STATE OF MICHIGAN

COURT OF APPEALS

MOHAMAD HAMAD,

Plaintiff-Appellant,

v

FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
November 28, 2006

No. 265971
Wayne Circuit Court
LC No. 04-422297-NZ

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

In this action to recover noneconomic damages under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals as of right from a circuit court order granting summary disposition to defendant under MCR 2.116(C)(10). The court concluded that plaintiff had not established that his closed-head injury or injuries to his neck and back met the threshold of a serious impairment of body function. We affirm in part, reverse in part, and remand this case for further proceedings. This case is being decided without oral argument under MCR 7.214(E).

This Court reviews de novo a trial court's decision to grant summary disposition. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001). "A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support of a claim. The motion should be granted if the evidence demonstrates that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law." *Id*. (citation omitted).

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 that dealt with his closed-head injury and satisfied the second sentence of subsection 3135(2)(a)(ii).[1] In our 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

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[1] On appeal, plaintiff has submitted an affidavit that arguably meets the requirements of MCL 500.3135(2)(a)(ii). However, because this document was not presented below, we do not consider it on appeal. See *Maiden v Rozwood*, 461 Mich 109, 126 n 9, 597 NW2d 817 (1999); *Quinto v Cross & Peters Co*, 451 Mich 358, 366 n 5; 547 NW2d 314 (1996). Plaintiff presented other medical records to the trial court but did not present any testimony under oath that satisfied MCL 500.3135(2)(a)(ii).

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*, we 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).

We conclude that plaintiff established a factual question concerning his closed-head injury under the other provisions of MCL 500.3135(2)(a)(i) and (ii). Memory is an important body function, and neuropsychological testing may suffice as an objective manifestation of an impairment of an important body function. See *Shaw v Martin*, 155 Mich App 89, 92-95; 399 NW2d 450 (1986). The neurological assessments performed by Dr. Van Horn and Dr. Axelrod in this case both indicated significant deficiencies in plaintiff's memory and cognitive abilities. Dr. Van Horn opined that a battery of tests indicated that plaintiff suffered a closed-head injury and had deficits in memory, attention, concentration, higher cognitive functions, and sensory and motor functions. Dr. Axelrod believed that plaintiff was feigning at least some of his problems. Thus, there was a question of fact concerning the nature and extent of plaintiff's closed-head injury.

If there is a question of fact concerning the nature and extent of the injuries, summary disposition may be granted if the dispute is not material to the determination of whether the plaintiff suffered a serious impairment of body function. *Kreiner, supra,* p 136 n 21. Viewed in the light most favorable to plaintiff, the neuropsychological assessment by Dr. Van Horn indicated that plaintiff's memory and cognitive abilities were severely impaired. The inability to remember interferes with a person's ability to lead a normal life. *Shaw, supra,* p 94. In light of the severity of the deficits claimed by plaintiff and substantiated by Dr. Van Horn, we cannot conclude that the nature and extent of plaintiff's closed-head injury is not material to the determination of whether he suffered a serious impairment of body function. Accordingly, a remand for trial is appropriate.

With respect to plaintiff's neck and back injuries, these were objectively manifested by an electromyography. In addition, Dr. Policherla observed cervical neck spasms in the examination on March 19, 2004. Muscle spasms establish an objectively manifested injury. See *Harris v Lemicex*, 152 Mich App 149, 153-154; 393 NW2d 559 (1986). Whether the neck and back injuries affected plaintiff's general ability to lead his normal life presents a closer question. After our review of the record, we conclude that even if a question of fact existed regarding the nature and extent of plaintiff's neck and back injuries, plaintiff did not develop a record sufficient to demonstrate that the effect on his life from the neck and back injuries was extensive enough to meet the "serious impairment" threshold. Accordingly, the trial court did not err in granting summary disposition to defendant with respect to the neck and back injuries.

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

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter