STATE OF MICHIGAN

COURT OF APPEALS

RENEE LOUISE COCKLE,

Plaintiff-Appellant,

v

MARY BELL THOMAS and CHARLES ANDERSON,

Defendant-Appellees,

and

WILLY LOU ANDERSON and AUTOMOBILE CLUB INSURANCE ASSOCIATION,

Defendants.

UNPUBLISHED
October 24, 2006

No. 261884
Wayne Circuit Court
LC No. 02-244032-CZ

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

METER, J. (*concurring*).

I concur in the result reached by the majority but write separately to express my opinion regarding the ambiguity of MCL 500.3135(2)(a).

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) . . . 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*. [Emphasis added.]

In this case, plaintiff did not present medical testimony from a licensed allopathic or osteopathic physician regarding her closed-head injury and therefore did not satisfy the second sentence of subsection 3135(2)(a)(ii). In my opinion, the wording of MCL 500.3135(2)(a) is somewhat ambiguous. It is at least arguable that the Legislature, in adding the second sentence of subsection 3135(2)(a)(ii), meant to *require* that a plaintiff in a closed-head injury case, in order to have the "serious impairment" issue assessed by a jury, provide testimony of a physician as described in the statute. Indeed, in *Kreiner v Fischer*, 471 Mich 109, 132 n 15; 683 NW2d 611 (2004), the Court noted that MCL 500.3135(2)(a)(ii) created "a special rule for closed head injuries . . . ." However, in *Churchman v Rickerson,* 240 Mich App 223, 232; 611 NW2d 333 (2000), this Court stated:

The language of § 3135 does not indicate . . . that the closed-head injury exception provides the exclusive manner in which a plaintiff who has suffered a closed-head injury may establish a factual dispute precluding summary disposition. In the absence of an affidavit that satisfies the closed-head injury exception, a plaintiff may establish a factual question under the broader language set forth in subsection 3135(2)(a)(i) and (ii), which, as noted above, provide that whether an injured person has suffered serious impairment of body function is a question for the court unless the court finds that "[t]here is no factual dispute concerning the nature and extent of the person's injuries," or, if the court finds that there is such a factual dispute, that "dispute is not material to the determination as to whether the person has suffered a serious impairment of body function . . . ." [Emphasis added.]

In light of *Churchman*, the holding of which is binding on this Court under MCR 7.215(J)(1), and in light of the unclear meaning of the phrase "special rule" in *Kreiner*, I conclude that plaintiff, in order to have the "serious impairment" issue submitted to a factfinder, was not required to provide testimony of a physician as described in MCL 500.3135(2)(a)(ii).

I therefore concur in the result reached by the majority in this case. There was a factual dispute regarding the nature and extent of plaintiff's closed head injury, and this dispute was material to whether plaintiff suffered a serious impairment of a body function. Accordingly, a remand for a new trial is appropriate.

/s/ Patrick M. Meter