

## **CASES DISMISSED ON** **MOTIONS FOR SUMMARY DISPOSITION**

**2008**

1. **Brown v. Addison** Written by Michael J. Watt and argued by Allison L. Silverstein. This matter involved a third party automobile negligence claim brought by Janice Murray Brown. The police report in this matter indicated that Ms. Addison was not at fault for causing the incident. Defendant's motion for summary disposition was brought on multiple grounds including lack of negligence by Defendant Anita Addison, as well as the failure of Plaintiff Janice Brown to show that she sustained a serious impairment of an important body function. The court seemed inclined to adjourn the motion since Plaintiff's counsel claimed that he did not have notice of the negligence issue. Defense counsel determined that it would proceed solely upon the serious impairment arguments so that the hearing could go forward on that date. We reserved our right to raise the negligence issue at a later time.

Counsel for Defendant pointed out the lack of any evidence of objective injury suffered by Plaintiff Janice Brown in this matter. Defendant pointed to the significant pre-accident medical conditions suffered by Janice Brown, including bipolar disorder, anxiety, depression and most significantly, sickle cell anemia. Plaintiff also had significant substance abuse issues prior to the incident. She had multiple prior motor vehicle accidents and slip and fall injuries. Defendant pointed out that sickle cell disease causes the patient to suffer pain episodes in multiple areas of the body. Plaintiff had had several episodes of sickle cell issues through the years. Furthermore, there was no objective evidence of any injury after the accident. Plaintiff pointed to a notation regarding a possible facet fracture. However, multiple subsequent x-rays confirmed that no such fracture existed. The only other objective injury pointed to by counsel was the diagnosis of carpal tunnel syndrome an eventual carpal tunnel release surgery. Interestingly, none of Plaintiff's physicians ever related the carpal tunnel to the automobile accident. Sickle cell disease could have caused Plaintiff's problems with carpal tunnel syndrome.

Furthermore, the course and trajectory of Plaintiff's life had not been altered as a result of this accident. Plaintiff had numerous prior health problems which affected her ability to function. She has been disabled from employment for several years and had visited the doctor on numerous occasions due to medical issues. Plaintiff had had her children taken from her previously and had prior complaints of inability to perform household activities. Clearly, Plaintiff could not point to any change in her life as a result of this accident.

The court questioned Plaintiff at the hearing as to the lack of any affidavit or documentation from a doctor relating the carpal tunnel syndrome to the automobile accident. Counsel for Plaintiff conceded at the hearing that no such documentation existed.

Judge Joseph Farah of the Genesee County Circuit Court granted Defendant's motion for summary disposition. He pointed to the fact that there was no objective evidence of any injury causally related to the automobile accident. The Judge

opined that the lack of any affidavit or medical records from Plaintiff's physician linking the diagnosis of carpal tunnel syndrome to the accident was fatal to Plaintiff's case.

2. **Masters v. Blanchard** Written and argued by Allison L. Silverstein. This matter involved a third party automobile negligence case regarding a low impact accident. The police report assigned fault to Plaintiff for causing the accident. However, negligence was not an issue raised in Defendant's motion for summary disposition. Defendant argued that he was entitled to summary disposition pursuant to MCR 2.116(C)(10) based upon Plaintiff's inability to show that she suffered a threshold injury. Specifically, Defendant argued that there was lack of any objective evidence of an injury related to the automobile accident. Moreover, Plaintiff failed to show pursuant to Kreiner vs. Fisher that there had been an alteration in the course of her life as a result of the accident.

Plaintiff argued that there was objective evidence of her injury in that there were muscle spasms recorded in medical documentation and that there was a MRI finding of one minimal disc bulge in Plaintiff's cervical spine. Plaintiff in this matter claimed neck injury, back injury and a right shoulder injury which she related to the automobile accident. All reviewing radiologists of Plaintiff's x-rays and MRIs noted that the findings were normal, or showed no significant evidence of abnormality. Plaintiff was making massive complaints of pain which were never supported by any objective manifestation of her injury. Plaintiff was able to find a physician who provided her with "off work" notes from the date of the accident. However, these physicians provided no medical justification as to why Plaintiff was physically unable to work. The only thing that these physicians were treating were Plaintiff's subjective complaints of pain.

