

STATE OF MICHIGAN
COURT OF APPEALS

LARRY DUDLEY and GLORIA DUDLEY,

Plaintiffs-Appellants,

v

ELI BLAZEFF,

Defendant-Appellee.

UNPUBLISHED

March 20, 2003

No. 239078

Oakland Circuit Court

LC No. 01-029258-NI

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a circuit court order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Larry Dudley was involved in an automobile accident with defendant Blazeff. Thereafter, Dudley experienced pain in his right shoulder and filed this action for damages. The trial court dismissed the complaint, finding that plaintiff's injuries did not meet the serious impairment threshold.

The trial court's ruling on a motion for summary disposition is reviewed de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. In ruling on such a motion, the trial court must consider not only the pleadings, but also depositions, affidavits, admissions and other documentary evidence, MCR 2.116(G)(5), and must give the benefit of any reasonable doubt to the nonmoving party, being liberal in finding a genuine issue of material fact. Summary disposition is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-455; 597 NW2d 28 (1999).

A person is subject to tort liability noneconomic loss for automobile negligence if the injured person "suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is defined as "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). Because the statutory definition of serious impairment of body function is the same as that adopted in *Cassidy v McGovern*, 415 Mich 483, 505; 330 NW2d 22 (1982), it is appropriate to refer to *Cassidy* and

cases decided thereunder in deciding this case. *Kern v Blethen-Coluni*, 240 Mich App 333, 340-342; 612 NW2d 838 (2000). Whether a person suffered a serious impairment of body function is a question of law for the court if there is no factual dispute about the nature and extent of the person's injuries or there is a factual dispute but it is not material to the determination whether the plaintiff suffered a serious impairment of body function. MCL 500.3135(2)(a).

To establish a serious impairment of body function, the plaintiff must first show that he has an objectively manifested impairment or injury, which is a medically identifiable injury or condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002). An impairment can be objectively manifested, for example, by an x-ray, *Sherrell v Bugaski*, 140 Mich App 708, 711; 364 NW2d 684 (1984), other objective tests such as an MRI or an EMG, *Kreiner v Fischer*, 251 Mich App 513, 518 n 4; 651 NW2d 433 (2002), or a passive range of motion test, *Shaw v Martin*, 155 Mich App 89, 96; 399 NW2d 450 (1986).

Plaintiff's x-rays were normal. The MRI was normal apart from a Type II or III acromion and bone spurs. Plaintiff's doctor, Michael Holda, opined that the Type II or III acromion was a normal variation of the shoulder blade. The bone spurs were abnormal, but were not caused by the accident. The only thing attributed to the accident was the shoulder pain, which Holda suspected was caused by some sort of impingement due to swelling and inflammation of the rotator cuff. The impingement was not shown by any objective test and Holda admitted that the swelling and inflammation could not be objectively diagnosed by objective testing. Holda opined that the impingement was objectively manifested because repeated physical tests elicited the same response, that being pain upon movement, but the plaintiff's injuries, not his pain, must be medically substantiated through objective manifestation. *Guerrero v Schoolmeester*, 135 Mich App 742, 748; 356 NW2d 251 (1984).

Finally, plaintiff exhibited limited range of motion during some exams, but the evidence presented does not indicate if the range of motion tests were active or passive. "Since it is plaintiff's responsibility to present his claim in the best manner, this Court must assume the limited flexion was not objectively manifested." *Shaw, supra* at 97. Because the evidence does not establish an objectively manifested condition that was caused by the accident, the trial court did not err in granting defendant's motion.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Helene N. White
/s/ Joel P. Hoekstra