

STATE OF MICHIGAN
COURT OF APPEALS

CHARLES ALLEN and LISA ALLEN,

Plaintiffs-Appellants,

v

BLOOMFIELD HILLS SCHOOL DISTRICT,

Defendant-Appellee.

FOR PUBLICATION

September 23, 2008

No. 275797

Oakland Circuit Court

LC No. 2005-070739-NI

Advance Sheets Version

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

HOEKSTRA, J. (*concurring in part and dissenting in part*).

I agree with the majority's conclusion that a plaintiff seeking to avoid governmental immunity and recover third-party no-fault damages from a governmental agency must establish a "bodily injury" within the meaning of MCL 691.1405. However, I disagree that post traumatic stress disorder (PTSD) can be such an injury.

In *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 84-85; 746 NW2d 847 (2008), the Supreme Court addressed the definition of "bodily injury":

Although the GTLA [governmental tort liability act] does not define "bodily injury," the term is not difficult to understand. When considering the meaning of a nonlegal word or phrase that is not defined in a statute, resort to a lay dictionary is appropriate. *Horace v City of Pontiac*, 456 Mich 744, 756; 575 NW2d 762 (1998). The word "bodily" means "of or pertaining to the body" or "corporeal or material, as contrasted with spiritual or mental." *Random House Webster's College Dictionary* (2000). The word "injury" refers to "harm or damage done or sustained, [especially] bodily harm." *Id.* Thus, "bodily injury" simply means a physical or corporeal injury to the body.

Plaintiffs argue that plaintiff Charles Allen suffered a "bodily injury" because the accident caused physical damage to his body, as evidenced by a positron emission tomography (PET) scan of his brain. In making this argument, plaintiffs rely on the affidavit of Joseph Wu, M.D., who reviewed Allen's PET scan and opined that it depicted "decreases in frontal and subcortical activity consistent with depression and post traumatic stress disorder." Wu further opined that "the abnormalities in . . . Allen's brain as depicted on the . . . PET scan are quite pronounced and are clearly different in brain pattern from any of the normal controls. They are

also consistent with an injury to Mr. Allen's brain." Wu related the abnormalities to the train-bus accident. Plaintiffs also rely on the report of Gerald Shiener, M.D., who opined that PTSD "causes significant changes in brain chemistry, brain function, and brain structure." Allen's PTSD is alleged to have been caused by the emotional upset resulting from his belief, as the accident was occurring, that his operation of the train was "about to maim or kill numerous school children," rather than a physical impact on his body during the collision.

In my opinion, plaintiffs' evidence concerning Allen's brain abnormalities does not satisfy the definition of "bodily injury" discussed above. Rather, plaintiffs' evidence demonstrates, at most, mental or psychiatric abnormalities or changes. Although not binding on this Court, I find persuasive the analysis in *Bobian v CSA Czech Airlines*, 232 F Supp 2d 319 (D NJ, 2002), regarding whether PTSD constitutes a "bodily injury" compensable under Article 17 of the Warsaw Convention. There, in addressing the plaintiffs' claim that PTSD constitutes a bodily injury by virtue of the physical effects of PTSD on the brain, the court stated, "Given that all human thoughts and emotions are in some fashion connected to brain activity, and therefore at some level 'physical,' to accept Plaintiffs' argument would be to break down entirely the barrier between emotional and physical harms" *Id.* at 326. Following this reasoning, any change to Allen's brain functions resulting from the accident is properly characterized as a mental, emotional, or psychiatric injury rather than a bodily injury. Because the term "bodily injury" in MCL 691.1405 does not encompass these types of changes, defendant was immune from suit, including Allen's claim for economic damages and plaintiff Lisa Allen's claim for loss of consortium. As such, I would hold the trial court properly granted summary disposition for defendant.

/s/ Joel P. Hoekstra