

STATE OF MICHIGAN
COURT OF APPEALS

CARL WILKINSON and JEANETTE
WILKINSON,

UNPUBLISHED
March 27, 2001

Plaintiffs-Appellees,

v

No. 203218
Oakland Circuit Court
LC No. 94-487015-NI

ANTHONY LEE and GENERAL MOTORS
CORPORATION,

Defendants-Appellants.

ON REMAND

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

WHITBECK, J. (*concurring*).

I concur in the majority's opinion. I would be remiss, however, if I did not comment on the Supreme Court's per curiam opinion remanding this case. To me, the critical passage in that opinion is:

The majority [in *Wilkinson v Lee*, unpublished per curiam opinion of the Court of Appeals, issued June 15, 1999 (Docket No. 203218)] erred in focusing on the underlying brain tumor as the "basic injury" involved in this case. *Regardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition.*^[1]

I can make no sense of the emphasized sentence as it is written. The first clause ("Regardless of the preexisting condition . . .") appears to instruct us to disregard the preexisting injury entirely. However, the ending clause (" . . . if the trauma caused by the accident triggered symptoms from that condition.") appears to refer us back to that very preexisting injury, thus preventing us from disregarding it and, perhaps, requiring us to relate the symptoms to the injury. On its face, therefore, the sentence seems, to me at least, to be internally – and fatally – contradictory. The metaphor of a squirrel cage comes to mind.

It appears to me that there are two different ways of reconstructing the emphasized sentence. The first is to omit the first clause and slightly change the ending clause. The sentence

¹ *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000) (emphasis supplied).

would then read: “Recovery is allowed if the trauma caused by the accident triggered symptoms from a preexisting condition.” This is a sensible reading of the sentence, but it may lead to a very broad result. It may mean that a plaintiff can recover not only for an injury but also for the symptoms of an injury. While I do not possess the medical or scientific background to attempt to distinguish between an injury and the symptoms of an injury, it does seem to me, at least intuitively, that there is some distinction between the two. The first reconstruction of the sentence, however, is at least susceptible of being interpreted as obliterating that distinction.² Thus, under the facts of this case, plaintiff’s symptoms perhaps simply have *become* the injury. While this may now be the law in Michigan, I must admit that I have never seen it stated so baldly in reported decisions of the Supreme Court or this Court.

The second reconstruction of the sentence is considerably less sensible and considerably more alarming. It is to change the ending clause so that the sentence would read: “Regardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms of an injury.” Under this reading, it would make no difference whether the symptoms related to the preexisting injury and the only inquiry would be as to whether the plaintiff exhibited symptoms of *an* injury, indeed *any* injury. Thus, under the facts of this case, plaintiff would recover even if there were *no* relationship between his symptoms and his preexisting brain tumor. It would be sufficient if he could show that he simply exhibited free-floating “symptoms” of *some* injury. I cannot conceive that this is now the law in Michigan on this point.

The analytical fulcrum under circumstances such as those that exist here is causation. For a person with a pre-existing injury or condition, it is especially important that there be proof that (1) the person did not suffer certain symptoms before the accident, (2) only the accident could have caused the symptoms to exist and, (3) the existence of the new symptoms indicates that the defendant is liable for worsening the condition (that is, the automobile injury is the trauma to the pre-existing condition, as evidenced by the new symptoms). Under my second reconstruction of the critical sentence, the element of causation is entirely missing.

I suggest that, at best, we know for certain that on the facts of this case “recovery is allowed.” Perhaps in some future opinion, the Supreme Court will resolve the application of that conclusion to other factual situations.

/s/ William C. Whitbeck

² I recognize that the sentence, as reconstructed, is also susceptible to a different interpretation, one drawn from the dictionary definition of “symptom.” Merriam-Webster’s Collegiate Dictionary defines a symptom as “subjective evidence of disease or physical disturbance” or, more broadly, “something that indicates the presence of bodily disorder.” If used in this manner, a symptom may be viewed as determining the effect of an injury; the analogy, therefore, would be to a continuum with the injury at one end and the symptoms at the other. If this is the analogy the Court meant to imply, I can only observe that this is not clear from either the original sentence or my reconstruction of that sentence.