STATE OF MICHIGAN

COURT OF APPEALS

DENTON C. SLAVINGS,

Plaintiff-Appellant,

v

RACHEL L. ADAMS,

Defendant-Appellee,

and

HAZEL V. SHAW,

Defendant.

UNPUBLISHED
January 12, 2010

No. 287245
Van Buren Circuit Court
LC No. 07-056475-NI

Before: Markey, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Plaintiff Denton C. Slavings brought this action to recover non-economic damages under the no-fault act, MCL 500.3135 *et seq*. After trial, the jury found that plaintiff had not suffered a serious impairment of body function as a result of the automobile accident at issue. The trial court entered a judgment of no cause of action and plaintiff appeals by right. We affirm.

At trial, following the close of proofs, plaintiff moved for directed verdict. The trial court granted plaintiff's motion with respect to the issue of proximate cause and stated there was no genuine issue of material fact that the accident injured plaintiff's right eye. Nonetheless, the trial court found that material issues of fact remained as to whether plaintiff's injury constituted a serious impairment of a body function under the no-fault act. Specifically, the trial court ruled that questions of fact for the jury included (1) did the accidental injury result in plaintiff's losing sight in his right eye, and if so, (2) did the vision loss affect plaintiff's ability to lead his normal life? The jury concluded that plaintiff did not suffer a serious impairment of body function as a result of the accident. Subsequently, plaintiff moved for judgment notwithstanding the verdict (JNOV) and the trial court again rejected plaintiff's motion. On appeal, plaintiff contends that the trial court erred in denying his motions for directed verdict and JNOV. We disagree.

We review de novo both a trial court's denial of a motion for directed verdict and its denial of a motion for JNOV. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). In conducting this review, we must view the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Id.* A directed verdict

or JNOV should be granted only when no material fact question exists on which reasonable minds could differ, and the moving party is entitled to judgment as a matter of law. *Id.*; *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005).

A motorist in Michigan is subject to tort liability under the no-fault statute, MCL 500.3135, for noneconomic loss caused by his or her "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(1); *Moore v Cregeur*, 266 Mich App 515, 517; 702 NW2d 648 (2005). A "serious impairment of body function" is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7). A trial court may decide whether a party has suffered a serious impairment of a body function as a matter of law only if "[t]here is no factual dispute concerning the nature and extent of the person's injuries," or if 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 . . . ." MCL 500.3135(2)(a). "If there are material factual disputes, a court may not decide the issue as a matter of law." *Moore*, *supra* at 518.

In this case, the evidence showed that plaintiff had a number of health problems before being involved in the accident at issue. Dr. Sally Vetter, plaintiff's primary care physician, testified that plaintiff suffered from uncontrolled diabetes, gross hematuria, hypertension, morbid obesity, high cholesterol, heart problems including coronary artery disease, tobacco dependence, and digestive problems. In addition, a few months before the July 7, 2005, auto accident, plaintiff was diagnosed with renal failure, requiring that he quit his job as a truck driver and immediately begin kidney dialysis.

Plaintiff also had historical medical problems with respect to his right eye from which he claims to have lost sight as a result of the auto accident. Plaintiff saw ophthalmologist Dr. Thomas Jennings on March 18, 2002, who found diabetic retinopathy or macular edema in plaintiff's right eye. Jennings testified that macular edema is swelling and leakage of the blood vessels in patients who are diabetic. Plaintiff's macular edema was outside the area of his central vision, and it did not affect him in a significant manner. Jennings saw no signs of optic nerve damage but performed minor laser surgery on March 23, 2002 to treat plaintiff's macular edema. Jennings explained that plaintiff's macular edema problem was chronic and when left untreated, could progress to loss of and blurred vision. Jennings testified that after a follow-up appointment on May 18, 2002, when plaintiff's condition was improving, he was surprised that plaintiff never returned to his office for continued monitoring and treatment.

Dr. Vetter saw plaintiff the day after his auto accident. Although plaintiff had several minor injuries that eventually resolved, plaintiff also complained to Dr. Vetter regarding his right eye, specifically blurred vision. Vetter noted that plaintiff had not previously complained of vision problems, which she would have recorded because of his diabetes. Vetter performed various vision tests and concluded that plaintiff had essentially lost the top half of his vision in his right eye. She referred plaintiff to ophthalmologist Dr. James Haviland.

Vetter opined that she was "one-hundred percent" certain that the accident contributed to plaintiff's vision loss. Vetter based her opinion entirely on plaintiff's not having complained to her before regarding vision problems. But Vetter conceded plaintiff did not regularly inform

doctors of his problems and, specifically, did not inform Vetter regarding his 2002 laser treatment for macular edema. Vetter also acknowledged that plaintiff was not taking any medications for his various ailments when she first saw him on April 13, 2004. Indeed, plaintiff's medical record regarding plaintiff's complaint about his right eye indicates he had been having vision problems before the accident. The July 8, 2005 entry reads: "Also of note, patient states his vision in his right eye is blurrier than it normally is. He states his eyes have been somewhat blurry recently; however, much more so in the right eye since the accident."

