STATE OF MICHIGAN

COURT OF APPEALS

DAN MCCALL and BARBARA MCCALL,

Plaintiffs-Appellants,

v

JOYCE DORCH,

Defendant-Appellee.

UNPUBLISHED
January 23, 2007

No. 269817
Berrien Circuit Court
LC No. 03-003617-NI

Before: Murray, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

Plaintiffs Dan and Barbara McCall appeal by right the trial court's final order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) and dismissing plaintiffs' claims for noneconomic damages. We affirm.

The present case arises from plaintiff Dan McCall's injuries in an automobile accident on September 15, 2002.[1] Plaintiff maintains that the trial court erred when it granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10) because a question of fact existed regarding whether he suffered a serious impairment of body function as a result of the automobile accident. We do not agree.

We review de novo the trial court's order granting summary disposition to defendant pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). When considering a motion pursuant to MCR 2.116(C)(10), the trial court must "review the record evidence, and all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists to warrant a trial." *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the plaintiff, the non-moving party. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817

[1] Because Barbara McCall's claims are derivative of plaintiff Dan McCall's claims, we will only refer to Dan's claims in the following discussion.

(1999). However, the court may not make factual findings or weigh the credibility of witnesses. *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999).

"A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Maiden, supra* at 120.

Similarly, we review questions of law involving statutory interpretation and statutory construction de novo. *Michigan Muni Liability & Prop Pool v Muskegon Co Bd of Co Rd Comm'rs*, 235 Mich App 183, 189; 597 NW2d 187 (1999); *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

MCL 500.3135(1) states, "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." 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." To determine if an individual suffered a serious impairment of body function,

> the effect of the impairment on the course of a plaintiff's entire normal life must be considered. Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's "general ability" to lead his normal life has not been affected and he does not meet the "serious impairment of body function" threshold. [*Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004).]

Our Supreme Court developed a multi-step process to identify "whether a plaintiff who alleges a 'serious impairment of body function' as a result of a motor vehicle accident meets the statutory threshold for third-party tort recovery." *Id.*

> First, a court must determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. . . .
>
> [I]t must next determine if an "important body function" of the plaintiff has been impaired. . . . If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. Subjective complaints that are not medically documented are insufficient.
>
> [I]t then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. [*Id.* at 132.]

However, MCL 500.3135(2)(a) states:

> (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.

In MCL 500.3135(2)(a)(*ii*), our Legislature has provided an exception under which a plaintiff may automatically establish a question of fact regarding whether he suffered a serious impairment of body function if he provides testimony by a licensed allopathic or osteopathic physician stating that he may have suffered a serious neurological injury. *Churchman v Rickerson*, 240 Mich App 223, 226; 611 NW2d 333 (2000). To establish that he suffered a "serious neurological injury," plaintiff must provide more than a diagnosis that he sustained a closed-head injury. *Id.* at 229. Instead, "the plain language of the statute requires some indication by the doctor providing testimony that the injury sustained by the plaintiff was severe." *Id.* at 230.

Plaintiff submitted the affidavit of neurologist Dr. Lisa Ferley to defendant and the trial court at the hearing on defendant's motion for summary disposition. In this affidavit, Ferley stated that she evaluated plaintiff in 2003 and concluded that, as a result of the September 2002 accident, he suffered from post-concussive syndrome following a closed-head injury. She concluded that his condition "represented a serious neurological injury that would have prevented him from performing his job as an ironworker and would have significantly interfered with normal activities of daily living." Plaintiff argues that, because the affidavit signed by Ferley, a licensed physician and neurologist, indicated that he suffered from a serious neurological injury caused by the September 15 accident, the affidavit was sufficient to establish a question of fact pursuant to MCL 500.3135(2)(a)(*ii*) regarding whether he suffered a closed-head injury that constituted a serious impairment of body function.

