S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

ROBERT ALAN MACDONALD,

Plaintiff-Appellant,

v

CURTIS KARL KOCH and NORANDEX REYNOLDS DISTRIBUTION COMPANY,

Defendants-Appellees,

and

MICHIGAN EDUCATION EMPLOYEES MUTUAL INSURANCE COMPANY,

Defendant.

UNPUBLISHED
June 18, 2009

No. 285371
Wayne Circuit Court
LC No. 06-625179-NF

Before: Borrello, P.J., and Meter and Stephens, JJ.

PER CURIAM.

In this automobile negligence action, plaintiff appeals as of right from an order granting defendants-appellees' motion for summary disposition under MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings.

In September 2006, plaintiff filed a complaint alleging that defendant-appellee Curtis Karl Koch[1] accidentally drove a vehicle into plaintiff's vehicle in September 2005 and that plaintiff sustained resultant injuries, including:

a. Injury to his cervical and lumbosacral back including muscle spasm[s];

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[1] Defendant-appellee Norandex Reynolds Distribution Company owned the vehicle that Koch was driving at the time of the accident. The term "defendants" will be used in this opinion to refer to Koch and Norandex, collectively.

b. Aggravation of pre-existing arthritic condition resulting in muscle spasms and radiculpathy [sic, radiculopathy]; [and]

c. Traumatic brain injury resulting in diminished cognitive abilities and emotional/behavioral sequelae[.]

In February 2008, defendants moved for summary disposition under MCR 2.116(C)(10), citing *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), and arguing that plaintiff had not met the no-fault threshold contained in MCL 500.3135(1)[2] because the accident-related injuries had not affected his general ability to lead his normal life. Defendants also alleged that there was no evidence of a serious neurological injury and that plaintiff's case therefore could not be "saved" by virtue of MCL 500.3135(2)(a)(*ii*). Plaintiff responded that (1) he suffered an objectively manifested injury to his neck that affected his general ability to lead his normal life and (2) he suffered a closed-head injury that "may be a serious neurological injury under MCL 500.3135(2)(a)(*ii*)." A motion hearing took place in April 2008, and the trial court granted defendants' motion, stating that plaintiff's general ability to lead his normal life had not been affected by the accident and that his lawsuit therefore could not proceed. The court did not specifically mention the alleged head injury. Plaintiff moved for reconsideration, pointing out, among other things, that the alleged head injury required the case to proceed to a jury. The trial court denied the motion without elaboration.

On appeal, plaintiff first argues that the trial court erroneously evaluated the evidence of a neurological injury and that summary disposition was inappropriate, in light of MCL 500.3135(2)(a)(*ii*). "We review de novo a trial court's ruling on a motion for summary disposition." *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003). In evaluating a summary disposition motion brought under MCR 2.116(C)(10), a court considers the "affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties" in the light most favorable to the opposing party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

MCL 500.3135 states, in 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.
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> (2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:

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[2] The pertinent portions of MCL 500.3135 are set forth later in this opinion.

(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.]

As noted in *Minter v Grand Rapids*, 275 Mich App 220, 227; 739 NW2d 108 (2007), rev'd on other grounds 480 Mich 1182 (2008),[3] "[i]f a properly qualified doctor testifies 'that there may be a serious neurological injury,' there would *automatically* be a jury question" (emphasis in original).

Here, plaintiff focuses on affidavits filed by Mary Ann Guyon, M.D., and Gerald A. Shiener, M.D., arguing that these affidavits sufficed to create a jury question under MCL 500.3135(2)(a)(*ii*). Dr. Guyon, who is board-certified in physical medicine and rehabilitation, stated that she "regularly diagnose[s] or treat[s] individuals with back, neck and head injuries, including mild traumatic brain injuries." She stated that she evaluated plaintiff and noted the following on November 3, 2005:

-Seems a trifle dazed

-Mental status impaired

-Word finding problems

-Slow speech

-Mild dysarthria [a motor speech disorder]

-Tenderness at neck to rhomboids

-Decreased ROM of neck

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[3] The Supreme Court in *Minter* disagreed with the Court of Appeals regarding whether the plaintiff's closed-head injury satisfied the no-fault threshold, but it did not disturb the Court's statement concerning an "automatic" jury question. See *Minter v Grand Rapids*, 480 Mich 1182; 747 NW2d 229 (2008).

