

S T A T E O F M I C H I G A N  
C O U R T O F A P P E A L S

DAVID J. AKIN,

Plaintiff-Appellant,

JUN 10 1986

-v-

No. 82995

LESTER G. SLOCUM,

Defendant-Appellee.

BEFORE: T.M. Burns, P.J., D.E. Holbrook, Jr., and J.D. Payant\*,  
JJ.

PER CURIAM

Plaintiff David J. Akin brings this appeal by leave granted from a circuit court order affirming a district court order granting summary judgment in favor of defendant Lester G. Slocum. We reverse and remand for trial.

Plaintiff filed a complaint on December 4, 1981 in Oakland County Circuit Court against defendant for injuries he sustained in a motor vehicle accident on July 13, 1979. Plaintiff's motorcycle collided with a truck driven by defendant.

Plaintiff alleged that his injuries caused a "serious impairment of body function, permanent significant scarring, and an impairment of earning capacity". After the case was remanded to 50th District Court, defendant moved for summary judgment pursuant to GCR 1963, 117.2(1) and DCR 117.2(1), claiming that plaintiff's injuries, as a matter of law, did not meet the threshold requirement for recovery under the no-fault act, MCL 500.3135; MSA 24.13135. Plaintiff countered the motion, contending that the accident caused him several injuries, including a hematoma of the right leg which required drainage, scarring, a cracked bone in his leg, lumps, bruises, abrasions, a lower back injury and a hip injury, and that these injuries impaired his ability to walk and thereby caused a serious

---

\*Circuit judge, sitting on the Court of Appeals by assignment.

impairment of body function. Plaintiff added an affidavit stating that he needs a cane to walk, that his consumption of the painkillers Motrin and aspirin has caused him to suffer gastritis, and that his injuries prevented him from returning to the field of common labor. Plaintiff submitted that at the very least his injuries presented a factual issue as to their extent so as to preclude summary judgment against him. The district court in granting defendant's motion, held that "this is one of those cases that the Supreme Court meant was not to be brought under the No-Fault Act".

Plaintiff appealed to Oakland County Circuit Court, claiming a material issue of fact existed as to the extent of his injuries. Plaintiff's counsel argued that plaintiff had seen an orthopedic surgeon and intended to see another surgeon about his knee as soon as he completed treatment for gastritis. Other factual questions for the jury, plaintiff urged, concerned his use of crutches for four to six months after the accident and the amount of Motrin and aspirin he consumed. Plaintiff concluded that the use of crutches, reliance on painkillers to the extent he suffered gastritis, and the recommendation of various surgical procedures, and the necessity of permanently being required to use a cane constituted objective manifestations of the serious impairment he sustained. Defendant responded that the nature and extent of plaintiff's injuries were readily ascertainable, were not serious, and were not objectively manifested.

The circuit court held that the district judge's decision was not clearly erroneous and affirmed summary judgment in favor of defendant.

First we consider whether the circuit court reversibly erred by applying a "clearly erroneous" standard of review in affirming the grant of defendant's motion for summary judgment. We hold that it did.

Because plaintiff's allegation that a genuine issue of material fact existed regarding the nature and extent of his injuries was rejected by the district judge, the circuit court

should have reviewed the record before it to determine whether as a matter of law there was a genuine issue of fact. American Parts Company v American Arbitration Association, 8 Mich App 156, 170; 154 NW2d 5 (1967). The circuit court improperly applied the "clearly erroneous" standard. The question of whether there is a serious impairment of a body function is not a question of fact but rather a question of law. Questions of fact only should be reviewed in the "clearly erroneous" standard. We are not unmindful of Kelleher v Kuchta, 138 Mich App 45; 359 NW2d 224 (1984), in which this court applied the "clearly erroneous" standard to review of a no-fault threshold case. That panel reasoned that to do otherwise would force reviewing courts to simply "second guess" the trial court's decision. While it is hoped the review amounts to more than guesswork, we are of the opinion that this aptly defines the function of an appellate court in reviewing a question of law and prefer to follow the panels in Routley v Dault, 140 Mich App 190; 363 NW2d 450 (1984); Vreeland v Wayman, 141 Mich App 574; 367 NW2d 362 (1985); and Guerrero v Schoolmeester, 135 Mich App 742; 356 NW2d 25 (1984) as to the standard of review.

Plaintiff argues that there were factual disputes surrounding the nature and extent of his injuries, and the disputes were material to the determination of whether he suffered a serious impairment of a body function. The factual dispute centered on plaintiff's insistence that his ability to walk normally had been significantly impaired. He claims he can present evidence at trial to prove he was required to use crutches for the first four to six months after the accident, that he will be permanently required to use a cane because of the instability and pain in his knees, and that one doctor recommended surgery for his knees. Defendant argues that the doctor's report does not state that plaintiff's knee injuries were caused by the accident and that in fact plaintiff had been treated by another doctor for a 1982 knee sprain.

Plaintiff has presented a question of fact material to the threshold issue. The factual dispute surrounds plaintiff's ability to walk, an important body function. See Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), reh den 417 Mich 1104 (1983). Plaintiff has produced disputed evidence that the pain in his knee is so bad that he must consume large quantities of painkillers and will require him to walk with a cane on a permanent basis.

Plaintiff also claims he developed gastritis, most probably from ingesting large doses of Motrin and aspirin following the accident and further complains of back pains. Neither of these two conditions constitute a serious impairment of a body function. Plaintiff has not produced any objective manifestation of a back injury, and the gastritis condition is not so serious as to constitute a threshold injury.

Given that material issues of fact exist regarding the plaintiff's ability to walk, the district court reversibly erred in granting defendant's motion for summary judgment. The circuit court reversible erred when it applied the "clearly erroneous" standard of review.

REVERSED and REMANDED for trial.

/s/ Thomas M. Burns  
/s/ Donald E. Holbrook, Jr.  
/s/ John D. Payant