Defendant argued in the trial court, and argues on appeal, that the affidavit was untimely filed and, therefore, may not be considered when determining if plaintiff established a question of fact regarding whether he suffered a serious impairment of body function. The trial court determined that, regardless of the admissibility of the affidavit, plaintiff failed to establish the third step of the *Kreiner* analysis, namely, that the impairment affected his ability to lead his normal life. However, the trial court's reasoning that defendant had to satisfy the requirements of the *Kreiner* analysis to establish a question of fact regarding whether he suffered a serious impairment of body function, even if he submitted an admissible affidavit indicating that he suffered a closed-head injury, is incorrect. MCL 500.3135(2)(a)(*ii*) provides an alternate method to establish a question of fact regarding whether a closed-head injury constitutes a serious impairment of body function. Because an admissible affidavit would establish a question of fact

regarding the existence of a serious impairment of body function under this alternate method, plaintiff would not need to apply the *Kreiner* factors to establish a question of fact regarding whether he suffered a serious impairment of body function.

However, the trial court should not have considered the Ferley affidavit when ruling on defendant's motion for summary disposition because the affidavit was inadmissible. MCL 600.2102 states:

> In cases where by law the affidavit of any person residing in another state of the United States, or in any foreign country, is required, or may be received in judicial proceedings in this state, to entitle the same to be read, it must be authenticated as follows:
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> * * *
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> (4) If such affidavit be taken in any other of the United States or in any territory thereof, it may be taken before a commissioner duly appointed and commissioned by the governor of this state to take affidavits therein, or before any notary public or justice of the peace authorized by the laws of such state to administer oaths therein. The signature of such notary public or justice of the peace, and the fact that at the time of the taking of such affidavit the person before whom the same was taken was such notary public or justice of the peace, shall be certified by the clerk of any court of record in the county where such affidavit shall be taken, under the seal of said court.

The affidavit was taken before and signed by a notary public of the state of Illinois. However, the affidavit does not indicate that the clerk of the court of McHenry County, Illinois, where the affidavit was signed, certified under seal that the notary public was authorized as such at the time the affidavit was signed. In *Apsey v Memorial Hosp (On Reconsideration)*, 266 Mich App 666, 676; 702 NW2d 870 (2005), this Court held that MCL 600.2102 requires that an out-of-state affidavit must meet the special certification requirements included in MCL 600.2102(4) before it can be received and considered by the court. Because the Ferley affidavit did not meet these requirements, the trial court was not permitted to receive the affidavit and consider it when ruling on defendant's motion for summary disposition.[2]

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[2] In addition, the trial court was not required to consider the Ferley affidavit because it was untimely filed. MCR 2.116(G)(1) notes that, with regard to motions for summary disposition,

> (a) Unless a different period is set by the court,
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> (*i*) a written motion under this rule with supporting brief and any affidavits must be filed and served at least 21 days before the time set for the hearing, and

(continued…)

Plaintiff could only establish a question of fact regarding whether he had a closed-head injury pursuant to the exception provided in MCL 500.3135(2)(a)(*ii*) through the Ferley affidavit. However, because the affidavit was inadmissible because it did not meet the requirements of MCL 600.2102(4), plaintiff could only establish a question of fact regarding whether he suffered a serious impairment of body function if he presented sufficient evidence to satisfy the *Kreiner* factors.

However, as the trial court noted in its ruling on defendant's motion for summary disposition, plaintiff failed to establish that the impairments he suffered in the September 15 accident affected his ability to lead his normal life. The *Kreiner* Court noted,

> In determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "*any* effect" on the plaintiff's life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life. [*Kreiner*, *supra* at 132-133.]

The accident, and the injuries that plaintiff suffered therein, did not affect his general ability to lead his normal life. Plaintiff was disabled before the accident. He had been involved in numerous motor vehicle accidents and work-related accidents over the ten-year period

(…continued)

> (*ii*) any response to the motion (including brief and any affidavits) must be filed and served at least 7 days before the hearing.
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> (b) If the court sets a different time for filing and serving a motion or a response, its authorization must be endorsed in writing on the face of the notice of hearing or made by separate order.
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> (c) A copy of a motion or response (including brief and any affidavits) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten.