> -Positive Spurling [this refers to a test for the evaluation of cervical spine radiculopathy]
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> -Decreased ROM right shoulder
>
> -Decreased strength in right wrist and hand
>
> -Slight decrease in sensation over right deltoid
>
> -Tenderness to rhomboid and right deltoid muscle
>
> -Balance and coordination impaired on right
>
> -Decreased balance right heel/toe walking
>
> -Decreased single leg stance on right
>
> -Decreased balance on right with tandem gait

Dr. Guyon stated that she diagnosed plaintiff with, among other things, "[m]ild traumatic brain injury" as a result of the accident. Later in the affidavit, she stated that plaintiff "sustained a closed-head injury that is a serious neurological injury resulting in severe consequences." She indicated that plaintiff

> is permanently, medically restricted from activities that involve rapid verbal instructions because [he] needs an excessive amount of time to process information and figure things out, as his traumatic brain injury prohibits him from thinking when he is rushed.

Dr. Shiener, a psychiatrist, indicated that he regularly diagnoses or treats individuals with closed-head injuries. Dr. Shiener stated, in part:

> Review of medial records and examination reveals psychomotor slowing, paucity of thought, constricted affect, depressed mood with a somatic trend to his conversation. He is suffering from a combination of the effects of brain damage sustained in the motor vehicle accident complicated by a depressive reaction as a result of the chronic and unremitting pain that he has experienced.
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> * * *
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> A careful review of his psychological history reveals no other factors capable of presenting with a pattern of impairment such as he manifests other than a reaction to traumatic brain injury. A careful review of his psychosocial history reveals no other factors capable of causing a symptom complex of this type. I would therefore conclude that his current pattern of decompensation is a direct result of injuries sustained in the September 12, 2005 motor vehicle accident.

Dr. Shiener stated that plaintiff, as a result of the accident, "sustained a closed-head injury that may be a serious neurological injury resulting in severe consequences."

The affidavits of Dr. Guyon and Dr. Shiener did indeed create a jury question under MCL 500.3135(2)(a)(*ii*). The affidavits indicated that plaintiff may have sustained a serious neurological injury as a result of the accident.

Citing *Churchman v Rickerson*, 240 Mich App 223; 611 NW2d 333 (2000), defendants contend that plaintiff presented insufficient evidence of a "serious" injury. In *Churchman*, *supra* at 230, the Court stated that the statute does not define "serious" but "the plain language of the statute requires some indication by the doctor providing testimony that the injury sustained by the plaintiff was severe."[4] The *Churchman* panel indicated that, in that case, the affidavit in question did not address the degree of the alleged injury and therefore did not satisfy the no-fault threshold. *Id*. at 231. Here, in contrast, Dr. Guyon opined that plaintiff suffered a "serious neurological injury resulting in severe consequences." She stated that he "sustained a traumatic brain injury with residual right hemisparesis, mild dysphasia, and memory deficits, as well as a probable partial complex seizure disorder as a result of the . . . accident." Dr. Guyon indicated that plaintiff "needs an excessive amount of time to process information and figure things out, as his traumatic brain injury prohibits him from thinking when he is rushed." Dr. Shiener opined that plaintiff suffered a closed-head injury "that may be a serious neurological injury resulting in severe consequences." He stated that plaintiff exhibited "psychomotor slowing, paucity of thought, [and] constricted affect," among other things. Given these affidavits, we disagree with defendants' allegation that there was insufficient evidence of a "serious" injury to satisfy the no-fault threshold.

Defendants also contend that there was insufficient evidence of causation. We disagree. While it is true that there was evidence that plaintiff obtained fairly low scholastic grades even before the accident, Dr. Shiener, in particular, opined that plaintiff's current cognitive impairment must have resulted from the motor vehicle accident, in light of his psychosocial history. Dr. Guyon also stated that plaintiff sustained a brain injury "secondary to motor vehicle accident . . . ." Accordingly, there was sufficient evidence of causation.

Defendants also briefly suggest that Dr. Guyon was not qualified to offer an opinion in this case because she "only works with 'mild traumatic brain injuries' (as opposed to the statutorily required 'serious neurological injuries') . . . ." Defendants, however, mischaracterize the statutory language. MCL 500.3135(2)(a)(*ii*) states that the physician in question must "regularly diagnose[] or treat[] closed-head injuries . . . ." It does not impose a requirement that the physician regularly treat "serious neurological injuries."

