STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND ROY SMITH,

Plaintiff-Appellee,

v

PORTIA LYNN REILLY,

Defendant-Appellant.

UNPUBLISHED
August 28, 2014

No. 313627
Oakland Circuit Court
LC No. 2011-120511-NI

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

OWENS, J. (*dissenting*).

I respectfully dissent from the majority opinion and would reverse the trial court's order denying defendant's request for a directed verdict and its order denying defendant's request for a judgment notwithstanding the verdict, vacate the trial court's judgment in favor of plaintiff, and remand the case for entry of an order of no cause of action in favor of defendant.

Generally, the no-fault act abolishes tort liability arising from the ownership, maintenance, or use of a motor vehicle. *Johnson v Recca*, 492 Mich 169, 175; 821 NW2d 520 (2012). Pursuant to MCL 500.3135(1), however, "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 a body function, or permanent serious disfigurement." (Emphasis added). In this case, it is undisputed that plaintiff has a lengthy history of back and neck pain. Inherent in this statutory language, however, is the element of causation. Thus, although a plaintiff may recover where the accident aggravates a preexisting condition, the plaintiff must still demonstrate a causal link between the accident and the aggravation of the preexisting condition. *Wilkson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000). Causation in negligence cases requires proof that the defendant's actions were both a cause in fact and legal or proximate cause of the injury. *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

I conclude that, on this record, the trial court erred in denying defendant's motion for a directed verdict or, in the alternative, her motion for JNOV because the evidence, even when viewed in the light most favorable to plaintiff, was not sufficient to support a finding by the jury that the March 24, 2011 automobile accident aggravated plaintiff's preexisting back conditions. As stated, it is undisputed that plaintiff had a history of back injuries. It is also undisputed that the same injuries prevalent in plaintiff's post-accident MRI were also prevalent in his pre-

accident MRI. In essence, then, the only evidence in support of plaintiff's claim of an exacerbation was his own testimony to that effect and the testimony of Dr. Glassen and Dr. Rapp, indicating that, in their opinions, plaintiff's self-reported increased pain was caused by the accident. However, the doctors' opinions were merely conclusory, with no supporting medical evidence other than plaintiff's subjective manifestations to them of increased pain. See *McCormick v Carrier*, 487 Mich 180, 195, 215; 795 NW2d 517 (2010) (stating that in an action under MCL 500.3135, to prove that the accident resulted in a serious impairment of a body function a plaintiff must introduce evidence demonstrating a physical basis for his subjective complaints of pain and suffering, which generally requires medical documentation). The doctors did not explain how they reached their conclusions, such as by identifying what symptoms were exacerbated, how, or to what extent. Moreover, both doctors admitted that they could not be certain that there was any actual change in the underlying pathology of plaintiff's condition because they did not compare plaintiff's pre-accident and post-accident MRIs. Therefore, I find that plaintiff has failed to "present substantial evidence from which a jury may conclude that more likely than not, but for the defendant's conduct, the plaintiff's injuries would not have occurred." *Skinner*, 445 Mich at 164-165. Accordingly, a directed verdict, or alternatively, JNOV should have been granted in defendant's favor.

/s/ Donald S. Owens