STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

NANCY H. PERRY,

Plaintiff,

v

File No. 94-12598-NI
HON. PHILIP E. RODGERS, JR.

CASSIE LAYNE KUTCHINSKI, EDWARD and LINDA POPLOSKI, jointly and severally,

Defendants.
_____/

Mark Messing (P29745)
Attorney for Plaintiff

Linda Marsh Raetz (P42883)
Attorney for Defendant Kutchinski

John P. Racine, Jr. (P25606)
Attorney for Defendant Poploski
_____/

DECISION AND ORDER

Following a trial of this action in which verdicts of no cause of action were entered in favor of each Defendant, the Plaintiff filed a Motion for New Trial or Judgment Notwithstanding the Verdict pursuant to the provisions of MCR 2.610 and 2.611. A transcript of the proceedings was prepared, the parties filed their briefs and the Court entertained the oral argument of counsel on June 3, 1996. The Court then took the matter under advisement. It will now provide its findings of fact and conclusions of law. MCR 2.517.

Plaintiff claimed injuries arising out of two separate motor vehicle accidents. The first accident involved the Defendant Poploski on February 9, 1993. The second accident occurred with the Defendant Kutchinski on October 27, 1993.

The remedy of a new trial generally rests within the sound discretion of the trial judge. The appellate cases recognize that

this discretion should only be exercised consistent with substantial justice. Wiggenton v Lansing, 129 Mich App 53; 341 NW2d 228 (1983); People v Mack, 112 Mich App 605; 317 NW2d 190 (1981); Hamburger v Henry Ford Hospital, 91 Mich App 580; 284 NW2d 155 (1979).

Although the Plaintiff does not state with precision the particular grounds within MCR 2.611(A) which justify the requested new trial, the Court presumes from the nature of the errors claimed that Plaintiff is asserting an error of law by the Court. MCR 2.611(A)(1)(g). Specifically, Plaintiff asserts that the Court committed legal error by failing to submit to the Jury a special instruction regarding single indivisible injuries and, second, by failing to provide the Jury with a verdict form which would allow the Plaintiff to recover damages from the negligent Defendants if they found a permanent, serious disfigurement.

First, addressing the question of a divisible injury, the Court would note that this matter was the subject of substantial discussion at the time of trial. The parties were provided with an opportunity to brief and argue the issue to the Court. The Court ruled that the operative language was best described in Maddux v Donaldson, 362 Mich 425, 108 NW2d 33 (1961). There, the Michigan Supreme Court wrote as follows:

> [I]f there is competent testimony, adduced either by plaintiff or defendant, that the injuries are factually and medically separable, and that the liability for all such injuries and damages, or parts thereof, may be allocated with reasonable certainty to the impacts in turn, the jury will be instructed accordingly and mere difficulty in so doing will not relieve the triers of the facts of this responsibility. This merely follows the general rule that where independent concurring acts have caused distinct and separate injuries to the plaintiff or where some reasonable means of apportioning the damage is evident, the courts generally will not hold the tort feasors jointly and severally liable.
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> But if, on the other hand, the triers of the facts conclude that they cannot reasonably make the division of liability between the tort feasors, this is the point where the road of authority divides. Id., p 432.

Following this ruling, the Court determined that it would review the testimony of the final medical witness as it was read to the Jury and then take up argument regarding whether the Maddux standards had been satisfied, i.e., whether there was competent testimony of factually and medically separable injuries such that a division could be made with reasonable certainty. If there was, the Court advised counsel that it would instruct consistent with Standard Jury Instructions 41.02 and 41.03. Alternatively, the Court would use 41.04 and a consistent verdict form. Transcript Volume III, pp 461-464.

At the conclusion of Dr. Schaiberger's testimony, this issue was revisited. The Court found relevant testimony from Dr. Schaiberger's transcript, pp 25, 27, 28 39 and 42. In summary, the Court concluded that Dr. Schaiberger found it speculative to assert a causal relationship between trauma that pre-existed October 27, 1993, and the Plaintiff's disc herniation and surgical repair. Accordingly, viewing the medical evidence from the Defendants' perspective, there was a factual basis upon which a Jury could find separable trauma for the accident of October 27, 1993. It was, then, the Court's obligation to instruct the Jury with regard to their duty to apportion damages if in fact they agreed that the injuries were factually and medically separable and could do so with reasonable certainty. The Court's ruling is found in the transcript at Volume III, pp 478-480. The Court does not believe that an error of law was committed and therefore would deny the motion for a new trial on these grounds.

