STATE OF MICHIGAN

COURT OF APPEALS

JAMES SCHMELING, Plaintiff-Appellee,	UNPUBLISHED February 15, 2011
v	Nos. 292190; 292740 Wayne Circuit Court
WILLIAM WHITTY and WASTE MANAGEMENT OF MICHIGAN, INCORPORATED, d/b/a WASTE MANAGEMENT, Defendants-Appellants.	LC No. 07-722135-NI

Before: CAVANAGH, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal by leave granted an order granting partial summary disposition in favor of plaintiff and an order denying their motion and granting plaintiffs' counter motion to take judicial notice of a speed limit and to strike their notice of nonparty fault. We affirm in part, reverse in part, and remand.

Plaintiff is, among other things, an emergency medical technician (EMT). This case arises out of automobile accident in which his partner, Kimberly Salas, illegally drove the ambulance in which he was working through a stop sign, without the use of lights or sirens. Defendant William Whitty was driving a garbage truck owned by defendant Waste Management on the intersecting road, and the garbage truck broadsided the ambulance in the intersection. The garbage truck did not have a stop sign, but there is some dispute whether it was exceeding the speed limit. Plaintiff was severely injured, and the patient being transported on a non-emergency basis died. The accident at issue in this case is the same accident that was at issue in *Freed v Salas*, 286 Mich App 300; 780 NW2d 844 (2009), which involved a suit by the estate of the patient.

Defendants first argue that the trial court erred in striking their notice of nonparty fault, which named plaintiff's employer, HealthLink, and plaintiff's coworker, Kimberly Salas (who, at the time of the accident, was driving the ambulance in which plaintiff was working at the time of the collision with a garbage truck). We agree. We review questions of law de novo. *McManamon v Redford Charter Twp*, 273 Mich App 131, 134; 730 NW2d 757 (2006).

In a tort action for personal injury, the trier of fact allocates liability amongst all persons found to have been at fault, "regardless of whether the person is, or could have been, named as a

party to the action." MCL 600.2957(1). Similarly, MCL 600.6304(1)(b) provides, in relevant part, for allocation of fault to "all persons that contributed to the death or injury . . . regardless of whether the person was or could have been named as a party to the action." However, before a person can be named as a nonparty at fault, it must first be shown that the person owed a duty to the plaintiff. *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18, 20-21; 762 NW2d 911 (2009).

The worker's disability compensation act (WDCA), MCL 418.101 *et seq*, provides that workers' compensation benefits are the exclusive remedy, as against an employer or coemployee, for workplace injuries, MCL 418.131 (employer); MCL 418.827(1) (coemployee), absent an intentional tort, *Palazzola v Karmazin Prods Corp*, 223 Mich App 141, 149-150; 565 NW2d 868 (1997). Plaintiff argues that, consequently, HealthLink and Salas did not owe him a duty. We disagree.

The existence of a duty turns on the relationship between the defendant and the person whose injury was allegedly caused by the defendant's act or failure to act. *Krass v Tri-Co Security, Inc*, 233 Mich App 661, 668; 593 NW2d 578 (1999). Essentially, the question of duty is a public-policy question of whether the defendant should be held responsible for the conduct or inaction in question. See, e.g., *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500-501; 418 NW2d 381 (1988). Although workers' compensation benefits are the exclusive *remedy* for an employee injured while working, *Palazzola*, 223 Mich App at 149, it does not follow that employers and coemployees do not owe an employee any duty.

A duty encompasses the type of behavior that the person in question must engage in, or refrain from, in order to avoid legal liability. A remedy, however, refers to the kind of relief a claimant may obtain, once the claimant has shown a breach of some duty. Critically, MCL 600.2957(1) and MCL 600.2304(1)(b) recognize this distinction by explicitly providing that a defendant can notice a nonparty at fault even though that nonparty could not be sued. In other words, a person *can* owe a duty to a plaintiff even when the plaintiff cannot recover any remedy from that person. We therefore conclude that the trial court erred as a matter of law by granting plaintiff's motion to strike defendants' notice of nonparty fault. The trial court's order in this regard is reversed.

Defendants argue that the trial court erred in granting plaintiff's motion to take judicial notice that the speed limit applicable to the garbage truck was 35 m.p.h., arguing that the trial court should have taken judicial notice that the speed limit was 45 m.p.h. We agree that the trial court should not have taken judicial notice that the speed limit was 35 m.p.h, but we disagree that the trial court should have taken judicial notice that the speed limit was 45 m.p.h.

Judicial notice is discretionary, MRE 201(c), and we review a trial court's decision whether to take judicial notice for an abuse of that discretion. *Freed*, 286 Mich App at 341. But for a trial court to take judicial notice of a fact, the fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MRE 201(b). We agree with the prior decision from this Court concerning the same accident:

> The parties agree that the relevant traffic control order indicates that the speed limit for the area where the accident occurred is 45 miles an hour. However, on its face, the traffic control order indicates that "[t]his order becomes effective when signs giving notice of same have been erected." This means that until 45 miles an hour signs were posted, the speed limit was not 45 miles an hour. All of the evidence indicated that the last sign before the area of the accident read 35 miles an hour. *Given that the signage and the traffic control order did not agree as to the speed limit for the area, the fact could not reasonably be said to have been undisputed or capable of accurate and ready determination*. [*Freed*, 286 Mich App at 341 (emphasis added).]

