STATE OF MICHIGAN

COURT OF APPEALS

RETHA M. BLEVINS,

Plaintiff-Appellant,

v

JOHN A. ABRAITIS and HASTINGS MUTUAL INSURANCE COMPANY,

Defendants-Appellees,

and

MICHAEL ROY SIMMONS,

Defendant.

UNPUBLISHED
August 25, 2005

No. 252947
Calhoun Circuit Court
LC No. 02-002532-NI

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court orders granting defendants' motion for summary disposition and denying her motion for reconsideration. We affirm the trial court's grant of summary disposition in favor of defendants regarding plaintiff's claim for noneconomic damages under MCL 500.3135(1), reverse the trial court's grant of summary disposition in favor of defendants regarding plaintiff's claim for excess economic work loss damages under MCL 500.3135(3)(c), reverse the trial court's denial of plaintiff's motion for reconsideration, and remand for further proceedings consistent with this opinion.

Plaintiff Retha Blevins sued defendant John Abraitis, alleging that his negligence was the proximate cause of injuries she sustained in a car accident. Plaintiff maintained that she suffered a serious impairment of body function, and sought tort recovery for noneconomic damages under MCL 500.3135(1). Plaintiff also sought recovery of excess economic work loss damages under MCL 500.3135(3)(c). Plaintiff also sued her no-fault insurer, defendant Hastings Mutual Insurance Company, alleging that because nonparty defendant Michael Roy Simmons was an uninsured motorist at the time of the accident, she was entitled to uninsured motorist coverage as set out by the terms of her insurance policy.

Defendants Abraitis and Hastings Mutual Insurance Company moved for summary disposition under MCR 2.116(C)(10), arguing that, as a matter of law, plaintiff's injuries did not rise to the level of a serious impairment of body function necessary to meet the threshold required to sustain a tort cause of action under MCL 500.3135(1). The trial court granted summary disposition in favor of defendants, ruling that plaintiff's injuries did not meet the threshold requirement necessary to sustain a tort cause of action under MCL 500.3135(1). The trial court also apparently concluded that because of plaintiff's preexisting back conditions, she was unable to demonstrate a sufficient causal link between the accident and her injuries to warrant putting the case before a jury, i.e., plaintiff failed to demonstrate a genuine issue of material fact that defendant Abraitis' negligence was the proximate cause of her injuries.

Plaintiff moved for reconsideration, arguing that defendants moved for summary disposition solely on the basis of whether her injuries rose to the level of a serious impairment of body function necessary to meet the threshold required to sustain a tort cause of action under MCL 500.3135(1), and that defendants did not raise the issue of whether factual questions existed regarding causation. Plaintiff argued that the trial court erred in granting summary disposition in favor of defendants because they failed to demonstrate that there was no genuine issue of material fact concerning excess economic work loss damages under MCL 500.3135(3)(c). Defendants argued that they had raised the issue of causation, and that plaintiff failed to present sufficient evidence of causation to survive a motion for summary disposition under MCR 2.116(C)(10). The trial court agreed with plaintiff that defendants failed to properly argue the issue of causation. However, the trial court denied plaintiff's motion for reconsideration on reasoning that, because plaintiff did not satisfy the threshold injury requirement necessary to sustain a tort cause of action, she was not entitled to have her claim of excess economic work loss damages go to a jury.

Plaintiff first argues that the trial court erred in granting defendants' motion for summary disposition because MCL 500.3135(3)(c) clearly and unambiguously affords a tort cause of action to the victim of a car accident for damages in excess of the amounts that one's insurer is required to provide by MCL 500.3107, including work loss, without a showing that the injury meets the tort threshold set out in MCL 500.3135(1).[1] We agree.

We review rulings on motions for summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition brought under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Id*. at 120. "In evaluating a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in a light most favorable to the party opposing the motion." *Id*. "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is

[1] Plaintiff does not contest the trial court's finding that her injuries did not constitute a serious impairment of body function necessary to meet the tort threshold for recovery of noneconomic damages under MCL 500.3135(1).

entitled to judgment as a matter of law." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "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." *Id*.