Defendants also emphasize that Dr. Shiener merely stated that plaintiff *may* be suffering from a serious neurological injury. That, however, is all the statute requires. Again, MCL 500.3135(2)(a)(*ii*) states: "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-

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[4] Given the statutory language, presumably the Court meant to say that there must be some indication by the doctor that the injury *may be* severe.

head injuries testifies under oath that there *may* be a serious neurological injury" (emphasis added).

Given the evidence presented, the trial court erred in granting defendants' motion for summary disposition because plaintiff created a question of fact under MCL 500.3135(2)(a)(*ii*).[5]

Plaintiff next contends that the trial court erred in granting defendants' motion for summary disposition because his neck and closed-head injuries have, contrary to the trial court's conclusion, affected his general ability to lead his normal life.

As noted, MCL 500.3135(1) states that "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle . . . if the injured person has suffered . . . serious impairment of body function . . . ." 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." Interpreting this statue, the Supreme Court in *Kreiner*, *supra* at 132-133, stated:

> In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "*any* effect" on the plaintiff's life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life. [Emphasis in original.]

Kreiner went on to state:

> The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. [*Id*. at 133-134.]

David Silbert, a chiropractor, indicated in an affidavit that plaintiff, as a result of the accident, "is now permanently, medically restricted from lifting greater than 8-10 lbs in a

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[5] Given our resolution of this issue, we need not address plaintiff's appellate argument concerning the trial court's denial of plaintiff's motion for reconsideration.

repetitive manner, driving more than 1 ½ hours, reaching, pulling, pushing, bending, or twisting." Dr. Guyon stated in her affidavit:

> 32. Prior to September 12, 2005, despite a disabling right knee injury which restricted [plaintiff] from kneeling, squatting and walking long distances, [plaintiff] was able to sit for long period of time, drive long distances, play his guitars, dress himself without difficulty, ride his bicycle on a regular basis, engage in sexual activity on a regular basis and was under no lifting restrictions.
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> 33. In my opinion, based upon a reasonable degree of medical certainty, as a result of the aforementioned cervical whiplash injury, [plaintiff] is permanently, medically restricted from kneeling, squatting, and walking distances beyond ½ to 1 block.

As noted earlier, Dr. Guyon also indicated that plaintiff is permanently restricted "from activities that involve rapid verbal instructions" as a result of injuries sustained in the accident.

At his deposition, plaintiff admitted that he had a preexisting knee injury that restricted him from kneeling and squatting. Plaintiff stated that he is unable to play one of his five guitars because of the accident. He also stated that he went from having sex before the accident three to seven times a week to having sex "once a month or less" because of pain in his neck. Plaintiff testified that he has memory problems since the accident and also has been having trouble reading. He obtained a full-time job for a time in December 2006 but stated that he "couldn't" continue with it. However, he had been on disability benefits before the accident, because of his knee problems. Plaintiff stated that, because of the accident:

> I can't remember my music. I probably have two or three hundred songs in my repatoire [sic] that I can't basically remember more than a couple at a time, which is my hobby and I can't, my other hobby was bicycle riding, and I can't do that on a regular basis any more.

Given the facts as presented, we simply cannot conclude that the trial court erred in finding that plaintiff presented insufficient evidence that his injuries affected his general ability to lead his normal life. Although the evidence suggested that plaintiff has trouble working as a result of the accident, he also had work difficulties before the accident. Moreover, while the evidence suggested that plaintiff has difficulty performing certain activities to the same degree as he did before the accident, he still is able to perform them. As noted in *Kreiner*, *supra* at 131, "minor changes in how a person performs a specific activity may not change the fact that the person may still 'generally' be able to perform that activity." We find no basis for reversal with regard to the trial court's findings concerning whether plaintiff's injuries affected his general ability to lead his normal life.[6]

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[6] Of course, as noted earlier, whether plaintiff suffered a "serious impairment of body function" as a result of a closed-head injury and possibly serious neurological consequences is a question for the jury, in light of the evidence presented.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Patrick M. Meter
/s/ Cynthia Diane Stephens