

STATE OF MICHIGAN
COURT OF APPEALS

SHAKITA CRITTENDON,

Plaintiff-Appellant,

v

CHERYL ANN JOHNSON,

Defendant-Appellee.

UNPUBLISHED

November 16, 2010

No. 293681

Oakland Circuit Court

LC No. 2006-079042-NI

Before: SERVITTO, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting defendant summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

This case is before us for the second time. In the earlier opinion, this Court provided the following background:

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. . . . [*Crittendon v Johnson*, unpublished per curiam opinion of the Court of Appeal, issued March 26, 2009 (Docket No. 283823), slip op at 1.]

This Court, citing MCL 500.3135, held:

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*. [*Crittendon*, slip op at 2.]

This Court also addressed whether the trial court properly granted defendant's motion for summary disposition on plaintiff's serious impairment of a body function claim. In this regard, this Court also held that the trial court erred in not considering evidence a closed-head injury. [*Crittendon*, slip op at 2.]

On remand, the trial court held a hearing, and afterwards, stated:

All right. I did review everything.

The matter is before the Court upon Defendant's motion for summary disposition. Defendant asserts that Plaintiff has not met the threshold for serious impairment under the Michigan No-Fault Act in that she has not suffered an objectively manifested injury that affects her general ability to lead her normal life.

As to Plaintiff's closed head injury claim, the neck and back and injury claims, the Court finds that Plaintiff has established a question of fact as to whether she has sustained objectively manifested injuries.

However, the Court finds that even taking into account all of the alleged injuries in reviewing the facts in a light most favorable to Plaintiff, the Plaintiff still has not established that these alleged injuries have affected her general ability to lead her normal life .

Although Plaintiff's life has changed, many of those changes such as birth of a child are unrelated to the accident. Plaintiff is still able to work, attend church and travel on occasion. The Court does not find that the injuries sustained affected her general ability to lead a normal life and I'm granting the motion.

This appeal ensued.

On appeal, a court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a motion under MCR 2.116(C)(10), a court must examine the documentary evidence presented and, draw all reasonable inferences in favor of the nonmoving party, and determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party has the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of disputed fact exists. *Id.* A question of fact exists when reasonable minds can differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992). Summary disposition is properly granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

Plaintiff first argues that the trial court erred in failing to conclude that Dr. Weiss' testimony automatically established a genuine issue of material as to whether plaintiff suffered a closed head injury. Specifically, plaintiff maintains that because "this Court previously quoted Dr. Weiss as opining, in his capacity as a neurological expert regularly dealing with closed head injury diagnosis and treatment, that plaintiff presented with a closed head injury that significantly impact[ed] her general level of intellectual functioning. Plaintiff's Brief on Appeal, p 10 (quotations omitted). We disagree.

Initially, we conclude this Court did not indicate that Dr. Weiss was a neurological expert or comment on the validity of his opinion. Rather, this Court merely held that the trial court failed to appreciate that "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." [*Crittendon v Johnson*, slip op at 2.] Further, the case law relied on by plaintiff is plainly distinguishable. In both *Minter v Grand Rapids*, 275 Mich App 220, 224; 739 NW2d (2008) and *McDonald v Kosh*, unpublished opinion per curiam of the Court of Appeals, issued June 18, 2009 (Docket No. 285371), slip op at 4, actual physicians testified under oath that the plaintiffs had sustained serious neurological injuries. Here, Dr. Weiss is not a physician and thus is not "a properly qualified doctor" and plaintiff cannot take advantage of the automatic question of fact provision in MCL 500.3135(2)(a)(ii).

As mentioned, plaintiff argues that there was evidence “that plaintiff presented with a closed head injury that significantly impact[ed] her general level of intellectual functioning.” Plaintiff’s Brief on Appeal, p 10 (quotations omitted). Plaintiff maintains that there is no cognizable difference between a “significant” or “severe” injury. However, our review of the record reveals that plaintiff failed to accurately quote Dr. Weiss’ report. Dr. Weiss’ report actually states that: “It is my impression that Ms. Crittendon presents with a closed head injury, this *most* significantly impacting on her general level of intellectual functioning.” (Emphasis added). Viewed in the proper context, this statement does not indicate that plaintiff suffered a serious neurological injury. The injury could in fact be minor yet “most significantly impacting on her general level of intellectual functioning.” “A closed-head injury “may cause damage that ranges from mild to profound.” *Churchman*, 240 Mich App at 230 (citations omitted). We conclude that Dr. Weiss’ testimony does not automatically establish a genuine issue of material fact as to whether plaintiff suffered a closed head injury. Thus, the trial court properly granted defendant summary disposition in regard to the automatic question of fact provision in MCL 500.3135(2)(a)(ii).

Nonetheless, we recognize that “[i]n 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)” *Churchman v Rickerson*, 240 Mich App at 232. Here, the trial court specifically found that “[p]laintiff has established a question of fact as to whether she has sustained objectively manifested injuries.” Accordingly, the only relevant question on appeal in this case is whether the trial court properly determined whether plaintiff’s alleged injuries, i.e. back, shoulder and the closed head injury, together establish that that plaintiff suffered a serious impairment of body function. However, at the time the trial court rendered its decision, the controlling standard used to make this determination was *Kreiner v Fisher*, 471 Mich 109, 130-131; 683 NW2d 611 (2004). *Kreiner* has since been reversed by the Supreme Court’s decision in *McCormick v Carrier*, ___ Mich ___; ___ NW2d ___ (2010). Since the Supreme Court in *McCormick* established a new standard for evaluating third-party claims under MCL 500.3135(1) and (7), we reverse the trial court’s decision in this regard and remand for further proceedings consistent with *McCormick*’s directives.

/s/ Deborah A. Servitto

/s/ Brian K. Zahra

/s/ Pat M. Donofrio