Here, the trial court erred in granting summary disposition in favor of defendants on the basis of its determination that the threshold requirements necessary to sustain a tort cause of action for noneconomic damages under MCL 500.3135(1) applied to excess economic work loss damages under MCL 500.3135(3)(c) as well. MCL 500.3135(3)(c) specifically provides that an injured party may recover damages for allowable work loss in excess of certain daily, monthly, and three-year limitations which an insurer is required to provide under MCL 500.3107(b), without any reference to the type or extent of injury suffered. *Cochran v Myers*, 146 Mich App 729, 731; 381 NW2d 800 (1985). Moreover, this Court has specifically held that an injured party may recover excess economic work loss damages under MCL 500.3135(3)(c) even where they have not met the threshold requirements necessary to sustain a cause of action for noneconomic damages under MCL 500.3135(1). *Clark v Auto Club Ins Ass'n*, 150 Mich App 546, 553-554; 389 NW2d 718 (1986). See also *Ouellette v Kenealy*, 424 Mich 83, 88; 378 NW2d 470 (1985). Accordingly, we reverse the trial court's grant of summary disposition in favor of defendants as it relates to plaintiff's claim for excess economic work loss damages under MCL 500.3135(3)(c).

Plaintiff next argues that the trial court erred in granting defendants' motion for summary disposition because a genuine issue of material fact existed concerning whether defendant Abraitis' negligence was a proximate cause of the injuries that led to plaintiff's alleged excess economic work loss damages where the medical evidence indicated that the accident likely exacerbated a preexisting back condition. We agree.

It is well settled that "[l]iability for negligence does not attach unless the plaintiff establishes that the injury in question was proximately caused by the defendant's actions." *Helmus v Dep't of Transportation*, 238 Mich App 250, 255; 604 NW2d 793 (1999). To establish causation, a plaintiff must prove that the defendant's conduct was both a cause in fact and a legal cause of her injuries. See *Wilkinson v Lee*, 463 Mich 388, 391; 617 NW2d 305 (2000). "The cause in fact element generally requires a showing that "but for" the defendant's actions, the plaintiff's injury would not have occurred." *Skinner v Square D Co*, 445 Mich 153, 163; 516 NW2d 475 (1994). "[L]egal cause or 'proximate cause' normally involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences." *Id*. "While the issue of proximate cause is usually a factual question to be decided by the jury, the trial court may dismiss a claim for lack of proximate cause when there is no issue of material fact." *Helmus, supra* at 256 (internal citation omitted).

Here, the trial court incorrectly determined that no record could be developed to establish proximate cause as a matter of law. First, plaintiff demonstrated the existence of a factual dispute regarding cause in fact, i.e., that "but for" defendant Abraitis' alleged negligence in causing the accident, plaintiff's injuries would not have occurred. *Skinner*, *supra* at 163. Plaintiff's doctor indicated that, although plaintiff had preexisting back injuries, they were certainly exacerbated by the accident. Defendant Hastings' doctor characterized plaintiff's back injuries as "old in nature" and, while opining that plaintiff may have sustained injuries as a result of the accident, whether the accident significantly contributed to her current condition was

unclear and a direct cause and effect relationship could not be established. Our Supreme Court has held that "[r]egardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition." *Wilkinson*, *supra* at 395. Therefore, a jury could believe the opinion of plaintiff's doctor, reject the contrary opinion of defendant's doctor and conclude that the accident caused by defendant's negligence was the cause in fact of plaintiff's current injuries.

Further, it is well settled that a defendant takes the plaintiff as he finds her, including with a susceptibility to injury resulting from preexisting back conditions. *Wilkinson*, *supra* at 396. Indeed, "[t]he negligent actor is subject to liability for harm to another although a physical condition of the other which is neither known nor should be known to the actor makes the injury greater than that which the actor as a reasonable man should have foreseen as a probable result of his conduct." 2 Restatement Torts, 2d, § 461, p 502. Here, plaintiff's preexisting back conditions made her more vulnerable to the adverse consequences of a car accident than the average person. See *Wilkinson*, *supra* at 397. However, it was certainly foreseeable that a result of defendant Abraitis' negligence in causing a car accident could be physical injury, including back injuries, to an occupant of the other vehicle. *Id*. The mere fact that plaintiff was unusually vulnerable to back injuries does not relieve defendant Abraitis of responsibility for those damages. *Id*.

Because plaintiff established that genuine issues of material fact existed concerning whether her injuries were proximately caused by defendant Abraitis' negligence, the trial court improperly granted summary disposition in favor of defendants under MCR 2.116(C)(10).

Plaintiff next argues that the trial court erred in denying her motion for reconsideration. We agree. We review a trial court's decision concerning a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). "The movant must show that the trial court made a palpable error and that a different disposition would result from correction of the error." *Herald Co, Inc v Tax Tribunal*, 258 Mich App 78, 82; 669 NW2d 862 (2003); MCR 2.119(F)(3). Plaintiff has demonstrated that the trial court made a palpable error in granting summary disposition in favor of defendants on her excess economic work loss claim. To that extent, the trial court's denial of her motion for reconsideration constituted an abuse of discretion.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly