

STATE OF MICHIGAN
COURT OF APPEALS

JUDITH ANDERSON,

Plaintiff-Appellant,

and

THEODORE ANDERSON

Plaintiff

v

FRANK SENGER,

Defendant-Appellee,

and

MARINE CITY NURSERY COMPANY,

Defendant.

UNPUBLISHED

July 26, 2007

No. 266941

St. Clair Circuit Court

LC No. 02-001346-NI

Before: White, P.J., and Saad and Murray, JJ.

PER CURIAM.

I. Introduction

Plaintiff, Judith Anderson, appeals as of right the trial court's September 19, 2005, judgment of no cause of action in favor of defendant, Frank Senger. On appeal, plaintiff argues that there was no evidence presented that could lead a reasonable juror to conclude that her injuries did not meet the serious impairment of body function threshold, and thus, the trial court erred when it denied her motion for judgment notwithstanding the verdict. In the alternative, plaintiff argues that even if it is found that there was some support for the jury's verdict, the great weight of the evidence presented established that her injuries met the serious impairment threshold, and thus, the trial court abused its discretion when it denied her motion for a new trial. Moreover, plaintiff argues that the trial court made reversible evidentiary errors when it precluded Dr. Robertson from giving his opinion regarding whether he thought plaintiff's injuries met the serious impairment threshold, and from testifying that he was originally retained

by defendant to conduct an independent medical investigation. We disagree with plaintiff's arguments and affirm the trial court's judgment.

II. Facts and proceedings

On May 19, 2000, defendant was driving a vehicle southbound on Marsh Road, which collided with plaintiff's vehicle. The parties do not dispute the fact that defendant's negligence caused the accident.

On May 14, 2002, plaintiff and her husband Theodore Anderson initiated this action by filing a complaint against defendant alleging that defendant's negligence was the proximate cause of plaintiff's threshold injuries, in addition to being the proximate cause of Theodore's loss of consortium and emotional distress. The complaint also alleged that defendant's employer, Marine City Nursery Company (MCNC), was vicariously liable. The trial court dismissed the claims against MCNC and that dismissal has not been appealed.

Plaintiff's claims against defendant proceeded to trial on June 14, 2005. At the beginning of trial, the jury was advised that defendant was conceding that his negligence caused the accident, and thus, the trial would focus on plaintiff's injuries. After hearing seven days of testimony regarding plaintiff's injuries, and listening to the attorney's arguments and the trial judge's instructions, the jury gave affirmative answers to the questions "Was plaintiff injured?" and "Was defendant's negligence a proximate cause of any of plaintiff's injuries?" but gave a negative answer to the question "Did the plaintiff's injury result in serious impairment of a body function or permanent serious disfigurement?" On September 19, 2005, the trial court entered judgment of no cause of action in favor of defendant.

On July 20, 2005, plaintiff filed a motion for judgment notwithstanding the verdict or for a new trial. On October 31, 2005, after hearing the parties' arguments, the trial court found that the issue of serious impairment was properly submitted to the jury and the evidence presented supported the jury's verdict.

The verdict as rendered, in this Court's opinion, by the jury was valid. This Court is of the opinion that the issue of serious impairment was a proper issue for the jury as fact-finders and the evidence presented at trial included the videotape evidence of plaintiff living her normal life in a way that she claims she couldn't. The evidence presented, in this Court's opinion, could properly support the finding that she did – did not suffer a, serious impairment. The jury properly found that plaintiff did not meet her burden of proof under *Kreiner* that the injury affected her general ability to live her normal life. The Court will, therefore, deny the Plaintiffs' Motion for Judgment Notwithstanding the Verdict and/or For a New Trial.

III. Analysis

Plaintiff first argues that there was no evidence presented that could lead a reasonable juror to conclude that her injuries did not meet the serious impairment of body function threshold, and thus, the trial court erred when it denied her motion for judgment notwithstanding the verdict. In the alternative, plaintiff argues that even if it is found that there was some support

for the jury's verdict, the great weight of the evidence presented established that her injuries met the serious impairment threshold, and thus, the trial court abused its discretion when it denied her motion for a new trial.

We review a trial court's ruling on a motion for JNOV de novo. *Garg v Macomb County Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646 (2005). In reviewing a trial court's denial of a JNOV motion, we examine the testimony and all legitimate inferences from it in a light most favorable to the nonmoving party to determine if there was sufficient evidence presented to create an issue for the jury. *Detroit/Wayne County Stadium Authority v Drinkwater, Taylor and Merrill, Inc*, 267 Mich App 625, 642-643; 705 NW2d 549 (2005).

