STATE OF MICHIGAN

COURT OF APPEALS

DEBBIE R. NELSON,

Plaintiff-Appellant,

v

MICHAEL A. VASICH,

Defendant-Appellee.

UNPUBLISHED
September 21, 2006

No. 269082
Macomb Circuit Court
LC No. 2004-004045-NI

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

In this threshold case under the no-fault act,[1] plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant. We reverse and remand. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiff was injured in an auto accident. Plaintiff alleges that while she was attempting to complete a left turn, defendant ran a red light and collided with her. She filed suit asserting that her injuries resulted in a serious impairment of bodily function. Defendant moved for summary disposition.

The trial court granted the motion, finding that plaintiff had failed to show that "she has been unable to participate in any activities due to the . . . accident," and that the record therefore did "not establish plaintiff's general ability to lead her normal life has been affected." The trial court noted that plaintiff had been diagnosed with a closed-head injury and cognitive disorder, but opined that "the record is devoid of any evidence to suggest these alleged impairments rise to the level of a serious neurological injury."

Plaintiff argues on appeal that the trial court erred in failing to recognize that she presented sufficient evidence in connection with her closed-head injury to create a question of fact for jury resolution. We agree that summary disposition was inappropriate in this instance.

[1] MCL 500.3101 *et seq.*

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

MCL 500.3135(1) provides that 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." MCL 500.3135(7) states that "'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(2)(a) establishes that whether a person has suffered serious impairment of a body function is a question of law for the court, where there is no factual dispute concerning the nature and extent of the injuries, or where no such factual dispute is material to the question of whether the person has suffered serious impairment of a body function. But MCL 500.3135(2)(a)(*ii*) specifically provides that "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."

Plaintiff presented an affidavit from a physician, who identified himself as a licensed osteopathic physician who regularly diagnosed and treated patients with closed-head injuries, including plaintiff in connection with her injuries arising from the traffic accident at issue. The physician attested, "I diagnosed [plaintiff] as having a closed head injury as a result of the 11/6/01 vehicle collision which is a serious neurological injury." The trial court concluded that the expert's affidavit failed to create a question of fact because it "automatically equat[ed] a closed head injury with a serious neurological injury." See *Churchman v Rickerson*, 240 Mich App 223, 229; 611 NW2d 333 (2000) ("the closed-head injury provision of § 3135 requires more than a diagnosis that a plaintiff has sustained a closed-head injury").

Plaintiff argues that the expert's statement does create a question of fact and we agree. MCL 500.3135(2)(a)(*ii*) requires testimony from a qualified expert "that there may be a serious neurological injury." Plaintiff's expert stated that plaintiff had suffered "a closed head injury . . . which is a serious neurological injury." We find that plaintiff's expert's statement suggests that plaintiff might have a serious neurological injury. We see no reason to adopt the narrow construction of the expert's phrasing that the trial court adopted. The phrasing is sufficiently ambiguous to admit of two possible readings: that a closed head injury is by default a serious neurological injury, or that the closed head injury that plaintiff suffered presents a serious neurological injury. Because MCL 500.3135(2)(a)(*ii*) hinges on the phrase "may be," rather than "must be" or "is," we find the expert's statement creates a question of fact.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper