

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RENEE LOUISE COCKLE,

Plaintiff-Appellant,

v

MARY BELL THOMAS and CHARLES  
ANDERSON,

Defendants-Appellees,

and

WILLY LOU ANDERSON and AUTOMOBILE  
CLUB INSURANCE ASSOCIATION,

Defendants.

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UNPUBLISHED

October 24, 2006

No. 261884

Wayne Circuit Court

LC No. 02-244032-CZ

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Plaintiff, Renee Louise Cockle, appeals as of right from the grant of a directed verdict in favor of defendants, Mary Bell Thomas and Charles Anderson, resulting in a directed verdict in favor of plaintiff's third-party automobile negligence claim. Because MCL 500.3135(2)(a)(ii) does not delimit the admissibility of evidence pertaining to the existence of a closed-head injury, the trial court erred in refusing to permit a Ph.D. psychologist to opine or provide evidence of the existence of a closed head injury, we remand for a new trial on threshold injuries. And, because factual questions exist involving witness credibility determinations on which reasonable jurors could differ, the trial court erred in granting a directed verdict on the issue of liability, and we remand for a new trial on liability. Reversed and remanded.

Plaintiff's claims arise from an automobile accident that occurred on March 16, 2002. Plaintiff was a restrained backseat passenger in a Buick owned and operated by Anthony Smith. The collision occurred as Thomas pulled out of a parking spot on Harper in Detroit. Despite being restrained, plaintiff asserts she was thrown forward and back during impact. Plaintiff also contends she struck her right shoulder against the back seat. And when thrown forward, plaintiff alleges she hit her head against the back of the front passenger seat so that "[her] face was inside the seat." Plaintiff filed her initial complaint in December 2002 asserting injuries to her "neck and lumbar disc" involving disc herniation, shoulder injuries and other, unspecified injuries

resulting in a “serious and permanent impairment of important body functions.” In July 2003, plaintiff filed an amended complaint, reasserting her previously alleged neck and back injuries and including the incurrence of a closed-head injury. Defendants timely answered and trial commenced.

Before initiation of trial, defendants filed a motion seeking to preclude plaintiff from offering expert testimony at trial. Plaintiff planned to assert a closed-head injury and provide opinion testimony pertaining to the alleged injury through use of Donald Deering, a doctoral-level psychologist. Defendants objected to the proposed witness testifying regarding a closed-head injury based on his failure to qualify as a medical expert, lack of reliable methodology or testing used, and the failure to timely notify defendants of the intent to call this witness.

The trial court entertained oral argument on the matter at the onset of trial. Among other argument, defendants argued that plaintiff had failed to provide or list either a licensed allopathic or osteopathic physician to meet the threshold requirement for testimony regarding the alleged closed-head injury relying on MCL 500.3135(2)(a)(ii). The trial court precluded evidence by plaintiff’s psychologist, indicating:

You can’t do it that way. That’s specifically outlawed by the Michigan No Fault Law. There has to be an M.D. or a D.O. to testify to that. Therefore, the motion of [defense counsel] is granted. And so the jury is not going to hear about her treatment for a closed head injury.

The trial court also denied defendants’ request to introduce testimony by their retained neuropsychologist for the limited purpose of demonstrating malingering by plaintiff, ruling such testimony would be “collateral” and would potentially “open the door to everything thing [sic] I’ve just excluded.” The trial court indicated its ruling did not extend to the exclusion of medical records by treating doctors, but only “the psychologist’s reading of them.”

On appeal, plaintiff argues the trial court erred in refusing to permit documentary evidence and testimony by a psychologist to establish the existence of a closed head injury. We review a trial court’s decision regarding the admission of evidence for an abuse of discretion. *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 688; 630 NW2d 356 (2001). “An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion.” *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Plaintiff specifically contends the trial court erred in refusing to permit a Ph.D. psychologist to opine or provide evidence of the existence of a closed head injury. Defendants assert that the language of MCL 500.3135(2)(a)(ii) requires the testimony of a medical doctor to establish the existence of a closed head injury. MCL 500.3135, provides, in relevant part:

(2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, 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."