A trial court's decision on a motion for a new trial is reviewed for an abuse of discretion. *Drinkwater, Taylor and Merrill, Inc, supra* at 644. An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). In general, "our courts are 'reluctant to overturn a jury's verdict' where there is 'ample evidence' to support the jury's decision, . . . and will do so only where we are satisfied that allowing the verdict to stand would be inconsistent with substantial justice." *Clark v Kmart Corp*, 249 Mich App 141, 150; 640 NW2d 892 (2002), quoting in part *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289, 295; 624 NW2d 212 (2001).

Under the no-fault automobile insurance act, MCL 500.3101 et seq., tort liability for non-economic losses is limited to instances in which the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 500.3135(1); *Hardy v Oakland Co*, 461 Mich 561, 565; 607 NW2d 718 (2000); *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005). A serious impairment of body function is "an objectively manifested impairment of an important body function that affects the person's general ability to lead his . . . normal life." MCL 500.3135(7); *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

To help determine whether a plaintiff has met the statutory threshold, the *Kreiner* Court developed a multi-step process to assist a trier of fact in determining whether a plaintiff has suffered a threshold injury. *Kreiner, supra* at 131. This multi-step inquiry entails the following: First, it must be determined if the plaintiff suffered an impairment. Second, if an impairment is found, the trier of fact "must next determine if an 'important body function' of the plaintiff has been impaired." *Id.* at 132. Third, if it is found that an important body function has been impaired, the trier of fact must next determine if the impairment is objectively manifested. *Id.* An objectively manifested impairment is a "medically identifiable injury or condition that has a physical basis." *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002). Fourth, and finally, if the trier of fact "finds that an important body function has been impaired, and that the impairment is objectively manifested, it then *must* determine if the impairment affects the plaintiff's general ability to lead his . . . normal life." *Id.* (emphasis added). The *Kreiner* Court noted:

In determining whether the course of the plaintiff's normal life has been affected, a [trier of fact] should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the

[trier of fact] must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's 'general ability' to conduct the course of his life. Merely 'any effect' on the plaintiff's life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff's 'general ability' to lead his life. [*Id.* at 132-133.]

The *Kreiner* Court went on to list five non-exclusive, non-exhaustive objective factors to assist in evaluating whether an impairment has affected a plaintiff's "general ability" to lead or conduct the course of his normal life: "(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery." *Id.* at 133. The five factors are not intended to be individually dispositive, but rather are intended to serve as a framework to apply the totality of the circumstances to determine whether the plaintiff's impairments affect his general ability to conduct the course of his normal life. *Id.* at 133-134.

At trial, plaintiff presented evidence regarding how her injuries affected her general ability to lead her normal pre-accident life. Plaintiff's brother-in-law and daughters testified that, as a result of her physical and mental injuries, plaintiff can no longer function on her own and is totally dependent on her family. Plaintiff can no longer drive, has memory problems, cannot lift things and needs help cutting her food. Additionally, plaintiff now has trouble speaking, and as a result has turned from an "outgoing person to this very quiet, shy person" who no longer socializes with friends. Plaintiff's daughter, Jacqueline Schnitz, further added that after the accident plaintiff gave up most of her hobbies, such as gardening, scrap booking, cooking and reading. Plaintiff's case manager, Deborah Johnson, also opined that plaintiff can no longer maintain her household on her own, and additionally noted that Dr. Bradley restricted plaintiff's driving.

However, evidence was also presented showing that plaintiff was never restricted from partaking in any activities other than driving. Dr. Adams stated that plaintiff was still strong enough to cut her own food, and additionally, could still live her daily life and do everything she enjoys, including reading, going to the movies and doing basic calculations. Furthermore, Dr. Sahn stated that he would not restrict any of plaintiff's household activities, and Dr. Mercier noted that plaintiff still partakes in many activities, such as socializing with friends and family, going out to eat, reading books and watching television. Moreover, private investigators Guy Browning and Sandra Issell both presented post-accident video surveillance footage depicting plaintiff out and about with her husband partaking in everyday activities, such as walking long distances without assistance, talking on a cell phone, shopping, visiting family and friends, going to a beauty salon on her own, and using her left arm and hand with no apparent difficulty. Furthermore, Browning and Issell both stated that they did not observe anything physically wrong with plaintiff. Thus, evidence was presented that created a question of fact whether any of plaintiff's injuries affected her general ability to lead her normal pre-accident life. *Kreiner, supra* at 132-134. Therefore, viewing the evidence presented in a light most favorable to defendant, sufficient evidence was presented to create an issue of whether plaintiff's injuries met the serious impairment of body function threshold, and the trial court's conclusion that the jury's verdict was not against the great weight of the evidence was a reasonable and principled outcome. *Kreiner, supra* at 131-134. Thus, the trial court did not err when it denied plaintiff's

motion for judgment notwithstanding the verdict, and likewise, did not abuse its discretion when it denied plaintiff's motion for a new trial. *Drinkwater, Taylor and Merrill, Inc, supra* at 642-644.