Plaintiff had gone through many different modalities of treatment including physical therapy, acupuncture and chiropractic treatment. Plaintiff also was prescribed several medications to treat her pain. Despite all these methods, Plaintiff continued to complain that she was in significant pain that prohibited her from working at her position as a secretary. Defense counsel pointed to several medical records where physicians evaluated Plaintiff and found no relationship between Plaintiff's complaints of pain and any objective injury. Some physicians even went as far to recommend that Plaintiff see a pain psychologist due to her lack of improvement and diffuse complaints. An orthopedic evaluation also indicated that there was nothing that could be done for her complaints of shoulder pain. IMEs showed a significant behavioral component to Plaintiff's pain behaviors, as well as secondary gain issues. Defendant argued that Plaintiff's limitations should be considered self limitations since there was no objective medical reasoning why Plaintiff could not continue with her activities.

Judge David Reader of the Livingston County Circuit Court determined that he would grant Defendant's motion for summary disposition. He ruled that based upon the record before him, he did not believe that Plaintiff had shown any significant objective injury as a result of the accident. While he did note that some individuals have higher pain thresholds than others, he believed there to be an overall lack of objective evidence to support Plaintiff's claims that she had suffered a serious impairment of an important body function.

3. **Kennedy v. (Insurance Company - Name Withheld)**. This matter involved a claim for first party PIP benefits. Plaintiff was a minor at the time of the incident

in 1997. Defendant was assigned this claim through the Assigned Claims Facility. Plaintiff did not file an application for benefits until March of 2001. Defendant initially argued that under the one year notice provision and the one year back rule, summary disposition was appropriate. After several years of appellate review, the appellate courts ruled that since Plaintiff was a minor at the time of the incident, she was entitled to the tolling provision in reference to the one year notice provision of MCL 500.3145. However, pursuant to the precedent in Cameron vs. ACIA, 476 Mich 55 (2006), the Supreme Court remanded the matter to the Court of Appeals to determine whether benefits had been incurred within the one year period prior to the filing of the lawsuit. The Court of Appeals felt that based upon the record before it, it could not make a determination and so the matter was remanded back to the trial court to gather evidence and determine whether any benefits had been incurred within the applicable period. Defendant filed its most recent motion for summary disposition with the trial court arguing that there was no evidence whatsoever that Plaintiff had incurred benefits within the period outlined for determination by the Court of Appeals. Defendant pointed to responses to Request for Admissions, prior responses to motions for summary disposition and prior appellate documents wherein no evidence was submitted that any recoverable benefits were incurred during the time period at issue. The majority of the claims Plaintiff was making was for household replacement services. Defendant pointed out that MCL 500.3107(1)(c) limited recovery of household services to the three year period after the accident. Accordingly, Plaintiff's claims for household replacement services were barred since the statutory limitation would have run on February 27, 2000. Testimony of Plaintiff's mother regarding services allegedly being provided including cooking, cleaning, and doing Plaintiff's laundry. Plaintiff had recently provided an affidavit of her mother dated January 11, 2007 claiming to have provided some sort of supervisory care to Plaintiff during the time period at issue. However, this affidavit was contrary to Plaintiff's mother's deposition testimony, as well as contrary to the testimony at deposition of Plaintiff herself. Plaintiff testified that she was able to care for herself and in fact had even given birth to her own child since the time period at issue.

Judge Edwards of the Wayne County Circuit Court granted Defendant's motion for summary disposition since there was no evidence that attendant care benefits were actually incurred after January 9, 2003. Judge Edwards pointed out that his ruling was made specifically pursuant to the Court of Appeals remand order. Judge Edwards felt that there was no admissible evidence showing that benefits were actually incurred. Plaintiff filed a Motion for Reconsideration which was denied by the trial court. (Written and argued by Allison L. Silverstein).

4. **Maness v. Asher** This was a claim for injuries brought by plaintiff as the result of a slip and fall incident that occurred in a pharmacy. There was video documentation of the incident as it occurred. We represented the cleaning company that was mopping the floors of the pharmacy near the time of the incident. The attorneys for the pharmacy filed a Motion for Summary Disposition with the trial court based upon the "Open and Obvious" doctrine. We filed a concurrence to this motion. Both motions were denied by the trial court. This denial was appealed and the Court of Appeals eventually reversed the trial court's ruling on the "Open and Obvious" doctrine. However, the Court of Appeal found that the open and obvious doctrine did not apply to the cleaning company. The Court of Appeals still found that even under a general negligence standard,

summary disposition was appropriate and reversed the trial court's ruling since defendants exercised due care in placing a wet floor sign to warn plaintiff of the condition of the floor.