Plaintiff next asserts that an error of law was created when the Jury was not provided with a verdict form which would allow Plaintiff to recover damages from a negligent Defendant if they found a surgical scar that created permanent, serious disfigurement. As to this issue, the Court can find no mention in the record whatsoever of any request for such a verdict form. Rather, after substantial discussion regarding proximate causation, serious impairment and the divisible injury argument, the Court prepared a verdict form and counsel reviewed it. Subject to issues

that were preserved for the record, Plaintiff approved the verdict form. Transcript Volume III, p 514.

While the Court did instruct the Jury with regard to permanent, serious disfigurement as an element of damage, the verdict form did not have a specific line for such loss. Having failed to timely object to the verdict form, Plaintiff has waived this issue.

Plaintiff also seeks a judgment not withstanding the verdict or a new trial as to Defendants Kutchinski and Poploski because she believes the medical evidence must cause any reasonable and honest juror to find a serious impairment of body function. In this argument, Plaintiff focuses upon the conditions leading to the discovery of disc herniation, the resultant fusion of her cervical vertebrae at C5-6 and the consequences of that surgery.

The Defendant Cassie Kutchinski was involved in a motor vehicle accident with the Plaintiff on October 27, 1993. Recognizing her negligence, the Jury found there to be a proximate causal relationship between that negligence and Plaintiff's injury. However, the Jury did not find that the Plaintiff suffered serious impairment of an important body function.

The Jury differed in its findings with regard to the Defendant Linda Poploski, who was involved in the February 9, 1993 accident. The difference was that the Jury never reached the issue of serious impairment because they found Linda Poploski's negligence not to be the proximate cause of an injury to Plaintiff.

A motion for judgment notwithstanding the verdict is brought pursuant to MCR 2.610. The parties agree upon the standard of review. Given all the evidence and viewing the facts most favorably from the non-moving party's perspective, together with all reasonable inferences therefrom, the Court must determine whether the moving party is entitled to judgment as a matter of law. Murphy v Muskegon County, 162 Mich App 609; 413 NW2d 73 (1987) citing with approval Willoughby v Lehrbass, 150 Mich App 319; 388 NW2d 688 (1986). Courts generally recognize that if there is any credible evidence subject to one of two competing

inferences, then judgment notwithstanding the verdict should not enter. Killen v Benton, 1 Mich App 294, 136 NW2d 29, lv app den (1965). Verdicts which are attacked based upon the weight of the evidence may result in a new trial but not a judgment notwithstanding the verdict. At the trial, the Court described its opinion on this issue as it related to the Defendant Kutchinski.

> THE COURT: Well, perhaps the best way to resolve this may be with respect to post-judgment motions. In all candor and with all sincerity and with what I understand to be the law that applies to both of you in this case, I would find it very difficult to not set aside a Jury verdict that would be a complete no-cause of action as to your client [Defendant Kutchinski] on this record. On this record your client is going something less than twenty-five miles per hour when she taps on the brakes and runs into the rear-end of a parked motor vehicle, and viewed most favorably from the Plaintiff's -- from your perspective, the Plaintiff has serious complaints prior to this accident, but now experiences some enhancement of them that leads her to a physician and subsequent serious disc surgery. I don't know what compilation of evidence in this record a reasonable Jury could rely upon and find no causal relationship between that impact, no legal causal relationship between that impact and the surgery that occurred less than three months later. It would seem to me to be a bizarre result.
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> Now, if to protect this record and to make this matter clear for appeal it would be more logical to allow the Jury to answer these questions and deal with it post-judgment, I may well be amenable to that suggestion. Trial Transcript Volume III, pp 500 ln 14 - 501 ln 16.
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> MR. MESSING: She's not disabled with this problem at this time is what the note says, but Doctor Johnson went on and testified at length about what he observed and knew, and again, I'm not trying to be contentious, your Honor.
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> THE COURT: I understand.
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> MR. COUTURE: Your Honor, we have decided this issue and we're certainly taking up a lot of Court time revisiting it and I would object and urge the Court to proceed further.

> THE COURT: Well, clearly, if the Court was to exercise an abundance of caution, it would let the Jury do what it believes it's going to do with regard to causation and serious impairment, in any event, but with regard to the Defendant Kutchinski and the medical testimony that's been received, viewed most conservatively from the Defendant Kutchinski's viewpoint, I cannot find in my notes or in Doctor Schaiberger's testimony evidence that would allow a reasonable jury to determine that the impact of October 27th, 1993 was not a proximate cause of a serious impairment of an important body function. The herniation, whenever the Jury were to determine it occurred, needed to be repaired surgically and clearly there is no evidence that would allow a reasonable jury to determine that the surgical repair of a disc herniation was something that was going to occur with reasonable medical probability absent the accident of October 27th, 1993. The surgical repair of a disc herniation in an anterior surgical diskectomy and fusion, is that a serious impairment body function as a matter of law? It certainly would be a cruel jury that would determine otherwise. Trial Transcript Volume III, pp 495-496, ln 10.
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> THE COURT: . . .
> With regard to serious impairment of an important body function, the Court likewise believes that it is beyond all room for rational disagreement that the anterior cervical diskectomy at C-4/5 was anything other than a serious impairment, -- 5/6 -- yet will let that issue go to the Jury and revisit that question if necessary following the return of their verdict. Trial Transcript Volume III, p 509 ln 7-14.

