

STATE OF MICHIGAN
COURT OF APPEALS

SHAKITA CRITTENDON,

Plaintiff-Appellant,

v

CHERYL ANN JOHNSON,

Defendant-Appellee.

UNPUBLISHED

March 26, 2009

No. 283823

Oakland Circuit Court

LC No. 2006-079042-NI

Before: Cavanagh, P.J., and Fort Hood and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court order that granted defendant's motion for summary disposition and dismissed plaintiff's claim for noneconomic damages under the no-fault insurance act, MCL 500.3101 *et seq.* We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff's claim arises from an automobile accident. Plaintiff's complaint alleged that defendant negligently rear-ended her automobile at an intersection. The complaint also alleged that, as a result of the accident, plaintiff sustained various injuries, including but not limited to "cervical disk abnormalities, right cervical radiculitis, thoracic and lumbar pain, closed head injury, depression, anxiety and impaired memory function," resulting in serious impairment of important bodily functions.

Plaintiff submitted an affidavit of a psychologist, Dr. Richard Weiss, Ph.D., to the trial court. Dr. Weiss diagnosed plaintiff as suffering posttraumatic brain syndrome, secondary to closed head injury. He also opined that plaintiff's emotional status reflects severe depression. Ultimately, Dr. Weiss concluded that plaintiff presented with a closed head injury that "significantly impact[ed] her general level of intellectual functioning."

The trial court granted defendant's motion for summary disposition on the basis that the affidavit of Dr. Weiss regarding plaintiff's allegation of closed head injury was by a psychologist, as opposed to an allopathic or medical doctor, and that plaintiff did not sustain an injury that rose to the level of being a serious impairment of an important body function.

On appeal, plaintiff contends the trial court erred in refusing to consider a Ph.D. psychologist's opinion or to consider other evidence as to the existence of her closed-head injury. We agree.

MCL 500.3135 provides, in relevant part:

(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 issue 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.

Contrary to the determination of the trial court and argument of defense counsel, the statutory provision enumerated in MCL 500.3135(2)(a)(ii) does not provide the exclusive manner or means for a plaintiff to establish a closed-head injury and the existence of a factual dispute. *Churchman v Rickerson*, 240 Mich App 223, 232; 611 NW2d 333 (2000). MCL 500.3135(2)(a)(ii) does not delimit the admissibility of evidence pertaining to the existence of a closed-head injury. Rather, it is an exception that permits a party to automatically create a question for a jury through provision of testimony by a physician that a serious neurologically based injury might exist.

The record reveals that the trial court failed to properly consider the issue whether plaintiff presented the requisite proof of a closed-head injury, separate and distinct of the automatic exception in MCL 500.3135(2)(a)(ii). Because the trial court did not make the required findings, we reverse and remand for the purpose of determining the existence of a threshold "closed-head" injury. *Churchman, supra*.

Plaintiff further argues that she submitted sufficient evidence of her inability to lead a normal life to create a genuine issue of material fact that only the jury can resolve. Therefore, plaintiff contends that the trial court erred in granting summary disposition as to her back and neck claims.

A person may recover noneconomic damages under the no-fault act only when they have suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). Plaintiff asserts she has suffered "serious impairment of body functions," thereby allowing her to sue for noneconomic damages. The record indicates that plaintiff raised two claims, one involving the closed-head injury and one involving neck and back injuries. Serious impairment of body function is statutorily defined as "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(7).

The standard applied for recovery of noneconomic damages is not based on serious pain and suffering, but rather, on injuries that impact the functioning of the body. *Miller v Purcell*, 246 Mich App 244, 249; 631 NW2d 760 (2001). To meet the threshold requirement, the impairment of the important body function must impact the trajectory of a person's entire normal life. *Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004).

In this case, the trial court granted defendant's motion for summary disposition on plaintiff's neck and back claims without the benefit of considering evidence related to her claimed associated closed-head injury. The court erred when it did not properly consider whether plaintiff presented the requisite proof of a closed-head injury. With this in mind, if admissible, evidence relating to the closed-head injury could affect the nature and extent of plaintiff's injuries on the whole, especially in relationship to her other asserted neck and back injuries. For this reason, we also reverse the trial court's summary disposition order with respect to plaintiff's neck and back claim, and remand for further consideration of those threshold injuries and their impact, if any, on her ability to lead her normal life.

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

/s/ Michael J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Alton T. Davis