Plaintiff filed an Application for Leave to Appeal with the Supreme Court, arguing that it was improper for the Court of Appeals to address the issue of general negligence since it had not been raised before the trial court. Plaintiff did not seek any appellate review regarding the Court of Appeals ruling that the condition of the floor was "Open and Obvious." The Supreme Court agreed with Plaintiff that the issue should not have been addressed by the Court of Appeals. The decision on the general negligence issue was reversed and the case was remanded back to the trial court.

Defendants then filed a Motion for Summary Disposition arguing that Plaintiff could not recover under a theory of general negligence since Defendants had not breach any duty that was owed to Plaintiff. The Defendant only had a duty to warn Plaintiff of foreseeable dangers. Defendant emphasized the Court of Appeals finding that the condition of the floor was open and obvious. This decision was never appealed and it was now the law of this case that a reasonable user of average intelligence would know of the condition of the floor upon casual inspection due to the placement of the yellow wet floor sign. Amongst other theories, it was argued that the trial court was bound by this decision and therefore, must grant summary disposition to Defendant on the general negligence theory. The trial court agreed that it was bound by the decision of the Court of Appeals and concluded that the finding required him to rule that Defendants did not breach their duty to warn Plaintiff of foreseeable dangers. Accordingly, Summary Disposition was granted in favor of the defendant cleaning company. (Written and argued by A. Silverstein).

5. **Perry v. Ngo.** This was a third party no-fault case arising out a motor vehicle/motorcycle accident that took place on June 24, 2005 near the intersection of Martin Luther King Blvd. and Edgewood Drive in Lansing, Michigan. Specifically, Plaintiff alleged that our client disregarded a stop sign, thereby causing the collision. As a result of the collision, Plaintiff sustained multiple serious injuries, including a fractured jaw, fractured shoulder, fractured hip, fractured leg and fractured hands. Plaintiff's initial demand for non-economic and excess economic damages exceeded \$50,000.

In this case, we were able to successfully argue that our client was not negligent in causing the subject accident. Based on eyewitness testimony, we were able to establish that the Plaintiff was far exceeding the posted speed limit at the time he entered the intersection, which forfeited his right of way pursuant to MCL 257.649. Furthermore, a close inspection of Plaintiff's medical records revealed him with a blood-alcohol level of .197, more than twice the legal limit. Upon receipt of these medical records, Plaintiff reduced his demand to \$5,000, which was rejected.

During the subsequent Case Evaluation hearing, we secured the very rare "No Cause of Action" award, which, of course, we accepted. Following the hearing, Plaintiff reduced his demand to \$2,500, which was again rejected. Based upon the Case Evaluation result, we filed a Motion for Security for Costs with the Circuit Court. Based on the facts presented, the Judge granted our Motion and ordered the Plaintiff to post a \$10,000 bond with surety before the case could continue.

Following entry of this Order, Plaintiff voluntarily dismissed his case with prejudice.

6. **Whittenburg v. Woronec.** This was a third party automobile negligence case arising from a two vehicle accident which occurred on August 24, 2005 in Monroe County. Plaintiff was traveling eastbound on South Custer Road and slowed down to make a left turn. Defendant dropped her glasses, became distracted and struck the rear of the Plaintiff's vehicle. As a result of the accident, Plaintiff allegedly sustained injuries to her lower back, neck, and right shoulder.

In this case, we were able to successfully argue that Plaintiff had longstanding pre-existing medical conditions and that the diagnostic studies did not indicate any new objective injuries after the accident. We were also able to show that the Plaintiff's daily functioning and activities had not changed after the accident.

While finding a genuine issue of material fact regarding the existence of objective evidence of injury, the trial court reasoned that the plaintiff's injuries did not affect her general ability to lead her normal life. Accordingly, Summary Disposition was granted in favor of the defendant (Written and argued by J. Schreier).

7. **Brown v. (Insurance Company - Name Withheld).** This was an uninsured motorist claim arising from a fatal automobile-pedestrian accident which occurred on October 28, 2006 in Pontiac, Michigan. At that time, Plaintiff's decedent was in the roadway and could not be seen at the time of impact and was struck by two separate vehicles. Plaintiff brought suit for uninsured motorist benefits after executing a general release of all claims, including all claims against insurance companies, arising out of the subject accident.

We argued that the release of all claims included the Defendant and that the scope of the release is controlled by the language of the release. Where the language is unambiguous, a trial court should construe the Release as written. Plaintiff argued that the Release only applied to one of the impacts and not the other. We argued that the two impacts constitute one accident and were both governed by the language in the release. The trial court granted agreed with Defendant's argument and granted the motion for summary disposition. Plaintiff subsequently appealed this ruling and a final decision is pending (Written and argued by J. Schreier).