Commentators have recognized, and this Court agrees, that there is no objective standard by which to assess the weight of the evidence in passing on a motion for new trial. Martin, Dean & Webster, Chapter 2, p 475. The extreme positions seem to be first represented by a case where there is sufficient evidence to survive a motion for directed verdict and yet a new trial is still properly granted. Davis v Belmont Creamery Co, 281 Mich 165, 274 NW 749 (1937). The second extreme would be the inappropriate grant of a new trial just because the trial judge might draw different inferences from the evidence or prefer a different result. Bell v Merritt, 118 Mich App 414, 325 NW2d 443 (1982). Between these extremes, Martin, Dean & Webster note, "lies an area in which the

proof begins to weigh heavily against the verdict wherein the trial judge's discretion must be accepted as the best guide to whether fairness requires a new trial." Id., Chapter 2, p 475.

Based upon the evidence introduced at the time of the trial and viewed most favorably from the non-moving party's perspective, it is this Court's opinion that the verdict with respect to Cassie Layne Kutchinski was contrary to the great weight of the evidence. MCR 2.611(A)(1)(e). The appropriate remedy is not to enter a judgment notwithstanding the verdict, but to order a new trial. See, Martin, Dean & Webster, Chapter 2, p 455.

This Court is not aware of an appellate decision which has ruled that a diskectomy at any level constitutes serious impairment of an important body function as a matter of law. The Court is cognizant of the Michigan Supreme Court's ruling in DiFranco v Pickard, 427 Mich 32; 398 NW2d 896 (1986) where the Court ruled that the issue of serious impairment is a jury question whenever evidence would cause reasonable minds to differ even though there is no material factual dispute as to the nature and extent of Plaintiff's injuries.

Michigan law also provides that for serious impairment of an important body function to be proven, the injury need not be permanent, DiFranco, supra, and SJI 2d 36.01A, and that the Defendant takes the Plaintiff as he finds her and is responsible for all damages resulting to her as a proximate cause of his negligence even if she was unusually susceptible to injury. Richman v City of Berkley, 84 Mich App 258, 269 NW2d 555 (1978), and SJI 2d 50.10. Also, the Defendant is not relieved from liability where the proximate cause of injury is the result of pre-existing disease and the effect of Defendant's negligent conduct. SJI 2d 50.11 and cases cited thereunder.

Here, the Court believes it overstated the issue during oral argument when it suggested that an interior surgical diskectomy and fusion would constitute serious impairment as a matter of law. However, on this record, the Court must respectfully disagree with

the Jury's determination of no serious impairment as a verdict which was contrary to the great weight of the evidence.

There was no dispute that the conditions created by disc herniation can be life-threatening and the surgery on Plaintiff's spine was necessary. The Court cannot find evidence in the medical record to support a finding that such surgery is not serious nor that its impact upon the cervical spine would not impair an important body function. In the interest of substantial justice, then, the Court feels compelled to order a new trial.

The Plaintiff also seeks judgment notwithstanding the verdict or a new trial with respect to the Defendant Poploski. Again, the same standard of review applies. Viewing the trial record most favorably from the Defendant's perspective, there is ample evidence that would support a finding of no proximate causal relationship between the automobile accident of February 9, 1993, and any serious impairment of an important body function. Additionally, there is credible evidence in the record to support a finding that there was no serious impairment of an important body function prior to the second accident of October 27, 1993.[1]

Since there is evidence upon which a reasonably honest Jury could rely in finding a separate injury relating to the trauma of October 27, 1993, thereby supporting a Jury determination of no proximate causal connection between the negligence of Linda Poploski on February 9, 1993, the disc herniation and no serious impairment of body function prior to October 27, 1993, the request for a judgment notwithstanding the verdict or new trial as to the Defendant Poploski is denied.

Having reviewed the foregoing arguments of the parties and entertained the oral argument of counsel, it is the Court's conclusion that Plaintiff is entitled to a new trial as to the Defendant Kutchinski and all other requests for relief are denied. It is the obligation of counsel for the Plaintiff to contact the

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[1] The Court's discussion on this point is found in Volume III of the transcript pages 490 through 493.

Court Administrator to set the matter for trial if no party seeks relief from the Michigan Court of Appeals within the time period for an appeal of right.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 1/31/97