

STATE OF MICHIGAN
COURT OF APPEALS

JOHN EDWIN LINDAHL III,

Plaintiff-Appellant,

v

CHRISTINA EILEEN RUBRIGHT,

Defendant-Appellee.

UNPUBLISHED

July 20, 2004

No. 245568

Kalamazoo Circuit Court

LC No. 01-000289-NI

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

Plaintiff appeals¹ from the trial court's order granting defendant's motion for summary disposition. We affirm.

Plaintiff, an avid motorcyclist, was traveling on his Harley Davidson when he was forced to take evasive action to avoid a collision with defendant's vehicle and a van. Plaintiff performed a "Brody maneuver" to avoid the collision, and he let off the brake and lost control of the motorcycle. Plaintiff went airborne, "flew like Superman," and landed on his hands, face, and chest. Initially, plaintiff did not request medical treatment, but arrived at the hospital later that day, complaining of abrasions to his arm, lacerations to the face, and pain to the left patella. Approximately a few weeks later, plaintiff reported, to his family physician, continued pain to his knee as a result of the accident. He was treated with over the counter medication and advised to return in four weeks for tests if the pain continued. Plaintiff waited three months before returning to the doctor for treatment. At this time, plaintiff reported continued pain in his knee and was given exercises to alleviate the pain. Plaintiff also reported, for the first time, an injury to his shoulder. Plaintiff was also given exercises to treat his shoulder and told to return for x-rays if the pain continued. Approximately, two months later, plaintiff returned to his doctor for treatment and indicated that he was experiencing pain in his shoulder and low back. For the first time, plaintiff attributed this pain to the motorcycle accident. However, plaintiff also

¹ By order dated March 4, 2003, this Court dismissed the appeal for lack of jurisdiction and later denied the motion for reconsideration. The Supreme Court vacated our order of dismissal and returned the case to this Court for plenary consideration. *Lindahl v Rubright*, 469 Mich 939 (2003).

acknowledged that he had suffered from back pain for many years and had been in a number of motorcycle accidents.

In his deposition, plaintiff's treating physician, Eric Born, testified that he began to treat plaintiff in January 1999, after complaints of shortness of breath. In March 1999, plaintiff also returned to the office with health concerns. However, plaintiff acknowledged that he consumed tremendous amounts of caffeine, smoked two to three packs of cigarettes a day, consumed moderate amounts of alcohol, and ingested cocaine.² Although it was recommended that plaintiff quit cigarette smoking, his cocaine use precluded the prescription of oral medications to treat that habit because of potential side effects. Dr. Born testified that people who engage in cigarette smoking generally do not heal as quickly as non-smokers. Dr. Born also reviewed plaintiff's medical records and noted that the initial treatment visits following the accident did not contain a report of lower back pain. Moreover, Dr. Born opined that the neck and shoulder injuries reported by plaintiff during the course of treatment were not related to the motorcycle accident.

Plaintiff acknowledged that he had suffered from back pain since the age of eighteen and had been involved in accidents that caused this injury. At the time of the accident, plaintiff held a marketing position with a company. At the time of his deposition, plaintiff had obtained a marketing position with a window company. At this company, every able-bodied individual was expected to help unload the truck. However, plaintiff had made it clear that he could not engage in that activity. There was no indication that such a restriction had any impact on plaintiff's employment. Plaintiff reported that he suffered lower back pain that radiated into his leg. He had difficulty engaging in sporting activities and difficulty standing for long periods. Plaintiff had been referred to and treated by a back specialist.³ Although the possibility of surgery was discussed, plaintiff began to attend physical therapy which did alleviate pain. However, plaintiff alleged that the termination of insurance benefits by his employer precluded continued physical therapy. Plaintiff did acknowledge that he had a gym membership and had begun to exercise there after a long absence. At the time of his deposition, plaintiff had recently taken a bike trip with his motorcycle club.

Defendant moved for summary disposition, alleging that plaintiff could not establish that the motor vehicle accident was the cause of his injury to his lower back. It was also alleged that plaintiff did not suffer from a serious impairment of a body function. At the hearing, plaintiff's counsel acknowledged that Dr. Born did not correlate the accident to the injuries. Rather, plaintiff relied on his own deposition testimony and alleged that the testimony of Dr. Born was contradictory and equivocal. The trial court granted the defense motion for summary disposition, holding that plaintiff failed to demonstrate causation between the accident and his injuries. The trial court further held that a serious impairment of a body function had not been

² The medical records indicated that plaintiff reported that he was a "regular" user of cocaine. However, in his deposition, plaintiff testified that his use was occasional.

³ Ultimately, plaintiff was diagnosed with a herniated or ruptured disc many months after the accident.

established where plaintiff was treated conservatively with exercise and over the counter medications for his injuries.

We review a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). The moving party has the initial burden to support its claim to summary disposition by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the nonmoving party to demonstrate a genuine issue of disputed fact exists for trial. *Id.* To meet this burden, the nonmoving party must present documentary evidence establishing the existence of a material fact, and the motion is properly granted if this burden is not satisfied. *Id.* Affidavits, depositions, and documentary evidence offered in opposition to a motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden, supra.*

To establish proximate causation, the plaintiff must prove that the driver's conduct was both a cause in fact and a legal cause of his injuries. See *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). A particular susceptibility of an injured person does not relieve the tortfeasor of full responsibility for the damages sustained. *Id.* at 394-395. Rather, in the case of a preexisting injury or condition, recovery is permitted if the trauma caused by the accident triggered symptoms from that condition. *Id.* at 395. In *Wilkinson, supra*, both experts for the prosecution and the defense acknowledged that the trauma suffered in the automobile accident may have caused, aggravated, or precipitated the plaintiff's symptoms. Consequently, the issue of proximate cause was properly submitted to the trier of fact where the plaintiff's preexisting brain tumor made him more vulnerable to adverse consequences than the average person. *Id.* at 397-398.

In the present case, we cannot conclude that the trial court improperly granted defendant's motion for summary disposition. *Maiden, supra.* In the present case, plaintiff's treating physician, Dr. Born, opined that there was no correlation between the injury and the accident. Plaintiff did not present documentary evidence by a physician to contradict the assertions of Dr. Born, and the record does not substantiate the attack to Dr. Born's qualifications and conclusions.⁴ For example, plaintiff contends that the documentary evidence reveals that plaintiff reported low back pain when he arrived at the hospital within hours of the accident. However, review of that record reveals that plaintiff positively reported that he was wearing a helmet. However, the hospital record contains a symbol⁵ to indicate that plaintiff did not report loss of consciousness, neck, or back pain. Plaintiff did not meet his evidentiary burden of correlating his injury to the accident with expert testimony like the plaintiff in *Wilkinson. Quinto, supra.* Accordingly, the trial court properly granted the defense motion for summary

⁴ For the first time on appeal, plaintiff contends that Dr. Born is not qualified to render an opinion in orthopedics. Plaintiff did not raise any such challenge at the hearing regarding the motion for summary disposition or during the deposition. Consequently, there is no lower court ruling regarding expert qualifications for our review on appeal.

⁵ The symbol of a circle with a line through it.

disposition based on causation, and we need not address plaintiff's remaining allegations of error challenging serious impairment.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Pat M. Donofrio

/s/ Stephen L. Borrello