STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM J. O'CONNOR,

Plaintiff-Appellant,

v

DETROIT FREE PRESS, INC.,

Defendant-Appellee.

March 27, 1991

No. 126228

Before: Griffin, P.J., and Reilly and T.M. Burns,* JJ.

PER CURIAM.

In this no-fault action, plaintiff appeals as of right from a circuit court order granting summary disposition to defendants under MCR 2.116(C)(10). We reverse.

Plaintiff has been employed by defendant since 1954. Most recently, plaintiff worked as a truck driver delivering bundles of newspapers to customers. On November 15, 1987, plaintiff returned to work after having been off work for over a year due to back problems. Shortly after leaving defendant's plant in a Free Press delivery truck, plaintiff hit a bump in the road that caused the driver's seat in the truck to bottom out, jolting plaintiff. The seat was mounted on a steel shaft and was held in place with a spring. Each time the truck hit a bump or pothole, the seat bottomed out and plaintiff was again jolted. Sometime during the night, plaintiff began to feel discomfort in his lower back. Plaintiff worked the remainder of the evening of November 15, and he continued to work as a truck driver for defendant. However, plaintiff saw his physician on November 25, 1987, and again on December 2, 1987, for his lower back problems. He filed a company accident report on December 9, 1987.

On December 11, 1987, plaintiff stopped working and he began receiving workers' compensation benefits. Plaintiff then brought this action seeking wage loss recovery under the no-fault act. Defendant moved for summary disposition under MCR 2.116(C)(10), claiming that plaintiff's injury was not the result of a motor vehicle accident within the meaning of the no-fault act because the injury was not caused by a single, specific event. The trial court agreed with defendant and granted defendant's motion.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. A party opposing a motion brought under (C)(10) may not rest upon the mere allegations or denials in his or her pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). [See Panich v Iron Wood Products, 179 Mich App 136, 139 (1989).]

The narrow question presented in defendant's motion for summary disposition, and the question before us here, is whether plaintiff's injury was not "accidental" within the meaning of §3105 of the no-fault act, MCL 500.3105; MSA 24.13105. We believe that the trial court erred in deciding this question as a matter of law and we therefore reverse.

Both parties agree that there are two cases which are pivotal to a resolution of this appeal.

In the first case, Wheeler v Tucker Freight, 125 Mich App 123; 336 NW2d 14, lv den 418 Mich 867 (1983), the plaintiff was a truck driver who became disabled due to the rigors of truck driving. The plaintiff claimed that his disability gradually developed over the nineteen years of his employment. The Court held that because the plaintiff's injuries were not attributable to a single identifiable event or accident, the injuries were not "accidental" within the meaning of the no-fault act: "Reading the no-fault act as a whole, we conclude that the Legislature intended to authorize the payment of personal protection insurance benefits only for an injury sustained in a single accident, having a temporal or spatial location." Id., pp 127-128.

The other case which is pivotal to this appeal is Randles v Carriers Ins Co, 139 Mich App 57; 361 NW2d 6 (1984). In Randles, the plaintiff was responsible for loading and unloading trucks which carried automobiles. Plaintiff claimed that he injured his back while getting in and out of various vehicles during the course of a single day's work. The trial court agreed with the plaintiff that the plaintiff's injuries could be considered as having occurred at a single point in time, thereby bringing the injuries within the purview of the no-fault act. However, the Court determined that the plaintiff's injury did not arise out of the use of a motor vehicle as a motor vehicle. MCL 500.3105(1); MSA 24.13105. Rather, the injury occurred through the accumulated use of his body in a certain way. Therefore, plaintiff's injury was not compensable under the no-fault act.

In deciding that plaintiff's injury may have been considered as having occurred at a single point in time, the Randles Court said, "The fact that an injury was not immediately perceptible is not dispositive; traumatic injuries do not always manifest themselves when first received." Randles, p 60. The Court also accepted as true the plaintiff's claim that a single point in time existed at which the injury occurred, even though the point could not be identified.

