

Sixth Circuit rules Michigan No-Fault Act's Closed-Head Injury provision not applicable to avoid summary judgment on threshold in federal court actions

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In a recent decision, *Shropshire v. Laidlaw Transit, Inc.*, --- F.3d ---, 2008 WL 5245692 (C.A.6 (Mich.)), the U.S. Court of Appeals for the Sixth Circuit held that the Michigan No-Fault Insurance Act provision identifying proofs that will establish an issue of fact regarding whether a closed-head injury has been sustained is procedural in nature and, therefore, not applicable in diversity actions pending in federal court.

Consequently, removal to federal court of future actions filed in Michigan, which seek recovery for alleged closed-head injuries, should allow a defendant in such an action to prevent plaintiffs from relying on this provision to stave off motions for summary judgment based on "the no-fault threshold."

MCL 500.3035(2)(a)(ii) provides that "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." Accordingly, if a plaintiff in a Michigan court alleges a closed-head injury, which is supported by the sworn testimony of such a physician, the plaintiff would survive a motion for summary disposition based upon an argument that the plaintiff's injuries do not satisfy the no-fault threshold of "serious impairment of body function." In light of the decision in *Shropshire*, however, this standard would no longer apply to motions for summary judgment in federal courts in Michigan that are hearing claims involving parties from different states.

The plaintiff in *Shropshire* was the mother of a five-year-old girl who was allegedly injured in an automobile accident. The mother did not seek medical attention for her daughter on the day of the accident. However, soon after the accident, the girl began experiencing headaches, nausea and vomiting. The girl's pediatrician referred her to a neurologist. Neither physician found any physical evidence of a head injury. The girl continued to see various physicians for a five-year period. A single electroencephalogram (EEG) indicated some abnormality in her brain. The doctor who performed this EEG submitted an affidavit indicating that the girl had suffered a traumatic brain injury as a result of the accident.

SIXTH CIRCUIT RULES MICHIGAN NO-FAULT ACT'S CLOSED-HEAD INJURY PROVISION NOT APPLICABLE
TO AVOID SUMMARY JUDGMENT ON THRESHOLD IN FEDERAL COURT ACTIONS Cont.

The U.S. District Court for the Eastern District of Michigan ruled that the doctor's affidavit was inadmissible and granted the defendant's motion for summary judgment. The plaintiff appealed.

The U.S. Court of Appeals for the Sixth Circuit affirmed the district court's holding. The court noted that in diversity cases federal courts must apply the substantive law of the state in which the federal court is situated, and federal law is to be applied with respect to procedural issues. The appellate court then held that MCL 500.3035(2)(a)(ii) was a procedural and not a substantive law, and as such, federal procedural rules properly applied. The court reasoned that MCL 500.3035(2)(a)(ii) did not create a new avenue for recovery for the plaintiff that would amount to a substantive law, but rather the statute merely provided the plaintiff an alternate route by which to avoid summary disposition.

Therefore, the plaintiff was not entitled to reach a jury simply because a closed-head injury was alleged and supported by a physician's sworn testimony as set forth in MCL 500.3035(2)(a)(ii). Rather, the appellate court held that, in federal court, on a motion for summary judgment, the plaintiff must meet the burden set forth in the Federal Rule of Civil Procedure 56(c), that being the existence of a genuine issue of material fact. The court held that the plaintiff, whose only evidence that her daughter's general ability to live her normal life was that she received a low penmanship grade in school, failed to raise a genuine issue of material fact, and summary judgment in favor of the defendant was, therefore, proper.

As the Michigan appellate courts have become more conservative in their interpretation of the threshold to be satisfied by plaintiffs seeking to recover for serious impairment of body function, plaintiffs' attorneys have often avoided summary disposition by simply securing an affidavit from a licensed physician reciting the "magic words" set forth in MCL 500.3035(2)(a)(ii). Based on this decision, no-fault defendants would be well served to remove any state court actions alleging closed-head injury to federal court whenever possible.