In *Freed*, this Court held that the trial court had not abused its discretion by declining to take judicial notice of the speed limit.

We now find that the trial court abused its discretion by taking judicial notice of it. Insofar as we can glean from the record, there was simply too much reasonable dispute about the speed limit to permit the trial court to take judicial notice of it, either the 35 m.p.h. interpretation or the 45 m.p.h. interpretation. The trial court's order taking judicial notice of the speed limit applicable to the garbage truck at the time of the accident is reversed.

Finally, defendants argue that the trial court erred in granting partial summary disposition to plaintiff on the issue of whether he suffered a threshold injury for no-fault purposes. We disagree. Summary disposition rulings are reviewed de novo. *Willett v Waterford Charter Twp*, 271 Mich App 38, 45; 718 NW2d 386 (2006).

Under Michigan's no-fault system, tort liability for automobile accidents is abolished subject to certain exceptions. MCL 500.3135(3). A person is entitled to swift and certain coverage from her own insurer for all out-of-pocket expenses, and statutory wage loss, without having to burden the system with proof that the other party was at fault. MCL 500.3101 *et seq*. The exceptions to the abolition of tort liability require "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). If such a "threshold" injury is proven, the plaintiff can recover noneconomic damages on a negligence claim against the other driver (as opposed to recovering from the plaintiff's own insurer). MCL 500.3135(1).

A "serious impairment of a body function" means "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 impairment must be objectively manifested, must affect an important body function, and must affect the plaintiff's ability to lead her normal life. MCL 500.3135(7). If there is no material factual dispute regarding the nature and extent of the plaintiff's injuries, the court decides as a matter of law whether the plaintiff's injury meets the threshold. MCL 500.3135(2).

The plaintiff's impairment need not affect his or her *entire* life. *McCormick v Carrier*, 487 Mich 180, 201-203; ___ NW2d ___ (2010). As used in MCL 500.3135(7), the word "general" modifies the word ability, not the word life. *Id*. at 195-196. The "nonexhaustive list of objective factors" discussed in the earlier case of *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), is incorrect because it has no corresponding language in the text of the

statute. *McCormick*, 487 Mich at 207-209. In *McCormick*, the plaintiff's ankle was broken when a coworker backed a truck over it, and although he eventually returned to work, he was unable to perform his prior duties and eventually volunteered for a different position, which he was able to perform. *Id*. at 184-186.

Plaintiff here suffered much more extensive injuries. He suffered two broken legs, two "busted-up" knees, numerous broken ribs, multiple bruises, a collapsed lung, a lacerated spleen, an ankle fracture, internal bleeding and bruising to several internal organs (such as a kidney and the bladder), post-traumatic stress, and a degloving injury to his left calf. In fact, plaintiff's spleen had to be removed, and it is not an organ that can be replaced or regenerated. Plaintiff's right ankle required surgeries to put screws in it and to realign it, and his ACL was torn in his right leg and damaged in his left leg. Plaintiff testified that he has a permanent surgical scar, running from his sternum to the top of the pubic bone.

Even leaving aside the other injuries, plaintiff's loss of his spleen, alone, establishes a serious impairment, because "plaintiff is still missing a portion of his body that he will never retrieve." *Caiger v Oakley*, 285 Mich App 389, 395; 775 NW2d 828 (2009). Furthermore, an infectious disease expert testified that, because of the removal of plaintiff's spleen, plaintiff should no longer work as an EMT, because he would have a very high risk of contracting an infection that would likely be fatal. The spleen is an important component of the immune system,[1] and the immune system is certainly an "important body function." Losing a significant part of one's immune system clearly affects the "general ability" for a person exposed to potential diseases to lead a normal life.

Additionally, plaintiff spent three weeks in a hospital after the accident. After that, he was bound to a wheelchair for three more months. Plaintiff was unable to work at any of his three jobs for about seven months, when he returned to his pastoral work. Plaintiff returned to being an EMT two or three months after that, and returned to firefighting about a year and a half after the accident. Plaintiff testified that his EMT and firefighting work causes him pain, and furthermore, his persistence in working those jobs is contrary to the wishes of his doctors. Plaintiff's physical medicine and rehabilitation expert testified that "There's almost nothing that he does that I would like him doing" and opined that, to a reasonable degree of medical certainty, in five years, plaintiff will no longer be physically able to work as a firefighter, and in ten years, will no longer be physically able to work as an EMT. Plaintiff's vocational rehabilitation expert concluded that plaintiff was actually working beyond his capability because he wanted to take care of his family as opposed to himself.

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[1] See, The Merck Manuals Online Medical Library, "Spleen Disorders and Immunodeficiency," at <http://www.merckmanuals.com/home/sec16/ch184/ch184j.html> (retrieved 2011-01-26); see also, The New York Times, "Finally, the Spleen Gets Some Respect," by Natalie Angier, at <https://www.nytimes.com/2009/08/04/science/04angier.html> (retrieved 2011-01-25).

Because plaintiff's injuries were more severe and more impairing than McCormick's, plaintiff, like McCormick, the trial court correctly held that plaintiff was entitled to summary disposition as a matter of law.

We affirm the trial court's grant of partial summary disposition in favor of plaintiff on the issue of whether he suffered a threshold injury for no-fault purposes. We reverse the trial court's order taking judicial notice of the speed limit applicable to the garbage truck at the time of the accident and striking defendants' notice of nonparty fault, and we remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause