STATE OF MICHIGAN

SUPREME COURT

FREDIE STOKES
Plaintiff-Appelllee,

v

DAIMLERCHRYSLER CORPORATION
Defendant-Appellant.
_______________________________________/

Supreme Court no. 132648

Court of Appeals no. 268544

Lower Court no. 02-000388

132648
Suppl

SUPPLEMENTAL BRIEF AMICI CURIAE MICHIGAN SELF-INSURERS' ASSOCIATION AND MICHIGAN MANUFACTURERS ASSOCIATION

PROOF OF SERVICE

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STATEMENT OF THE BASIS FOR THE JURISDICTION OF THE COURT

MCR 7.301(2) gives the Court jurisdiction to review *Stokes v DaimlerChrysler Corp*, 272 Mich App 571; 727 NW2d 637 (2006).

The application for leave to appeal was filed at the Court with the entry fee less than forty-two days after *Stokes* (December 7, 2006).

STATEMENT OF QUESTION PRESENTED

I

DID THE COURT OF APPEALS RELIEVE STOKES FROM ACTUALLY PROVING THAT HE WAS DISABLED FROM ALL OF THE JOBS THAT WERE WITHIN HIS QUALIFICATIONS AND TRAINING?

Plaintiff-appellee Stokes answers "No."

Defendant-appellant DaimlerChrysler answers "Yes."

Amici curiae answers "Yes."

Court of Appeals answered "No."

Workers' Compensation Appellate Comm did not answer.

STATEMENT OF FACTS

Fredie Stokes said that he could no longer drive a hi-lo after some twenty-eight years with DaimlerChrysler Corporation because of his rheumatoid arthritis. The Court of Appeals thought that this was enough to require DaimlerChrysler to establish that Stokes could do another job at an equivalent wage or pay compensation for disability.[1]

The Court directed Stokes, DaimlerChrysler, and amicus curiae to brief the question of "whether the burden-shifting analysis in the Court of Appeals opinion relieved the plaintiff of the burden of proving that he was disabled from all jobs within his qualifications and training" before deciding the application for leave to appeal.[2]

ARGUMENT

I

THE COURT OF APPEALS RELIEVED STOKES FROM ACTUALLY PROVING THAT HE WAS DISABLED FROM ALL OF THE JOBS THAT WERE WITHIN HIS QUALIFICATIONS AND TRAINING

A proponent has the responsibility or "burden" to come forward with evidence of those facts required by law.[3] This responsibility can only be avoided by the

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[1] *Stokes v DaimlerChrysler Corp*, 272 Mich App 571, 574-575, 591; 727 NW2d 637 (2006).

[2] *Stokes v DaimlerChrysler Corp*, ____Mich____;____NW2d____(2007).

[3] "...the burden of going forward with evidence (the risk of nonproduction) is upon the party charged with the burden of persuasion." *Kar v Hogan*, 399 Mich 529, 540; 251 NW2d 77 (1976).

proponent in either of two ways. One is by the judicial notice of the fact.[4] The other is by the agreement of the opponent.[5]

When not avoided, the responsibility can only be reassigned or "shifted" to the opponent in either of two ways. One is by a presumption of the fact.[6]

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4 "Judicial notice is, then, a substitute for proof." *Winekoff v Pospisil*, 384 Mich 260, 268; 181 NW2d 897 (1970).

5 "...submission of questions to any adjudicating forum, judicial or quasi-judicial on stipulation of fact, is praiseworthy in proper cases. It eliminates costly and time-consuming hearings. It narrows and delineates issues. But once stipulations have been received and approved they are sacrosanct. Neither a hearing officer nor a judge may thereafter alter them. This holding requires no support citation. The necessity of the rule is apparent. A party must be able to rest secure on the premise that the stipulated facts and stipulated ultimate conclusionary facts as accepted will be those upon which adjudication is based. Any deviation therefrom results in a denial of due process for the obvious reason that both parties by accepting the stipulation have been foreclosed from making any testimonial or other evidentiary record." *Dana Corp v Employment Security Comm*, 371 Mich 107, 110; 123 NW2d 77 (1963).

6 "...the function of a presumption is solely to place the burden of producing evidence on the opposing party." *Widmayer v Leonard*, 422 Mich 280, 289; 373 NW2d 538 (1985).

