

STATE OF MICHIGAN
COURT OF APPEALS

PENNY L. MICK,

Plaintiff-Appellant,

v

JENNIFER LYNN JACOBSON AND SONYA
MARGUERITE JACOBSON,

Defendant-Appellee.

UNPUBLISHED

June 15, 2004

No. 247626

Oakland Circuit Court

LC No. 2002-040778-NI

Before: Murphy, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition and dismissing plaintiff's claims in this third-party automobile negligence and negligent entrustment matter. On appeal, plaintiff argues that the circuit court improperly granted summary disposition based on plaintiff's failure to present evidence to support that her general ability to lead a normal life was affected because she had presented sufficient evidence to raise a question of fact for the jury. We affirm.

In December 2001, plaintiff's vehicle was rear ended by a vehicle driven by defendant Jennifer Jacobson. Defendant Sonya Jacobson owned the vehicle that defendant Jennifer Jacobson was driving. Plaintiff filed a complaint alleging that the collision was a result of defendant Jennifer Jacobson's "willful, wanton and/or gross negligence," and alleging that plaintiff suffered various injuries from the collision resulting in serious impairment of a bodily function and permanent serious disfigurement. Plaintiff further claimed that defendant Sonya Jacobson negligently entrusted defendant Jennifer Jacobson with the vehicle. Defendants' filed a motion for summary disposition contending that plaintiff failed to meet her burden of proving that she sustained an objectively manifested injury from the accident that affected her general ability to lead a normal life. In response, plaintiff contended that she had been on heavy pain medication and disabled from work for over a year and that there was a question of fact for the jury as to whether she sustained a serious impairment to a major bodily function. At a hearing on defendants' motion for summary disposition, in granting defendants' motion, the trial court stated:

The determination of a serious impairment of a body function or permanent disfigurement is an issue of law, rather than an issue of fact, and

An important body function is a function of the body that affects the person's general ability to . . . live a normal life. . . .

* * *

The first question is whether there is objective evidence of an impairment of a body function. Now viewing the evidence in the light most favorable to the Plaintiff, there is at least objective evidence of impairments. However, the Court must also address the issue of whether these impairments are serious enough to affect Plaintiff's general ability to lead her normal life.

Based on the fact that Plaintiff has showed no objective reason why she is disabled from performing her usual daily activities, including her work for General Motors, she has failed to show an objectively manifested impairment of an important body function that affects her general ability to lead her normal life. Therefore, Defendant's Motion for Summary Disposition is granted.

Plaintiff's issue on appeal is that the circuit court erred in granting defendants' motion for summary disposition because plaintiff had an objectively manifested impairment and an issue of material fact existed with regard to whether the impairment affected plaintiff's general ability to lead a normal life. We disagree, as the circuit court properly granted summary disposition based on the record it was provided.

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Under MCR 2.116(C)(10), summary disposition is proper when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999); *J & J Farmer Leasing, Inc v Citizens Ins Co*, 260 Mich App 607, 612; ___ NW2d ___ (2004). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

Plaintiff contends that summary disposition was not proper because a question of fact exists as to whether she suffered serious impairment of a body function. A " 'serious impairment of 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). To determine if a plaintiff's injury meets the threshold for a serious impairment of body function under MCL 500.3135(7), it should be examined under the three-part test articulated in *Kreiner v Fischer (On Remand)*, 256 Mich App 680, 684; 671 NW2d 95 (2003), leave granted 469 Mich 948 (2003). "First, there must be an objectively manifested impairment. Second, the impairment must be of an important body function. Third, the impairment must affect a person's general ability to lead his or her normal life." *Id.* For an impairment to be objectively manifested, there

must be a medically identifiable injury or condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002).

As quoted above, the circuit court determined that there was sufficient objective evidence of impairment of a body function to raise a question of fact for jury, but it did not specifically indicate whether it was of an “important” body function. However, the circuit court did determine that no showing was made that the alleged impairments were serious enough to affect plaintiff’s general ability to lead her normal life. In light of the circuit court’s ruling and defendants’ arguments, our focus is on whether the alleged impairment affected plaintiff’s general ability to lead her normal life.

“[A]ny effect does not suffice to establish a serious impairment of body function under MCL 500.3135, rather the effect must relate to a person’s general ability to lead his or her normal life.” *Kreiner, supra* at 687. In plaintiff’s complaint she does not specifically allege how her alleged impairment affected her general ability to lead her normal life. But in plaintiff’s response to defendants’ motion for summary disposition she claims that she had been disabled from work for over a year, but did not provide any documentary evidence for this contention and did not specifically describe how the injury affected her general ability to lead her normal life. Then, during the hearing on defendants’ motion for summary disposition plaintiff failed to make any assertion of how the injury affected her general ability to lead her normal life and the circuit court granted defendants’ motion because plaintiff had not made the required showing.

