

STATE OF MICHIGAN
COURT OF APPEALS

LARRY LAW,

Plaintiff-Appellant,

v

BRIAN KEITH NOVAK, and STONETECH
MARBLE & GRANITE, INC.,

Defendants-Appellees.

UNPUBLISHED

October 13, 2005

No. 254869

Kent Circuit Court

LC No. 03-000827-NI

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

In this action to recover noneconomic damages under the no-fault act, MCL 500.3101 *et seq.*, plaintiff appeals as of right from the circuit court's orders granting summary disposition to defendants and denying plaintiff's motion for reconsideration. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In October 2002, plaintiff was injured when defendant Brian Keith Novak, who was driving a truck leased by his employer, defendant Stonetech Marble & Granite, Inc., struck plaintiff's vehicle from behind while plaintiff was stopped at an intersection. Plaintiff was taken by ambulance to a hospital, where he complained of neck and back pain.

Plaintiff, who had suffered a workplace back injury in 1977, had been unemployed since that year, and he remained unemployed following the accident. Plaintiff was involved in a prior car accident in May 2001 that resulted in lower back pain, left leg pain, and headaches; he was treated for pain at a pain clinic approximately once a month following the prior accident and continued to receive similar treatment following the October 2002 accident. A November 2002 MRI indicated the existence of degenerative disc disease and focal tears of the disc annulus; however, the MRI report indicated that those symptoms were present in a previous MRI performed one year prior to the accident.

Plaintiff testified in his depositions that, following the May 2001 accident, he was unable to work on cars, do any house painting, fish, go for rides, go to movies, do housework, go grocery shopping, cut his grass, or go to races. Plaintiff further testified that, for a period of some months following the October 2002 accident, he suffered from increased pain.

On defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), the circuit court concluded that, based on evidence of edema or swelling at the point of plaintiff's preexisting back injury, plaintiff had arguably demonstrated the existence of an objectively manifested impairment of an important body function. The court nevertheless granted defendants' motion on the ground that plaintiff had failed to demonstrate the existence of a genuine issue of material fact that the impairment affected his general ability to lead his normal life.

This Court reviews de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Lind v Battle Creek*, 470 Mich 230, 238; 681 NW2d 334 (2004). The trial court may grant summary disposition under MCR 2.116(C)(10) if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Lind, supra* at 238; *Maiden v Rozwood*, 461 Mich 109, 119-121; 597 NW2d 817 (1999); see also MCR 2.116(G)(6).

We review the trial court's denial of a motion for reconsideration for an abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). The party moving for reconsideration "must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3).

MCL 500.3135(1) provides that a person "remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or 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(7) defines "serious impairment of body function" as "an objectively manifested impairment of an important body function *that affects the person's general ability to lead his or her normal life*" (emphasis supplied).

In *Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004), the Court held that

[a]lthough some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's "general ability" to lead his normal life has not been affected and he does not meet the "serious impairment of body function" threshold.

The Court stated, "the [trial] court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Id.*, 133.

Plaintiff suffered a back injury, had back surgery, and has been unemployed since 1977. Further, plaintiff was in a car accident before the instant accident, in May 2001, after which his

activities were significantly limited.¹ Although plaintiff presented evidence that his activities and abilities were more limited following the second accident, the difference is not substantial.

Plaintiff argues that the affidavit of his former roommate, Robert Faber, which was submitted along with his supplemental brief in opposition to summary disposition² and with his motion for reconsideration, demonstrates that his life was significantly changed following the October 2002 accident.³ The affidavit states that immediately before the October 2002 accident plaintiff was able to fish, ride in cars for extended periods, paint, do housework, mow his lawn, grocery shop, and work on cars, but plaintiff's deposition testimony concerning his pre- and postimpairment activities does not articulate these significant differences.

Defendants' motion for summary disposition was properly granted, and the circuit court did not abuse its discretion in denying plaintiff's motion for reconsideration.

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder

¹ Although plaintiff relied heavily on a letter supplied by his treating physician and on the emergency room admission record from the day of the October 2002 accident, neither document supports a finding that plaintiff's general ability to lead his normal life was affected.

² The circuit court allowed plaintiff to present additional documentary evidence in support of his position.

³ Defendants contend that the Faber affidavit is substantively inadmissible, and thus may not be considered because Faber was not listed by plaintiff as a proposed witness. For purposes of this appeal, we assume that the affidavit was properly submitted.