8. **Vision Manufacturing v. Diverse Solutions, Inc.** This was a claim and delivery action involving possession of two prototype development vehicles that was filed in Wayne County Circuit Court in 2008. Diverse Solutions obtained possession of the vehicles in 2006 pursuant to a contract entered into with a company called American Vans. Diverse Solutions performed research and development and was in the process of developing two "egg-shaped" vehicles to compete with the Dodge Sprinter van. American Vans failed to fulfill its contractual payment obligations and Diverse Solutions retained possession of the vehicles. American Vans filed suit against Diverse Solutions. That suit was dismissed with prejudice after its representative failed to appear at a court ordered status conference.

A short time later, American Vans dissolved and its principal officer formed Vision Manufacturing. Vision sued Diverse Solutions for possession of the vehicles. We

filed a Motion for Summary Disposition. The primary argument was that the claim was barred by the doctrine of res judicata. We pointed out that American Vans shared the same officers, same address, and same claim as the newly formed Vision. We also argued that the dismissal with prejudice was an adjudication on the merit according to MCR 2.504(B)(3).

The Court agreed with Defendant that this lawsuit involved the same parties or their privies. The Court also noted that the claims were exactly the same in both lawsuits and agreed that the dismissal with prejudice was an adjudication on the merits. Accordingly, the Court was constrained by the doctrine of res judicata to grant Diverse Solution's Motion for Summary Disposition (Written by B. Heintzelman and argued by A. Silverstein).

9. **Howard v. (Insurance Company - Name Withheld)**. This was a breach of contract action that was filed in Wayne County Circuit Court in 2008. Plaintiff signed a completed Homeowners Application for his home located in Detroit. The application contained several representations that turned out to be false. Less than a month after obtaining the policy of insurance, Plaintiff's home burned down. After discovering the misrepresentations in the application for insurance, Plaintiff's claim was denied and his policy was rescinded.

Plaintiff argued that he did not read the application before he signed it and that he did not agree to rescind the policy when he cashed the refund of premium check.

The Court agreed with Defendant that this lawsuit involved the same parties or their privies. The Court also noted that the claims were exactly the same in both lawsuits and agreed that the dismissal with prejudice was an adjudication on the merits. The court granted Defendant's Motion for Summary Disposition (Written by B. Heintzelman and argued by A. Silverstein)

10. **Monaco v. Harvey**. This matter involved a third party automobile negligence claim arising out of a May 24, 2007 accident. Plaintiff alleged that as a result of the accident she suffered serious injuries to her back, shoulder, neck, head, arms and legs. She also claimed that she had a permanent serious disfigurement as a result of scarring on her legs. Plaintiff claimed that on the night of the accident she suffered a muscle spasm which caused her to fall on a fence in her yard. Interestingly, the police report in this case indicated that the Plaintiff was actually the at fault party.

Defendant filed a Motion for Summary Disposition arguing that Plaintiff had not sustained a serious impairment, nor had she suffered a permanent serious disfigurement that was causally related to the accident.

Defendant argued to the Court that it was not reasonably foreseeable that an auto accident would cause Plaintiff to fall on a dangerous, rough fence. There was an intervening cause to the Plaintiff's injuries which would negate a causal connection between Plaintiff's scarring and any alleged negligence of Defendant. Plaintiff only provided speculative documentation from her doctors attempting to establish a causal relationship between the scarring and the automobile accident. The Court agreed with Defendant and noted that the information submitted by Plaintiff's physician was insufficient to create a question of fact on this issue.

Defendant also argued that Plaintiff was not entitled to recovery for non-economic damages since she had not suffered a serious impairment that altered the course and trajectory of her normal life. At the time of the incident, Plaintiff was working part time at two different jobs. Shortly after the accident, she obtained a third job as a waitress. Plaintiff claimed that as a result of the accident she lost her job working at a school and her job as a waitress. All the information gained during discovery pointed to the fact that the Plaintiff was let go from her jobs for reasons completely unrelated to the automobile accident. Plaintiff also began working more hours at her third job and failed to show that she lost any employment due to injuries as a result of this accident. Plaintiff also had no "off work" notes from her doctors limiting her ability to work. Any limitations in Plaintiff's recreational activities were self-limitations that were not imposed upon her by her physicians.

In the end, the Court found that Plaintiff had failed to show any material question of fact as to whether there was a significant alteration of the course and trajectory of Plaintiff's life and granted Summary Disposition to Defendants. (Written and argued by Allison L. Silverstein).