

STATE OF MICHIGAN
COURT OF APPEALS

THOMAS L. GUERRERO,

Plaintiff-Appellant,

v

DEREK A. SMITH and GLEN I. SMITH,

Defendants-Appellees.

UNPUBLISHED

August 22, 2006

No. 268477

Ingham Circuit Court

LC No. 04-000125-NI

Before: Cavanagh, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the summary dismissal of his third-party no-fault action. We reverse and remand for further proceedings.

On June 22, 2002, plaintiff allegedly sustained injuries when his vehicle was rear-ended in a chain reaction accident involving defendant Glen Smith's vehicle which was being driven by defendant Derek Smith. The injuries plaintiff claims to have suffered include a closed-head injury, back and neck injuries, and an aggravation of pre-existing back and neck injuries. After fairly extensive discovery, defendants filed a motion for summary disposition, pursuant to MCR 2.116(C)(10), arguing that the case should be dismissed because plaintiff could not establish that he suffered a threshold injury as required by MCL 500.3135. In particular, defendants argued, (1) plaintiff could not show an objective manifestation of any injuries relative to his head, back, or neck that were caused by the accident, and (2) even if he did suffer some minor injuries, they did not affect his general ability to lead his normal life.

Plaintiff responded to defendants' motion, arguing that he was entitled to summary dismissal pursuant to MCR 2.116(I)(2) because his medical records and physician's deposition show that (1) he suffered a closed-head injury, (2) back and neck injuries, and (3) an aggravation of a pre-existing arthritic condition which combined to affect his ability to lead his normal life, particularly his ability to work in his profession as a landscaper.

After oral arguments, the trial court granted the motion to summarily dismiss. The court concluded that, according to *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), plaintiff was required to show that his alleged closed-head injury was objectively manifested and plaintiff failed to do so. In particular, the trial court held that "[t]he serious impairment of a body function, albeit closed head injury, has to still be objectively manifested as an impairment of a body function and it must affect the person's ability to lead his or her normal life." The trial

court then concluded that, because there was not an objective sign of a closed-head injury, defendants were entitled to summary disposition as to that claim. However, the trial court did not directly address either plaintiff's alleged back and neck injuries or aggravation of a pre-existing condition claims. Plaintiff's motion for reconsideration was denied and this appeal followed.

MCL 500.3135 provides, in relevant part:

(1) A person remains subject to tort liability for noneconomic loss . . . 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 issue 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.

And, MCL 500.3135(7) defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. *Churchman v Rickerson*, 240 Mich App 223, 228; 611 NW2d 333 (2000). If the plain and ordinary language of the statute is clear, judicial construction is neither necessary nor permitted. *Id.* Here, the plain and ordinary language of the statute is clear—with regard to plaintiff's alleged closed-head injury, all that he was required to establish to avoid summary disposition was that "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." Contrary to the trial court's analysis, there is no requirement that the plaintiff also establish that it was objectively manifested to avoid summary dismissal of his closed-head injury claim under MCL 500.3135(2)(a)(ii).

The trial court's reliance on *Kreiner* for the proposition that the closed-head injury be objectively manifested was misplaced. *Kreiner* did not involve a purported closed-head injury. Rather, the focus in *Kreiner* was "whether plaintiffs' impairments affect their general ability to

lead their normal lives.” *Kreiner, supra* at 130. In fact, the *Kreiner* Court noted that MCL 500.3135(2)(a)(ii) “creates a special rule for closed head injuries by providing that 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.” *Id.* at 132 n 15.

Because the trial court failed to properly consider the issue whether plaintiff presented the requisite proof of a closed-head injury to avoid summary dismissal, we reverse the dismissal of this claim and remand for its consideration by the trial court. Further, because the trial court failed to directly address plaintiff’s back and neck injury claims, as well as his aggravation of a pre-existing condition claim, we reverse their summary dismissal and remand for consideration of the claims. See *Churchman, supra* at 232, citing *May v Sommerfield*, 239 Mich App 197, 202; 607 NW2d 422 (1999).

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Michael R. Smolenski