The other way is to present evidence of all of the facts required by law. [7]

Here, Stokes had the responsibility to present evidence of those facts required by law – *Sington v Chrysler Corp*[8] – to establish disability from an injury at work for DaimlerChrysler as he was the proponent of that fact to establish eligibility for compensation. The responsibility cannot be avoided. Disability is not the kind of common and obvious circumstance that can be judicially noticed. DaimlerChrysler never agreed that Stokes was disabled.

The responsibility cannot be assigned or shifted to DaimlerChrysler, the

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7 "...the burden of going forward may be shifted to the opposing party.

> 'We have seen something of the mechanics of the process of 'proceeding' or 'going forward' with evidence, viewed from the point of view of the first party who is stimulated to produce proof under threat of a ruling foreclosing a finding in his favor. He may in respect to a particular issue pass through three states of judicial hospitality: (a) where if he stops he will be thrown out of court; (b) where if he stops and his adversary does nothing, his reception will be left to the jury; and (c) where if he stops and his adversary does nothing, his victory (so far as it depends on having the inference he desires drawn) is at once proclaimed. Whenever the first producer has presented evidence sufficient to get him to the third state and the burden of producing evidence can truly be said to have shifted, his adversary may in turn pass through the same three stages. His evidence again may be (a) insufficient to warrant a finding in his favor, (b) sufficient to warrant a finding, or (c) irresistible, if unrebutted.' McCormick, *supra*, p 793." *Kar*, p 540.

8 467 Mich 144; 648 NW2d 624 (2002).

opponent. There is no statute in the Workers' Disability Compensation Act of 1969 [9] describing a presumption of disability to apply. Stokes does not have a physical loss that could allow the presumptions of disability in MCL 418.361(2)(a)-(l)[10] and (3)(a)-(g)[11] to apply.

And Stokes did not present evidence of all of those facts required by law – *Sington* – to establish disability and so shift the burden of going forward to DaimlerChrysler. Stokes presented no facts about other jobs that he could have done based on his qualifications and training with his rheumatoid arthritis.[12] Stokes presented no facts about whether DaimlerChrysler or another employer would have hired him with rheumatoid arthritis.[13] All that Stokes did say was that he could not continue at one job,

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[9] MCL 418.101, et seq.

[10] For example, subsection 361(2)(a) describes a presumption of disability for sixty-five weeks from the loss of a thumb.

[11] For example, subsection 361(3)(a) describes a presumption of disability for eight hundred weeks from the loss of sight of both eyes.

[12]

> "...worker's compensation magistrate and the WCAC may have to consider various factual matters in determining whether an employee is disabled. Such matters could include the particular work that an employee is both trained and qualified to perform, whether there continues to be a substantial job market for such work, and the wages typically earned for such employment in comparison to the employee's wage at the time of the work-related injury." *Sington*, p 157.

[13]

> "...if defendant would not have hired plaintiff or would not have accommodated plaintiff's injury except for it being work related, that would be indicative of a limitation in wage earning capacity." *Sington*, n 12, p 166.

driving a hi-lo. But that is not enough to establish a disability according to *Sington.*[14]

The Court of Appeals fabricated a presumption of disability when an employee professes an inability to resume a particular job that was held when injured and the existence of other jobs within the employee's qualifications are not obvious. The Court of Appeals said that when "the existence of other jobs within the employee's qualifications and training [are] not apparent…the employer would be expected to establish facts on which to base a contrary conclusion."[15] This *is* a presumption because the Court of Appeals has decided that the evidence from the proponent – an employee such as Stokes – about two facts – the inability to resume a given job and that the existence of other jobs is not obvious to him – implies another fact – disability – so that the burden of going forward shifts to the opponent – the employer such as DaimlerChrysler – to actually disprove the implication – disability – or accept it.[16] And this presumption was fabricated. The Court of Appeals did not refer to any text of any statute in the WDCA as the authority for this. Indeed, the Court of Appeals created this from what it said was only a "practical recognition."[17]

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14 "…'disability' as defined in MCL 418.301(4) cannot plausibly be read as describing an employee who is unable to perform one particular job, but who suffers no reduction in wage earning capacity." *Sington*, p 158.