Now, on appeal, plaintiff claims that her general ability to lead a normal life has been affected because she was disabled from returning to work. In support, plaintiff presented to this Court, for the first time, an attending physician’s statement indicating that she is disabled from work as of December 14, 2001, but would be able to return by January 1, 2004.¹ In addition, plaintiff claims, for the first time on appeal, that she can no longer: lift greater than five pounds, golf, walk for any period of time, do yard work, do house work, and visit her daughter as frequently as she did prior to sustaining injuries from the collision. There was no documentation or affidavits before the circuit court, which supported any of the above contentions.

Plaintiff did not specifically allege, in her complaint, how her general ability to lead a normal life was affected. The moving party must specifically identify the matters which have no disputed factual issues, MCR 2.116(G)(4), *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and has the initial burden of supporting the position by affidavits, depositions, admissions, or other documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). In a motion for summary disposition, defendants’ contended that plaintiff’s alleged injuries did not affect her general ability to live a normal life. Defendants presented case law and attached documents supporting their contention that no factual dispute existed with

¹ We note that this document is dated September 27, 2002, and, presumably, was available in January 2003 when plaintiff filed its response to defendants’ motion for summary disposition. In particular, the document would have been pertinent to rebut documentary evidence provided by defendants indicating that plaintiff was only disabled from work for a short period of time. Yet, plaintiff did not present this document in opposition to defendants’ motion.

regard to whether plaintiff's general ability to lead a normal life was affected, which shifted the burden to plaintiff. The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists. *Id.*; *Glass v Goeckel*, ___ Mich App ___; ___ NW2d ___ (Docket No. 242641, issued May 13, 2004) slip op p 3. When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Peña, supra* at 313 n 4.

Because our review is limited to the evidence presented to the circuit court at the time the motion was decided we find, upon review de novo of the record before the circuit court, that summary disposition was properly granted in favor of defendants. But we note that had the document attached to plaintiff's appellate brief been presented to the circuit court² and/or an affidavit from plaintiff regarding her inability to perform her daily activities listed above, based on the prior decisions of this Court in *Kreiner, supra*,³ and in *Straub v Collette (On Remand)*,

² The ability to work is a significant element of a normal life. *Kreiner, supra* at 688. Although the physician's statement indicates that plaintiff would be able to return to work, an injury does not need to be permanent to be considered serious. *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000).

³ In *Kreiner, supra* at 688-689, this Court provided:

[O]ne's general ability to lead his or her normal life can be affected by an injury that impacts the person's ability to work at a job, where the job plays a significant role in that individual's normal life, such as in the case at bar. Employment or one's livelihood, for a vast majority of people, constitutes an extremely important and major part of a person's life. Whether it be wrong or right, our worth as individuals in society is often measured by our employment. Losing the ability to work can be devastating; employment, regardless of income issues, is important to a sense of purpose and a feeling of vitality. For those working a standard forty-hour work week, a quarter of their lifetime before retirement is devoted to time spent on the job. An injury affecting one's employment and ability to work, under the right factual circumstances, can be equated to affecting the person's general ability to lead his or her normal life. For many, life in general revolves around a job and work. It would be illogical to conclude that where a person loses the ability to work because of an injury resulting from a motor-vehicle collision, after being gainfully employed, the person's life after the accident, in general, would be unaffected.

But this Court did note that "the focus must be on multiple aspects of the person's life, i.e., home life, relationships, daily activities, recreational activities, and employment, and not solely on one area of the person's life such as employment." *Id.* at 689.

258 Mich App 456, 462-463; 670 NW2d 725 (2003), leave granted 469 Mich 948 (2003),⁴ summary disposition may not have been proper. Absent such evidence being presented to the circuit court, plaintiff was unable to meet her burden in establishing that a genuine issue of material fact existed regarding whether she suffered a serious impairment of body function that affected her general ability to lead a normal life. Accordingly, the circuit court correctly entered summary disposition in favor of defendants based on the record it was provided.

Affirmed.

/s/ William B. Murphy

/s/ Kathleen Jansen

/s/ Jessica R. Cooper

⁴ In *Straub, supra* at 462-463, this Court found a serious impairment of body function where the plaintiff lost the use of his left hand for three months, which significantly affected the plaintiff's general ability to lead his normal life given the work and tasks that he performed before the accident. Here, it was plaintiff's neck, back, and shoulders, which according to statements in her brief on appeal, and the document attached to her brief on appeal, disabled her from her job for a significant period of time and prevented or adversely affected various daily activities.