

STATE OF MICHIGAN
COURT OF APPEALS

GELING MOCERI,

Plaintiff-Appellee,

v

LEO DAVID KONDZIOLKA,

Defendant-Appellant.

UNPUBLISHED

September 20, 2005

No. 261237

Macomb Circuit Court

LC No. 03-003538-NI

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

In this action for recovery of noneconomic damages under the no-fault insurance act, MCL 500.3101 *et seq.*, defendant appeals as of right the trial court's order denying his motion for summary disposition pursuant to MCR 2.116(C)(7) and permitting plaintiff to amend her complaint to plead facts in avoidance of governmental immunity. By leave granted, defendant also appeals that portion of the trial court's order denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse.

I. Basic Facts and Procedural History

In late January 2002, plaintiff was involved in a motor vehicle accident during which she suffered a lower back injury for which she was prescribed physician-supervised physical therapy. In April of that same year, while still under the care of her physical therapist, plaintiff was involved in a second motor vehicle accident wherein her sport utility vehicle was struck from behind by a sanitation truck owned by the city of Warren and being operated by city employee defendant Leo Kondziolka.¹ Following the accident plaintiff was transported to a local hospital where she complained of pain in her right hip and leg. However, she was released later that same day after an x-ray of her hip and pelvic region disclosed no evidence of any "abnormality."

¹ Although plaintiff asserts in her brief on appeal that the sanitation truck was traveling at a "high rate of speed" at the time of impact, her assertion in this regard is not supported by the record. To the contrary, the evidence of record indicates that this was a low impact crash that occurred while the truck was traveling at a speed of approximately five miles per hour.

Approximately two weeks later, plaintiff resumed physical therapy following an increase in lower back pain and reevaluation of her condition by physician Jeffrey Middeldorf. According to plaintiff, Middeldorf diagnosed her as suffering from “[l]umbar strain with likely right lumbosacral radiculopathy,” which he concluded to have been “aggravated” by the April 2002 motor vehicle accident involving defendant. Despite continued complaints of recurrent pain in her lower back, plaintiff progressed well during the next few months of physical therapy. As a result of her continued complaints of recurrent pain, however, plaintiff was directed by Middeldorf to undergo magnetic resonance imaging (MRI) of her lower lumbar region, which revealed the lumbosacral spine to be intact and again disclosed no evidence of any abnormality in that region. Given the absence of any evidence of abnormality in the lumbosacral region, as well as her marked improvement in such areas as pain and range of motion, plaintiff was discharged from physical therapy in August 2002.

In August of the following year, plaintiff filed the instant suit alleging negligence by defendant resulting in “serious and permanent injuries” to plaintiff. Following the close of discovery, defendant moved for summary disposition of plaintiff’s suit under MCR 2.116(C)(7) and (C)(10), arguing that plaintiff had failed to plead facts in avoidance of the immunity afforded defendant as a governmental employee, see MCL 691.1407(2), and that the evidence of record was insufficient to create a genuine issue of material fact regarding whether plaintiff had sustained the serious impairment of body function required by MCL 500.3135 for recovery of noneconomic damages. Finding the evidence sufficient to create a material factual dispute regarding the nature and extent of plaintiff’s injuries, and that plaintiff should be afforded the opportunity to amend her complaint to allege facts in avoidance of governmental immunity, the trial court declined to grant summary disposition in favor of defendant.

II. Analysis

On appeal, defendant argues that the trial court erred in denying his motion for summary disposition pursuant to MCR 2.116(C)(7) because any amendment of plaintiff’s complaint to allege facts in avoidance of governmental immunity is futile. Specifically, defendant argues that the evidence following discovery simply does not support that he was grossly negligent in connection with the accident alleged to have aggravated plaintiff’s injuries, as required to avoid the immunity afforded him by law. Defendant also argues that even if his conduct could be construed as grossly negligent, he was nonetheless entitled to summary disposition under MCR 2.116(C)(10) because the evidence was, as a matter of law, insufficient to support that plaintiff has sustained a serious impairment of body function. Because we find it to be dispositive, we address only defendant’s claim that the trial court erred in denying his motion for summary disposition pursuant to MCR 2.116(C)(10).

This Court reviews a trial court’s decision on a motion for summary disposition *de novo*. *Graves v American Acceptance Mortgage Corp (On Rehearing)*, 469 Mich 608, 613; 677 NW2d 829 (2004). A motion for summary disposition pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the nonmoving party, leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Pursuant to the no-fault insurance act, a person is subject to tort liability for noneconomic loss caused by his use of a motor vehicle “only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1). As defined by the act, a “serious impairment of body function” is “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). Whether a person has suffered a serious impairment of body function is a question of law for the court if (1) there is no factual dispute concerning the nature and extent of the injuries, or (2) there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to the determination whether the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a).

Here, in denying defendant’s motion for summary disposition pursuant to MCR 2.116(C)(10), the trial court reasoned that “any time you are talking about an aggravation there is a material dispute,” and thus declined to decide the threshold issue as a question of law. However, because the evidence does not support that any such aggravation, even if found to exist, affected plaintiff’s “general ability to lead . . . her normal life,” the dispute was not material to the determination whether plaintiff had suffered a serious impairment of a body function; thereby rendering this threshold question one of law for the court.

In *Kreiner v Fischer*, 471 Mich 109, 130-131, 134; 683 NW2d 611 (2004), our Supreme Court explained that the determination whether a person is generally able to lead his or her normal life requires considering whether the impairment at issue has, under the totality of the circumstances, affected the course of the person’s life. In making this determination, a court must examine the plaintiff’s life before and after the accident, and consider the significance of the affected aspects on the course of the plaintiff’s life. *Id.* at 132-133. The court must also examine how, to what extent, and for how long the plaintiff’s life has been affected by the impairment, and may consider factors such as the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery. *Id.* at 131, 133.

When viewed in a light most favorable to plaintiff, *Miller, supra*, the evidence shows that the impairment at issue stemmed from the aggravation of a previously incurred lumbar strain requiring approximately three months of physical therapy, during which plaintiff was restricted from full-time work. The evidence further shows, however, that upon completion of physical therapy plaintiff exhibited no physical sign of lumbrosacral abnormalities, and was not medically restricted from working or participating in any of the activities enjoyed by her before the accidents, such as biking, rollerblading, and recreational walking. Indeed, citing the results of plaintiff’s MRI, as well as her physical therapist’s positive discharge summaries, Middeldorf expressly declined to place plaintiff on disability or restrictive status, or to prescribe her pain medications, indicating that he simply had “no basis” to do so. Although plaintiff testified at deposition that she nonetheless chooses not to participate in such activities out of concern over “flare-ups” of her back condition, such self-imposed restrictions are insufficient to establish a serious impairment of body function. See *Kreiner, supra* at 133 n 17.

Moreover, while the evidence indicates that plaintiff does at times suffer from “flare-ups,” plaintiff testified that the discomfort and associated decrease in activity lasts only a few days and is treatable by over-the-counter medication. Other than avoiding activities that she believes might aggravate her back condition and cause pain, plaintiff has presented nothing to

show that any residual impairment has affected her life in general. Consequently, considering the totality of the circumstances, we cannot conclude that plaintiff's impairment affects her general ability to conduct the course of her normal life. *Id.* at 134. Accordingly, we find that plaintiff has failed to show that she suffered a serious impairment of body function, and summary disposition in favor of defendant is appropriate.

Reversed.

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder