

STATE OF MICHIGAN
COURT OF APPEALS

EDUARDO RIVERA and ELIZABETH RIVERA,

Plaintiffs-Appellants/Cross-
Appellees,

v

STUART LOYE,

Defendant-Appellee/Cross-
Appellant.

UNPUBLISHED

May 20, 2003

No. 236212

Kent Circuit Court

LC No. 99-012600-NI

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Plaintiff appeals an order of dismissal and, on cross-appeal, defendant appeals the trial court's denial of its motion for summary disposition.¹ Because we hold that this case should have been dismissed under MCR 2.116(C)(10), we reverse the trial court's denial of defendant's motion for summary disposition.

I. Facts and Procedural History

Plaintiff claims that, on December 26, 1996, as he was collecting shopping carts in a Target Store parking lot, defendant negligently hit him with his car. Plaintiff filed a complaint and sought damages for physical injuries. Thereafter, defendant filed a motion for summary disposition under MCR 2.116(C)(10), and argued that plaintiff could not meet the threshold requirements to recover noneconomic damages under the no-fault act, MCL 500.3101, *et seq.* In response, plaintiff abandoned his back injury claim and, instead, argued that he suffers from depression caused by the accident. The trial court dismissed plaintiff's back injury claim because (1) it was disclosed that plaintiff suffered from back problems for more than a decade before the accident and, indeed, claimed disability from back pain before the accident, and (2) plaintiff abandoned his "back injury" claim. However, the trial court denied defendant's motion with regard to plaintiff's alleged depression and granted plaintiff's motion to amend his complaint to add the claim of "depression."

¹ Because plaintiff, Elizabeth Rivera's claim is wholly derivative of her husband's claim, our use of "plaintiff" in the singular refers to Eduardo Rivera.

On March 16, 2001, defendant filed a second motion for summary disposition under MCR 2.116(C)(10). Defendant argued that plaintiff could not show that he developed a depressive disorder because of the accident or that the depression constitutes a serious impairment of body function. The trial court denied defendant's motion because plaintiff's counsel represented (without record support), that the Social Security Administration found plaintiff to be disabled and the issue of causation required a credibility determination that must be left to the jury.

On the first day of trial, defendant moved to dismiss the case because plaintiff violated the trial court's scheduling order by failing to file a witness list. The trial court granted defendant's motion and dismissed the case because the scheduling order specifically required plaintiff to submit a witness list and he failed to do so. The trial court further observed that, because plaintiff's failure to file a witness list would result in the exclusion of his expert's testimony at trial, plaintiff could not prove his case and, therefore, the action must be dismissed.

II. Analysis

Because we conclude that defendant's issue on cross-appeal is dispositive of this case, we consider the issue first. Defendant contends that the trial court erred by denying his motion for summary disposition under MCR 2.116(C)(10). We agree.

A. Standard of Review

As this Court recently reiterated in *Woodman v Miesel Sysco Food Service Co*, 254 Mich App 159, 166; 657 NW2d 122 (2003):

This Court reviews de novo a trial court's decision on a motion for summary disposition. A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. In deciding a motion under MCR 2.116(C)(10), the trial court considers the pleadings, affidavits, depositions, admissions, or other documentary evidence in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. [Citations omitted.]

As noted, plaintiff filed this claim to recover noneconomic damages under the no-fault act. MCL 500.3135 provides, in pertinent part:

(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.

(2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:

(a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury.

As set forth in the statute, “[a]bsent an outcome-determinative genuine factual dispute, the issue of threshold injury is now a question of law for the court.” *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). This Court reviews questions of law de novo. *Id.* at 342.

B. The Trial Court's Ruling

As noted, the trial court ruled that plaintiff established that he is disabled because of his depression and concluded that the issue for the jury's consideration is whether defendant's negligence caused plaintiff's injury. We hold that the trial court failed to properly consider the threshold issue of whether plaintiff suffered a serious impairment of body function.

At the outset, we note that the trial court failed to make sufficient factual findings to support its judgment. *May v Sommerfield*, 239 Mich App 197, 202; 607 NW2d 422 (2000); see also *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000). This Court has held that, “a trial court cannot determine whether a plaintiff has suffered a serious impairment of body function and enter judgment . . . without first making the factual findings required under subsections 3135(2)(a)(i) or (ii).” *Churchman, supra* at 232. Thus, on the question whether plaintiff suffered a serious impairment of body function, the trial court was required to make factual findings regarding the nature and extent of plaintiff's injury. *Id.* Here, the trial court did not point to a material factual dispute for purposes of MCL 500.3135(2)(a)(i) or (ii), or MCR 2.116(C)(10) and, accordingly, the trial court did not conclude that the jury must decide whether plaintiff suffered a serious impairment of body function. Therefore, the court apparently ruled, as a matter of law, that plaintiff established a threshold injury. In so ruling, the trial court erred for several reasons.

