STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND ROY SMITH, Plaintiff-Appellee,	UNPUBLISHED August 28, 2014
v	No. 313627 Oakland Circuit Court
PORTIA LYNN REILLY, Defendant-Appellant.	LC No. 2011-120511-NI

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

In this action under the no-fault act, MCL 500.3101 *et seq*., defendant Portia Lynn Reilly appeals from the trial court's judgment granting plaintiff Raymond Roy Smith damages following a two-day jury trial. We affirm.

This case arises from an automobile accident that occurred on I-75 on March 24, 2011. Plaintiff went to his doctor the day after the collision complaining of lower back pain. After unsuccessful courses of physical therapy and epidural injections he underwent lumbar spinal fusion surgery. It was undisputed that several years earlier plaintiff had been diagnosed with lumbar pathology and undergone a course of physical therapy at that time.

Prior to trial, defendant brought a motion for summary disposition, arguing the absence of a question of fact as to the causation of plaintiff's post-collision medical treatment and claimed disability. Defendant's motion for summary disposition did not assert that plaintiff failed to offer sufficient proof of a lack of serious bodily impairment;[1] rather, defendant argued solely that plaintiff could not prove proximate causation. The trial court reviewed physician depositions and denied defendant's motion, noting that, while the testimonial medical expert retained by defense counsel opined that the collision did not result in any injury, plaintiff's treating physicians testified to the contrary and stated that plaintiff's disability and need for surgical intervention were caused, at least in part, by the collision.

[1] Under MCL 500.3135(7), in order to prevail on a claim of serious impairment of body function, a plaintiff must prove that he has suffered "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

At trial, plaintiff and his wife testified as to his status both before and after the accident. According to their testimony, plaintiff had not missed a day of work in nearly 25 years prior to the accident but could not continue to work post-accident. In addition, they testified that plaintiff was able to carry out all his normal activities prior to the collision but was limited to sedentary activities thereafter. They also testified that, prior to the collision, plaintiff's radicular symptoms had been left-sided only and intermittent, not disabling. However, since the accident, these symptoms were bilateral and disabling.

Plaintiff's family doctor, Dr. Glasson, testified at trial via video deposition. She stated that she had been plaintiff's doctor since 1997. She indicated that plaintiff reported lower back problems in 1999 for which she ordered an x-ray and apparently did not provide any treatment. She stated that in late 2005 he again had lower back pain radiating down his left leg. His described pain was consistent with abnormal findings on MRI and EMG. Dr. Glasson referred plaintiff to Dr. Rapp, who ordered conservative treatment, i.e., physical therapy. Dr. Glasson did not testify regarding any reports of lower back or leg pain from plaintiff after the course of physical therapy, except for a single report on February 2, 2010.

Plaintiff's next witness was Dr. Rapp, a spinal surgeon. His video deposition was played for the jury. Dr. Rapp testified that he had seen plaintiff once in 2006 on referral from Dr. Glasson and not again until after the subject 2011 collision. He stated that, in 2006, he diagnosed plaintiff with disc pathology at L4/5 and L5/S1 vertebrae, at which time he concluded that there were three treatment options: conservative treatment, i.e., physical therapy, a microdisectomy, or a surgical spinal fusion. He testified that he recommended against a spinal fusion in 2006 and that he ordered a course of physical therapy as the treatment modality. He further testified that plaintiff did not return to him with any further problems until 5 years later, shortly after the collision. Dr. Rapp stated that because plaintiff had done so well with conservative treatment in 2006, he began with that treatment after the accident as well. Unfortunately, neither physical therapy nor epidural injections were of help. Dr. Rapp then ordered an MRI and a discogram. He testified that, without having the two sets of MRI films side by side at the time of his testimony, he could not say with certainty what differences there were between the studies, but that a comparison of his dictated observations upon review of the respective MRI films in 2006 and in 2011 indicated that "the disc at L4/5 was more prominent in 2011 than it was in 2006." He concluded by stating that, "It is my opinion based upon mechanism of injury, the temporal relationship between the motor vehicle accident and the onset of symptoms, the correlation with the radiologic studies that, indeed, the motor vehicle accident as discussed here today is the causative factor for me to perform surgery on Mr. Smith."

Defendant did not offer any testimony or other evidence to dispute the evidence that plaintiff had worked consistently for 25 years prior to the collision and that his ability to engage in non-sedentary activities was substantially reduced thereafter.