Plaintiff first provided defendant and the trial court with copies of the Ferley affidavit on the day of the motion hearing, in violation of MCR 2.116(G)(1)(a)(*ii*). Further, the trial court record does not indicate that the trial court permitted plaintiff to file the affidavit at a different time than that established by the court rule. Because plaintiff *must* have filed his response to defendant's motion for summary disposition, including his brief and supporting affidavits, at least seven days before the motion hearing, he violated the court rule when he submitted the Ferley affidavit to defendant and the trial court on the day of the hearing, and the trial court had the discretion to not consider the affidavit. See *Prussing v Gen Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1978).

preceding the accident. As a result, he experienced chronic pain (which he primarily treated with pain medication) and back spasms. Because of these injuries, plaintiff was restricted from performing heavy lifting and, after severely burning his hand in 1996, was restricted from working with his right hand. The parties provide no indication that these restrictions had been lifted by the time of the September 15 accident. Further, plaintiff stopped working and began receiving Social Security disability benefits after he was injured in a 1999 car accident. Although plaintiff claimed that he considered returning to work in construction before he was involved in the September 15 accident, he continued to receive Social Security disability benefits at the time of the accident and was not actively looking for a job. Finally, after plaintiff suffered a stroke in April 2002, he spent most of his time at home staring out his apartment window, relied on others for transportation, and was unable to participate in "outdoorsy" activities that he had previously enjoyed.

Therefore, the September 15 accident did not significantly change the course of plaintiff's normal life. Although plaintiff complained of neck, shoulder, and back pain and decreased range of motion in his right arm, and claimed that these problems were caused by the motor vehicle accident, his physician noted that his pain was a chronic condition and that the decreased range of motion in his right arm was an effect of the April 2002 stroke. Further, any physical injuries that plaintiff suffered in the September 15 accident did not significantly affect the manner in which he lived his life. After the accident, plaintiff still did not work, still received Social Security disability benefits, and still spent his days staring out the window of his apartment. Although plaintiff claimed that he could perform basic automotive maintenance on family cars and helped his grandchildren take trash and laundry baskets downstairs after his stroke but before his accident, but was unable to perform these activities after his accident, plaintiff's alleged inability to participate in these activities did not affect his general ability to lead his normal life.

Further, although plaintiff's wife claimed that plaintiff could not use his right hand after the accident, the parties do not indicate the extent to which plaintiff used his right hand before the accident. Instead, plaintiff's medical records indicate that his ability to use his right hand was affected by the 1996 accident in which he burned his hand and by his April 2002 stroke. Similarly, plaintiff claims that his accident affected his memory, causing him to occasionally forget to check his mail or to pick his wife up from work. However, we conclude that these occasional lapses in memory, if caused by the accident, did not affect plaintiff's general ability to lead his normal life.

Conversely, by the time of his deposition, plaintiff had resumed driving. In a typical day he would cook dinner, run errands, pick his wife up from work, and check on his grandchildren. Plaintiff's lifestyle did not change significantly after the accident. Accordingly, we find that plaintiff failed to establish a question of fact regarding whether the accident affected his general ability to conduct the course of his life. Because plaintiff failed to establish that a question of fact existed regarding the third step of the *Kreiner* analysis, defendant's MCR 2.116(C)(10) motion for summary disposition was appropriate.

We will affirm a trial court's decision to grant summary disposition if the trial court reaches the correct result, even for the wrong reason. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 150; 624 NW2d 197 (2000). Because plaintiff's affidavit was inadmissible and, therefore, should not have been considered by the trial court, and because plaintiff otherwise

failed to establish that he experienced a serious impairment of body function as a result of the accident, defendant's motion for summary disposition was appropriately granted.

Because the trial court did not err when it granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), it also did not err when it denied plaintiff's motion to reconsider its entry of this order. MCR 2.119(F)(3).

Affirmed.

/s/ Christopher M. Murray
/s/ Donald S. Owens

I concur in result only.

/s/ E. Thomas Fitzgerald