We read Randles as being consistent with the Wheeler Court's holding that in order for an injury to be "accidental" under the no-fault act, the injury must have been sustained in a single accident having a particular temporal and spatial location. However, under Randles, the fact that the plaintiff cannot identify the precise point in time and place where the accident occurred will not necessarily preclude a no-fault claim. Rather, an injury should be compensable under the no-fault act where the plaintiff is clearly injured, and the plaintiff can place the injury within fairly narrow temporal and spatial parameters.

In the instant case, plaintiff has consistently maintained that he injured his back during the first night off, on his established route, while driving defendant's truck. Under Randles, even if plaintiff could not indicate the precise point that the injury occurred, recovery may still be available under the no-fault act. The instant case is clearly distinguishable from Wheeler, supra, where the plaintiff alleged that his injuries occurred gradually over a nineteen-year period. Further, looking at plaintiff's deposition and the other documents available to the trial court, reasonable minds could disagree as to whether plaintiff did actually indicate that the very first bump was the point of injury and that subsequent bumps merely aggravated the injury. Thus, there remained a factual question regarding whether plaintiff had or had not stated a claim upon which relief was available under the no-fault act, and the trial court erred in granting summary disposition to defendants.

Reversed.

/s/ Richard Allen Griffin
/s/ Thomas M. Burns

STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM J. O'CONNOR,

Plaintiff-Appellant,

v

DETROIT FREE PRESS,

Defendant-Appellee.

March 27, 1991

No. 126228

Before: Griffin, P.J., and Reilly and T. M. Burns,* JJ.

REILLY, J. (dissenting)

I respectfully dissent.

While plaintiff's injury was accidental, it was not the result of a motor vehicle accident as that term is commonly understood.

The fact that plaintiff's back injury was not immediately perceptible is not dispositive. The issue is whether the injury was a result of a single accident having a temporal and spatial location. Molliter v Associated Truck, 140 Mich App 431; 364 NW2d 344 (1985). Plaintiff is not able to point to a specific location as being the site of his injury. According to plaintiff's testimony, his seat "bottomed out" every time he hit a pothole or bump in the road. Plaintiff claims he "bottomed out" one hundred to three hundred times on the first night he returned to work after recuperating from a previous back injury. If we accept plaintiff's reasoning, he had one hundred to three hundred "accidents" that evening, although he can only give the location of the first accident. He admits that he cannot say which bump caused his back injury.

According to Molitor, supra, and Wheeler v Tucker Freight, 125 Mich App 123; 336 NW2d 14, lv den 418 Mich 867 (1983), the plaintiff must be able to offer proof that his injury was the result of "a single specific accident," not a series of events.

In Randles v Carriers Ins Co, 139 Mich App 57; 361 NW2d 6 (1984), the plaintiff claimed that "a single point in time existed, at which the pain in his back increased so suddenly that it can be said that an injury occurred even though the time cannot be identified." For purposes of the appeal this Court accepted Randles' claim as true. Nevertheless, the Court found that his injury did not arise out of the use of a motor vehicle as a motor vehicle. Because his job involved getting in and out of various vehicles while loading or unloading them onto carrier trucks, the motor vehicles merely provided the site for his injury. The injury occurred not because of the use of the vehicle but because of the nature of his employment.

In contrast, plaintiff's injury may well have occurred as a result of using his motor vehicle -- as a motor vehicle -- because the injury allegedly resulted from repeated jostling over a five and one/half hour period. However, there is no evidence to indicate that the first bottoming out rather than the third or fiftieth was the cause of his injury, and there is no reason to believe that plaintiff could make such a showing if further discovery was permitted.

As plaintiff cannot identify a location for the jostling which caused his injury, I cannot say that his injury is the result of a single, specific motor vehicle accident. Repeated jostling on a bumpy or pot filled road due to inadequate springs is not sufficient to bring plaintiff's condition within the ambit of "no-fault" coverage.

I would affirm.

/s/ Maureen Pulte Reilly