doctor could find an objective basis for plaintiff's complaints and that there was an alternative source for them, the evidence did not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow it to stand. *Campbell, supra* at 193. Therefore, the trial court did not abuse its discretion by denying plaintiff's motion for a new trial.

Affirmed.

/s/ Jane E. Markey

/s/ Bill Schuette

/s/ Stephen L. Borrello