Dr. Haviland saw plaintiff for a single time on July 13, 2008. He testified regarding plaintiff's right eye that it had a central scotoma (loss of vision), significant diabetic macular edema, vitreous hemorrhaging, and optic nerve edema (swelling). Dr. Haviland testified that his last two findings could have resulted from a number of possible causes including trauma or diabetes. Haviland testified he did not "have enough information to render an adequate opinion on whether or not these findings are all directly related to the trauma or whether they're related to the diabetes or some other cause." But, Dr. Haviland wrote in a letter to Dr. Vetter that a likely diagnosis of the optic nerve edema was diabetic papillitis—an inflammation of the optic nerve related to diabetes. Dr. Haviland referred plaintiff to ophthalmologist Dr. Jeffery Zheutlin.

Dr. Zheutlin saw plaintiff on July 21, 2005. Regarding plaintiff's right eye, he diagnosed "significant hemorrhage . . . from peripheral diabetic retinopathy," which obstructed plaintiff's vision, and that the optic nerve was swollen although this "wasn't super clear." Zheutlin testified that testing disclosed significant reduction in visual information being transmitted from plaintiff's right eye to his brain, which indicated optic nerve damage, and nearly permanent loss of vision in plaintiff's right eye. Zheutlin testified that plaintiff's diabetic condition rendered him more susceptible, because of diminished blood flow, to traumatic eye injuries. Zheutlin asserted that because plaintiff's diabetic macular edema was controlled by laser surgery, and because the optic nerve was causing plaintiff's vision difficulty, it was more than likely that the accident, combined with plaintiff's preexisting diabetic conditions, to cause the optic nerve damage that resulted in plaintiff's right eye vision loss.

Dr. Zheutlin conceded that loss of blood flow in small vessels caused by diabetes could cause optic nerve damage. Zheutlin also conceded there is no good way to distinguish between diabetic optic nerve damage and trauma-caused damage, but he believed the latter occurred with respect to plaintiff based on the "time sequence."

Plaintiff testified that before the accident he did not have any vision problems with his right eye; however, after he was forced to quit his job as a truck driver and begin kidney dialysis, plaintiff completed a "Function Report," dated May 27, 2005, as part of an application for Social Security Administration (SSA) disability benefits. In that report, he and his wife Patricia, who helped him complete the form, asserted that he had vision problems with his right eye. The report was admitted as an exhibit at trial. Plaintiff explained that he was unsure of whether he was required to make this assertion in connection with his laser treatment in 2002. Plaintiff also testified in a deposition that he and a social worker backed-dated the form to May 27 but that the form was actually completed in August. In the SSA form, plaintiff also described his lifestyle as being severely limited by his ability to accomplish many tasks on his own or participate in activities.

We conclude on de novo review of the evidence that the trial court properly denied plaintiff's motions for directed verdict and JNOV. The evidence could lead reasonable jurors to disagree, so the trial court properly declined to substitute its judgment for that of the jury. *Foreman*, *supra* at 136; *Moore*, *supra* at 518. Specifically, the evidence created material questions of fact regarding (1) whether the accident caused the plaintiff's vision problems in his right eye, or were they the result of plaintiff's preexisting health conditions, or some combination thereof, and if at least partly caused by the accident, (2) did plaintiff's vision problems attributed to the accident affect plaintiff's ability to lead his normal life?

The trial court cited the SSA Function Report plaintiff completed as particularly important to raising material fact questions regarding the nature and extent of plaintiff's accident-caused injury and its affect on plaintiff's life. In denying plaintiff's motion for JNOV, the court concluded that jury determined that plaintiff simply had not satisfied his burden of proof by the preponderance of the evidence there was a serious impairment of body function caused by the accident. We agree that SSA form and plaintiff's effort to explain it likely severely impacted plaintiff's credibility regarding his claim of sudden, after-the-accident, onset of right-eye vision problems. Both Drs. Vetter and Zheutlin's opinions of trauma-caused damage were dependent on plaintiff's self-report of sudden onset of right eye vision loss. In addition, Dr. Vetter's recorded history undercuts plaintiff's claim of sudden onset. Further, Dr. Haviland, who saw plaintiff about one week after the accident, testified he did not have enough information to render an opinion whether plaintiff's vision problems were related to the trauma, and in a letter stated a likely diagnosis regarding the optic nerve edema was diabetic papillitis. Finally, the experts conceded plaintiff's vision problems could be caused by diabetes, and Dr. Zheutlin noted there is no good way to distinguish between diabetic optic nerve damage and trauma-caused damage. In short, there were material fact issues regarding the nature and extent of the injury plaintiff suffered as a result of the car accident, which depended heavily on the jury's assessment of plaintiff's credibility, and secondarily on the jury's assessment of the credibility of plaintiff's experts. It is a jury's responsibility to determine the credibility of witnesses and weigh their testimony. *Foreman*, *supra* at 136. Neither the trial court nor this Court may substitute its judgment for that of the jury. *Id.*; *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

We affirm. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Richard A. Bandstra
/s/ Christopher M. Murray