STATE OF MICHIGAN

COURT OF APPEALS

TED L. OLNEY, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED April 26, 2012
v	No. 301799 Ingham Circuit Court
DARRIN M. FOGG and TRACY LYNN FOGG, Defendants-Appellants/Cross-Appellees.	LC No. 08-000722-NI

Before: HOEKSTRA, P.J., and SAWYER and SAAD, JJ.

PER CURIAM.

Defendants appeal the trial court's order that granted plaintiff's motion for new trial. For the reasons set forth below, we reverse.

I. FACTS AND PROCEEDINGS

The parties were involved in a low-speed automobile accident on September 6, 2006. Defendant Darrin Fogg stipulated that he negligently caused the accident. At trial, defendant testified that, immediately following the accident, he spoke to plaintiff and his wife, who was a passenger in plaintiff's vehicle, and both said that they were "fine." Plaintiff testified that he told defendant that he and his wife were shaken up, but that he thought they would be all right. Plaintiff testified that, the following day, he began to experience pain and he attributed it to the accident. Plaintiff acknowledged that he was in a car accident in 1999 and that he experienced residual pain as a result of that accident. Plaintiff also testified that, before the 2006 accident with defendant, he regularly visited a chiropractor for pain in his hips, shoulders, and neck, and that he was on his way to the chiropractor when this accident occurred. Moreover, in 2004, plaintiff was scheduled to undergo surgery on his neck to alleviate pain caused by a bulging disc, but plaintiff cancelled the surgery after he decided that he was doing "well enough" without it.

On the advice of his doctors, plaintiff elected to have surgery to fuse vertebrae in his neck in 2006, and he underwent a second surgery in 2007. Plaintiff testified that he experienced increased pain and physical limitations after both surgeries and that, after the second surgery, he was no longer able to work. Plaintiff attributed his injuries to the 2006 accident, while defendants argued that plaintiff's pain and physical limitations were due to preexisting conditions and to the surgeries he underwent to correct those conditions.

At the close of proofs, plaintiff moved for directed verdict or summary disposition, arguing that reasonable minds could not differ about whether plaintiff sustained a serious impairment of a body function. MCL 500.3135(7). The trial court initially granted the motion, but later reversed its decision on the ground that plaintiff had not given defendant adequate notice of the motion.

The jury specifically found that plaintiff was not injured in the 2006 accident with defendant. Following trial, the trial judge asked the jury to remain to talk with the judge and counsel for both sides. The conversation was not recorded for the record, but plaintiff moved for judgment notwithstanding the verdict or a new trial on the basis of that conversation. Specifically, during the hearing on his motion, plaintiff's counsel cited the post-trial conversation with the jury as evidence that the jury did not understand the eggshell skull theory of tort liability. Our Supreme Court explained the "eggshell theory" as follows in *Pierce v Gen Motors Corp*, 443 Mich 137, 155-156; 504 NW2d 648 (1993) (citation omitted):

> All first-year law students are taught that a tortfeasor "takes his victim as he finds him," and are given the example of "the man with the eggshell skull." The principle is that if you hit a person on the head and a cracked skull results, you are responsible for the consequences, even if the skull was weak to begin with and you gave only a slight blow as a joke.

The trial court granted plaintiff's motion for new trial on the ground that the jury presumably misunderstood the eggshell skull theory, and because counsel failed to explore that theory in greater detail during trial. Defendants now challenge the court's decision.

II. DISCUSSION

"This Court reviews for an abuse of discretion a trial court's ultimate decision whether to grant a new trial but considers 'de novo any questions of law that arise.'" *Moore v Detroit Entertainment, LLC*, 279 Mich App 195, 223; 755 NW2d 686 (2008), quoting *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

MCR 2.611(A)(1) provides that a new trial may be granted to a party "whenever their substantial rights are affected" for any of the following reasons:

> (a) Irregularity in the proceedings of the court, jury, or prevailing party, or an order of the court or abuse of discretion which denied the moving party a fair trial.
>
> (b) Misconduct of the jury or of the prevailing party.
>
> (c) Excessive or inadequate damages appearing to have been influenced by passion or prejudice.
>
> (d) A verdict clearly or grossly inadequate or excessive.

(e) A verdict or decision against the great weight of the evidence or contrary to law.

(f) Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial.

(g) Error of law occurring in the proceedings, or mistake of fact by the court.

(h) A ground listed in MCR 2.612 warranting a new trial.

MCR 2.612 provides that a court may grant relief from a judgment or order if a defendant has not been properly notified of the pendency of the action, as well as on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment. [MCR 2.612(C)(1).]

The trial court failed to specify the subrule on which it based its decision to grant a new trial, and the only subsection that appears applicable to the record before us is MCR 2.612(C)(1)(f).

MCR 2.612(C)(1)(f) is not a "catch-all" provision upon which a court may base an order granting a new trial when none other is available. Rather, in *Huegel v Huegel*, 237 Mich App 471, 478-479; 603 NW2d 121 (1999), this Court explained the scope of the rule:

In order for relief to be granted under MCR 2.612(C)(1)(f), the following three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under subsections a through e, (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the judgment in order to achieve justice. Generally, relief is granted under subsection f only when the judgment was obtained by the improper conduct of the party in whose favor it was rendered. [Citations omitted.]

Here, the trial judge stated that she had the duty to "look at [whether] a different conclusion [would] have been reached if [the eggshell skull theory] was properly explored." However, the parties presented ample and thorough evidence of plaintiff's medical condition and the judge instructed the jury pursuant to M Civ JI 50.10, which is virtually identical to the *Pierce* Court's explanation of the eggshell skull theory. As we have repeatedly stated, "jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, it is unclear how much more "fully" the theory should have been explored. Moreover, a trial court's duty is to ensure that the initial proceedings were fair, not to revisit a verdict if it finds a party should have made a "fuller" presentation of evidence. Indeed, we find it necessary to make the self-evident observation that it is absolutely improper to grant a new trial on the basis of impressions gleaned during an informal conversation with jurors after the trial is concluded. Accordingly, we hold that the court abused its discretion by granting plaintiff's motion for new trial and we, therefore, reverse.

Plaintiff argues on cross-appeal that the trial court reached the "right result for the wrong reason." Specifically, plaintiff claims that the trial court should have granted its motion for summary disposition on the issue of whether he suffered a serious impairment of a body function. We review a trial court's decision regarding a motion for summary disposition de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition should be granted if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." MCR 2.116(C)(10). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The special verdict form asked the jury to consider whether plaintiff was "injured." The jury answered no, and the rest of the verdict questions, as instructed, remained unanswered, including question eight, which addressed the issue of serious impairment.

Clearly, there was extensive evidence on the record that plaintiff had serious back problems. While this may amount to "an objectively manifested impairment of an important body function that affects [his] general ability to lead his . . . normal life, MCL 500.3135(7), as discussed, a genuine issue of material fact existed about whether he was "injured" within the meaning of the no fault act, MCL 500.3101 *et seq.* See MCL 500.3105(1) ("Under personal protection insurance an insurer is liable to pay benefits for *accidental bodily injury* arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter.") (emphasis added); MCL 500.3135(1) ("A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement."). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183. The same evidence that supports plaintiff's claim of serious impairment also supports the conclusion that his injury existed prior to the 2006 accident with defendant. Thus, summary disposition was not warranted.

The trial court's decision to grant a new trial is reversed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Henry William Saad