Contrary to the determination of the trial court and argument of defense counsel, the statutory provision does not provide the exclusive manner or means for a plaintiff to establish a closed-head injury and the existence of a factual dispute. *Churchman, supra* at 232. MCL 500.3135(2)(a)(ii) does not delimit the admissibility of evidence pertaining to the existence of a closed-head injury. Rather, it is simply an exception that permits a party to automatically create a question for a jury through provision of testimony by a physician that a serious neurologically based injury might exist. Our review of the record reveals that the trial court failed to properly consider the issue whether plaintiff presented the requisite proof of a closed-head injury pursuant to MCL 500.3135(2)(a)(i) and (ii) wholly separate and distinct of the automatic exception in MCL 500.3135(2)(a)(ii). Because the trial court did not make the required findings, we reverse and remand for a new trial for the purpose of determining the existence of a threshold "closed-head" injury. *Churchman, supra* at 232, citing *May v Sommerfield*, 239 Mich App 197, 202; 607 NW2d 422 (1999).

Pursuant to the no-fault act, a person may recover noneconomic damages only when they have suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). Plaintiff asserts "serious impairment of body function," and the record indicates that plaintiff raised two separate claims, one involving the closed-head injury and one involving neck and back injuries. Serious impairment of body function is statutorily 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).

The standard applied for recovery of noneconomic damages is not based on serious pain and suffering, but rather, on injuries that impact the functioning of the body. *Miller v Purcell*, 246 Mich App 244, 249; 631 NW2d 760 (2001). To meet the threshold requirement, the impairment of the important body function must impact the trajectory of a person's entire normal life. *Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004). In this matter, the trial court granted a directed verdict in favor of defendant on plaintiff's neck and back claims without

the benefit of hearing evidence related to plaintiff's claimed associated closed-head injury. We have already determined that the trial court erred when it did not properly consider whether plaintiff presented the requisite proof of a closed-head injury. With this in mind, if ultimately admissible, evidence relating to the closed-head injury could affect the nature and extent of plaintiff's injuries on the whole, especially in relationship to her other asserted neck and back injuries. For this reason, we must vacate the trial court's directed verdict with respect to plaintiff's neck and back claim, and remand for a new trial on threshold injuries.

Plaintiff also contends the trial court erred in granting a directed verdict on the issue of liability. "This Court reviews de novo the grant or denial of a directed verdict. In reviewing the trial court's decision, we view the evidence presented up to the time of the motion in the light most favorable to the nonmoving party, granting that party every reasonable inference, and resolving any conflict in the evidence in that party's favor to decide whether a question of fact existed." *Cacevic v Simplimatic Engineering Co (On Remand)*, 248 Mich App 670, 679; 645 NW2d 287 (2001). If no factual questions exist on which reasonable jurors could differ then a directed verdict is properly granted. *Id.* at 679-680. A directed verdict is not appropriate if reasonable jurors could reach different conclusions and this Court should not substitute its judgment for that of the jury. *Id.* at 680.

The record clearly contains contradictory testimony regarding the mechanism and circumstances surrounding the accident. Smith contends he was driving on Harper in Detroit, when Thomas abruptly pulled out of a parking lot or alley and struck the right front portion of Smith's vehicle near the passenger side. Smith approximated his driving speed at 25 miles per hour and could not recall having the opportunity or sufficient time to apply his brakes. Contrary to Smith's version of the accident, Thomas indicated she was parallel parked on Harper. Prior to attempting to leave the parking space, Thomas reported looking both ways for traffic and did not pull away from the curb until she did not observe any traffic. Thomas indicated Smith's car struck her vehicle on the driver's side as she was pulling away from the curb.

In light of the incongruent testimony in the record, plaintiff argues that the trial court improperly assumed the role of fact finder to resolve the factual dispute when it granted a directed verdict on the issue of liability. Defendants contend the trial court was justified in granting a directed verdict because plaintiff's theory regarding the accident and the commensurate liability were implausible and unsupported by the evidence. Negligence can be proven by circumstantial evidence. A prima facie case of negligence may be based on legitimate inferences, provided that sufficient evidence is produced to take the inferences "out of the realm of conjecture." *Ritter v Meijer, Inc*, 128 Mich App 783, 786; 341 NW2d 220 (1983).

After reviewing the record in the light most favorable to plaintiff, granting plaintiff every reasonable inference, and resolving any conflict in the evidence in plaintiff's favor to decide whether a question of fact existed, it appears that plaintiff has presented evidence regarding liability for occurrence of the accident. Defendants have certainly disputed plaintiff's evidence. But, the fact remains that the evidence proffered by plaintiff does present questions of fact that the trial court should have left to the jury. Because factual questions exist involving witness credibility determinations on which reasonable jurors could differ, the trial court erred in granting a directed verdict on the issue of liability, and we remand for a new trial on liability. *Cacevic, supra* at 679-680.

Because our resolution of the foregoing renders any remaining issues moot, we decline to address their merits.

Reversed and remanded. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Pat M. Donofrio