Defendant's sole witness was Dr. Mayer, who performed a non-privileged medical examination and review and was retained as a defense witness. His deposition testimony, though not videotaped, was read into the record. He testified that, unlike Dr. Glasson and Dr. Rapp, he compared the 2006 and 2011 MRIs side-by-side and saw no increased pathology in the 2011 MRI. Indeed, he testified that he believed the 2011 MRI showed improvement and that, in his opinion, surgery was not indicated at the time Dr. Rapp performed it. The actual MRI films were not introduced into evidence. Dr. Mayer conceded that he had not treated plaintiff and that his

work consisted of 2 days per week of seeing patients and 3 days per week of performing medical evaluations for third parties, such as lawyers. Dr. Mayer concluded that, in his opinion, plaintiff was exaggerating his symptoms and his orthopedic problems were not the result of the subject collision.

As has just been summarized, the trial involved significant factual disputes. The jury resolved those disputes in a special verdict form, concluding that: (1) defendant was negligent; (2) plaintiff was injured; (3) defendant's negligence was a proximate cause of plaintiff's injuries, and; (4) plaintiff's injury's resulted in the serious impairment of a body function. They set damages at $150,000.

Defendant filed motions for a new trial and judgment notwithstanding the verdict (JNOV). She argued that the assessed damages were excessive, a claim not made on appeal, and that the verdict was against the great weight of the evidence regarding proximate causation. The trial court rejected the latter argument by stating, "I sat through the trial for two days and based on that I don't think there's any basis for this [motion]."

In her motions for summary disposition and JNOV, as well as on appeal, defendant argued that the question of proximate cause should not have been submitted to the jury.[2] We disagree. The question of proximate causation calls for an inquiry into "whether the result of conduct that created a risk of harm and any intervening causes were forseeable." *Jones v Detroit Med Ctr*, 490 Mich 960, 960; 806 NW2d 304 (2011). "For a [party] to prevail on proximate cause at the summary disposition stage, it must be shown that reasonable minds cannot differ that injury was a foreseeable, natural, and probable consequence of the defendant's negligence." *Id*. at 961. Both at the summary disposition stage and at the JNOV motion, we must consider the evidence in the light most favorable to the non-moving party. See *id*. In the instant case, plaintiff offered causation opinion testimony from two physicians. Defendant offered contrary

[2] We review de novo a trial court's rulings on motions for a directed verdict and on motions for a JNOV. *Taylor v Kent Radiology*, 286 Mich App 490, 499; 780 NW2d 900 (2009). "Motions for a directed verdict or JNOV are essentially challenges to the sufficiency of the evidence in support of a jury verdict in a civil case." *Id*. Accordingly, under both motions, we review "the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Id*. "Only if the evidence so viewed fails to establish a claim as a matter of law," should either motion be granted. *Id*. "If reasonable persons, after viewing the evidence in the light most favorable to the nonmoving party, could honestly reach different conclusions about whether the nonmoving party established his or her claim, then the question is for the jury." *Id*. "When considering a motion for a directed verdict, it is the factfinder's responsibility to determine the credibility and weight of trial testimony." *King v Reed*, 278 Mich App 504, 522; 751 NW2d 525 (2008) (internal quotations and citation omitted). With respect to a JNOV, "[i]f reasonable jurors could honestly have reached different conclusions, the jury verdict must stand." *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005).

expert testimony, which the jury apparently rejected.[3] See *Guerrero v Smith*, 280 Mich App 647, 669; 761 NW2d 723 (2008) ("The weight given to the testimony of experts is for the jury to decide, and it is the province of the jury to decide which expert to believe" [quotation marks and citation omitted]) Accordingly, the trial court did not err by denying defendant's motions for a new trial, directed verdict, or JNOV. See *id*. at 670 ("We give substantial deference to the trial court's conclusion that the jury's verdict was not contrary to the great weight of the evidence").[4]

Affirmed.

/s/ Kathleen Jansen
/s/ Douglas B. Shapiro

[3] We are particularly disinclined to overturn the jury's finding as they were erroneously instructed that plaintiff was required to prove proximate causation by clear and convincing evidence.

[4] On appeal, defendant has attempted to reframe her argument as one involving whether or not plaintiff sufficiently demonstrated the existence of a serious impairment of body function. However, no such claim was made at the trial level before, during, or after trial, and this Court does not generally review issues raised for the first time on appeal. *Smith v Foerster-Bolser Constr*, 269 Mich App 424, 427; 711 NW2d 421 (2006). Notably, defendant did not request that the trial court read M Civ JI 36.11, which sets forth a plaintiff's burden of proof regarding the existence of a serious impairment injury. Therefore, defendant's argument regarding serious impairment injury has been waived. *Lopez v General Motors Corp*, 224 Mich App 618; 569 NW2d 861 (1997). And, even if the collision resulted only in an aggravation of a preexisting injury, plaintiff is entitled to damages as long the aggravation is supported by physician testimony that the ultimate surgery was necessitated by the aggravation, as was the case here. *Caiger v Oakley*, 285 Mich App 389, 393-394; 775 NW2d 828 (2009).