First, while the trial court stated that plaintiff *alleges* he suffers from depression and that mental problems *may* constitute a serious impairment, its sole finding regarding the nature and extent of plaintiff's injury was that plaintiff is receiving Social Security benefits and that the Social Security Administration has found that he is disabled for employment purposes. This finding is insufficient for three reasons: (1) other than a bare assertion by plaintiff's counsel, there is no record evidence that plaintiff is receiving Social Security benefits for his depression and there is no record evidence that the Social Security Administration has declared that plaintiff is disabled or cannot work because of his depression; (2) the trial court failed to make findings

of fact regarding how plaintiff's alleged depression is objectively manifested; and (3) the trial court failed to consider any of the factors outlined in *Kern* to show that the impairment is serious -- "extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery." *Kern, supra* at 341.

Under our case law, the trial court failed to set forth sufficient facts to support its determination that plaintiff suffered a serious impairment of body function. We further note that plaintiff failed to satisfy his burden of production in response to defendant's motion for summary disposition. In his motion, defendant argued that plaintiff could not produce evidence to establish that he suffered a serious impairment of body function. Accordingly, plaintiff had to answer the motion with sufficient evidence to make out his claim. *Quinto, supra* at 362. It is well-settled that "a party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial." *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999). Here, while plaintiff relied on Dr. Faridi's deposition testimony, submitted by defendant, he offered no other "evidentiary proofs" to support his claims. Rather, in his response brief, plaintiff merely reiterated the claims in his pleadings and offered the new, unsupported assertion that he is collecting Social Security disability benefits because of his depression.

Again, absent some admissible evidence, there was no basis for the trial court to conclude that "the Social Security Administration has found that he is disabled from employment." Plaintiff offered no documentary evidence to show that he has been excused from work or that he has been officially identified as disabled because of his mental distress and, indeed, to the contrary, Dr. Faridi testified that he never placed defendant on disability and did not advise plaintiff to discontinue his regular activities.²

C. De Novo Review of Threshold Injury Claim

Because we review de novo questions of law and the grant or denial of a motion for summary disposition, we need not remand this case for the trial court to reconsider its decision on the threshold injury issue. *Kern, supra* at 344. We hold that, as a matter of law, plaintiff failed to establish that he suffered a serious impairment of body function.

We begin our analysis by considering the "nature and extent" of plaintiff's injury. *May, supra* at 202. MCL 500.3135(7) defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." See also *Kern, supra* at 340. The *Kern* Court further stated, "In determining whether the impairment of the important body function is 'serious,' the court should consider the following nonexhaustive list of factors: extent of the injury, treatment required, duration of disability, and extent of residual impairment and prognosis for eventual recovery." *Id.* at 341.

² Again, under *Smith v Globe Life*, it is not sufficient for a party to make an unsupported assertion that evidence *may be presented at trial* to support a claim; the responding party must submit evidentiary proofs to create a genuine issue of fact for trial. *Smith, supra* at 455 n 2. See also *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Lantz v Southfield City Clerk*, 245 Mich App 621, 627; 628 NW2d 583 (2001).

There is no factual dispute regarding whether plaintiff has an objectively manifested impairment -- he does not. Regardless whether plaintiff's depression is serious or "major," plaintiff must show that it "affect[s] the functioning of the body." *Miller v Purcell*, 246 Mich App 244, 249; 631 NW2d 760 (2001). There is no evidence that plaintiff's *depression* has a physical basis or that it has affected the functioning of his body. The record evidence shows that plaintiff contended throughout this litigation that his *back pain*, not his depression, caused his inability to sleep and his inability to perform certain tasks. Plaintiff abandoned his claim that the accident caused his back pain and, indeed, the trial court explicitly ruled that the accident did not cause plaintiff's back problems. Thus, plaintiff cannot now claim that his depression, triggered by his back pain, affected his ability to function to recover under the no-fault act.³

For similar reasons, there is no evidence that plaintiff's depression affected his general ability to lead a normal life. Dr. Faridi testified that, while plaintiff's back pain affected his activities, he never considered plaintiff disabled because of his depression and he never restricted plaintiff's activities. In sum, no record evidence suggests that plaintiff's feelings of hopelessness led to any significant life change.

Finally, were we to conclude that plaintiff's depression constitutes an impairment of body function, it is certainly not "serious" for purposes of the threshold injury requirement. Unrebutted record evidence shows: (1) plaintiff first sought treatment for his depression more than a year and a half after the alleged accident, (2) plaintiff visited Dr. Faridi only seven times on a monthly and bimonthly basis, and (3) plaintiff's depression improved with antidepressants to the point that plaintiff discontinued his doctor visits within a year. Under the *Kern* factors, discussed above, plaintiff's depression clearly does not amount to a "serious" impairment.

For the above reasons, the trial court erred by ruling that plaintiff suffered a serious impairment of body function and it erred by denying defendant's motion for summary disposition on this issue. Because there is no threshold injury, the question whether defendant negligently caused plaintiff's injury is moot. Therefore, after granting defendant's motion, the trial court should have dismissed the case in its entirety.

Because we conclude that the trial court should have dismissed this case pursuant to defendant's motion for summary disposition, we need not consider plaintiff's claim that the trial court erroneously dismissed the case on the first day of trial.

Reversed.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Donald S. Owens

³ We further note that, during pendency of this action, plaintiff changed his claim of injury from a skull fracture, to back pain, to mental distress. Further, the record reflects that, during this case, plaintiff repeatedly denied that he ever suffered from back pain before the accident, yet medical records show that not only did plaintiff have a significant history of back pain, he requested disability leave because of it.