Evidentiary Issues

Plaintiff's first evidentiary issue is that the trial court erred in granting defendant's motion in limine to preclude plaintiff's counsel from eliciting testimony from Robertson that he had originally been retained by defendant to perform an independent medical examination. Based on *Kissel v Nelson Packing Co*, 87 Mich App 1; 273 NW2d 102 (1978), the trial court ruled that plaintiff's counsel could call Dr. Robertson as a witness, but was precluded on relevancy grounds from eliciting testimony that he was originally retained by defendant.

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hospital*, 471 Mich 67, 76; 684 NW2d 296 (2004). When the trial court's decision involves a preliminary question of law, such as whether a statute precludes the admission of evidence, a de novo standard of review is employed. *Dept of Transportation v Frankenlust Lutheran Congregation*, 269 Mich App 570, 575; 711 NW2d 453 (2006).

"All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of Michigan, these rules, or other rules adopted by the Supreme Court." MRE 402. "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

In *Kissel, supra*, this Court held that where defense counsel arranged an independent medical examination of the plaintiff and decided not to subsequently take testimony from the examining doctor, the trial court erred when it precluded the plaintiff from deposing the examining doctor or subpoenaing him for trial. This Court further held that testimony regarding the examining doctor's original employment was not relevant to any issue presented, and thus even though the plaintiff could have the examining doctor testify on his behalf, the plaintiff could not bolster the examining doctor's credibility by eliciting testimony that he was originally retained by the defendant to conduct an independent medical examination of the plaintiff. *Id.* at 5. This Court further noted that the examining doctor's credibility could only be bolstered if it was attacked in the first instance by defense counsel. *Id.* See also, *Laudenslager v Covert*, 163 Mich App 484, 488-490; 415 NW2d 254 (1987).

Here, defendant never attempted to impeach Dr. Robertson's credibility, so the trial court determined that testimony regarding Dr. Robertson's original employment was not relevant to the determination of whether plaintiff's injuries met the serious impairment of body function threshold. The trial court therefore did not abuse its discretion when it precluded Dr. Robertson from testifying that he was originally retained by defendant. MRE 401; *Kissel, supra* at 5.

Plaintiff's second evidentiary issue challenges the trial court's sustaining of defendant's objection to plaintiff's question to Dr. Robertson of whether plaintiff's injuries met the serious impairment of body function threshold. "Testimony in the form of an opinion or inference

otherwise admissible is not objectionable because it *embraces* an ultimate issue to be decided by the trier of fact.” MRE 704 (emphasis added). Furthermore, *where a trial court determines that expert testimony will assist the trier of fact* in understanding the evidence or determining a fact in issue, the expert may testify in the form of an opinion even where the testimony embraces the ultimate issue to be decided. MRE 702; *Independence Twp v Skibowski*, 136 Mich App 178, 186; 355 NW2d 903 (1984). On the other hand, where a jury is capable as anyone else of reaching a determination, the court may conclude that an expert opinion will not assist the trier of fact. MRE 702; MRE 704; see also *Koenig v South Haven*, 221 Mich App 711, 725-727; 562 NW2d 509 (1997), rev’d in part on other grounds 460 Mich 667 (1999) (holding that where “a jury is as capable as anyone else of reaching a conclusion on certain facts,” MRE 704 does not permit an expert witness to give an opinion on a matter that “invades the province of the jury” because such an opinion is not helpful to the jury under MRE 702, and thus, is not otherwise admissible).

At trial, the jury heard detailed but conflicting testimony from several doctors regarding the seriousness of plaintiff’s injuries. Furthermore, the jury was properly instructed regarding what must be shown to establish that an injury meets the serious impairment of body function threshold. Thus, the jury was in as good a position as an expert to determine whether plaintiff’s injuries met the serious impairment of body function threshold, and Dr. Robertson’s expert opinion of whether plaintiff’s injuries met the serious impairment threshold would not have been helpful to the jury. The trial court therefore did not abuse its discretion when it precluded Dr. Robertson from giving his opinion regarding whether he thought plaintiff’s injuries met the serious impairment of body function threshold.

Affirmed.

/s/ Helene N. White
/s/ Henry William Saad
/s/ Christopher M. Murray