15 *Stokes*, p 591.

16 "a presumption is solely to place the burden of producing evidence on the opposing party. It is a procedural device which allows a person relying on the presumption to avoid a directed verdict, and it permits that person a directed verdict if the opposing party fails to introduce evidence rebutting the presumption." *Widmayer*, p 289.

17 *Stokes*, p 591.

It was disingenuous in the extreme for the Court of Appeals to say that this "does not change the allocation of the burden of proof."[18] The responsibility or burden of coming forward with evidence *is* reallocated or shifted from the proponent – the employee – to the opponent – the employer – when the proponent has presented evidence of fewer facts than required by law – *Sington*. Indeed, the disposition of this case reveals the shift. The Court of Appeals ratified the conclusion that Stokes – the proponent – was disabled – with evidence of fewer facts than were required by law – *Sington* – when he said he could not do any job he had done in the past – and because DaimlerChrysler – the opponent – had not come forward with any evidence contradicting the conclusion.[19]

The dissent was entirely correct about the mistake by the Court of Appeals. The dissent observed that,

> "This broad burden of proof includes the burden of showing disability under *Sington* and the Supreme Court's order in *Rea v Regency Olds/Mazda/Volvo*, 450 Mich 1201; 536 NW2d 542 (1995). The *Rea* order specifically states that "the 1987 definition of disability in the Workers' Disability Compensation Act [the present version of §301(4)] *requires a claimant* to demonstrate how physical limitation affects wage-earning capacity in work suitable to

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[18] *Stokes*, p 591.

[19] "...his qualifications and training limited him to jobs driving a hi-lo and working in a warehouse, and 'physically strenuous work from which he is clearly disabled.' This conclusion was based on plaintiff's testimony concerning his prior jobs, his education and training, **and defendant's failure to produce evidence** showing that, contrary to plaintiff's proofs, there were, in fact, jobs within plaintiff's qualifications or training that he could perform that would provide him with his maximum wage." *Stokes*, p 592. (emphasis added)

the claimant's qualifications and training."[20]

This was right because the case law authority – *Rea v Regency Olds/Mazda/Volva* [21] – was specifically endorsed by the Court in *Sington.*[22]

The error by the Court of Appeals is jurisprudentially significant for it effectively undermines the legal standard of disability established by the Court in *Sington.* It requires the employer to prove ability before the employee actually proves disability and if the employer does not prove that ability, then the employer must pay compensation and all on the basis of a "practical recognition." And not on the basis of any text of any statute or *Sington.* Again, the Court must reprove the Court of Appeals for having created rules from "practical recognition" or to "avoid hardship" when there is simply no text allowing for that,

> "Our task, under to constitution, is the important, but yet limited, duty to read and interpret what the Legislature has actually made the law. We have observed many times in the past that our Legislature is free to make policy choices that, especially in controversial matters, some observers will inevitable think unwise. This dispute over the wisdom of a law however, cannot give warrant a court to overrule the people's Legislature."[23]

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[20] *Stokes*, p 600 (SAAD, J., dissenting). (emphasis added).

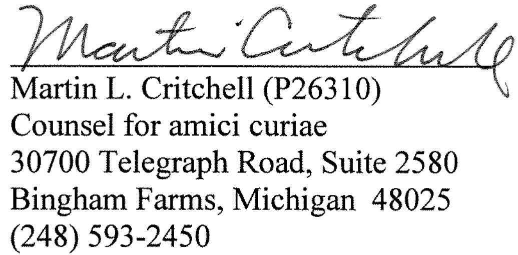
[21] 450 Mich 1201; 536 NW2d 542 (1995).

[22] "Our analysis in this regard is consistent with the following conclusion in *Rea*…'and'…we conclude, as did the *Rea* court before us, that…" *Sington*, p 156, 158.

[23] *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 161; 680 NW2d 840 (2004) .

RELIEF

Amicus curiae Michigan Self-Insurers Association and Michigan Manufacturers Association ask the Court to reverse *Stokes* v *DaimlerChrysler Corp,* 272 Mich App 591; 737 NW2d 637 (2006) and remand the case to the Workers' Compensation Appellate Commission or grant leave to appeal.



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