

STATE OF MICHIGAN
COURT OF APPEALS

TERESA JO RATHBUN,

Plaintiff-Appellant,

v

LEE M. HUBBELL and CINDY L. HUBBELL,

Defendants-Appellees.

UNPUBLISHED

March 14, 2006

No. 265177

Hillsdale Circuit Court

LC No. 04-000631-NI

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm.

Plaintiff filed this action to recover noneconomic damages for injuries sustained in an automobile accident with defendant Lee Hubbell, who was driving a vehicle registered to defendant Cindy Hubbell. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff's injuries did not affect her general ability to lead her normal life, and as a result she did not meet the "serious impairment of body function" threshold necessary to sustain an action in tort. MCL 500.3135(1) and (7). The trial court agreed and granted summary disposition in favor of defendants.

We review de novo a trial court's decision on a motion for summary disposition. *McDaniels v Hemker*, 268 Mich App 269, 272; 707 NW2d 211 (2005). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition is appropriate where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *McDaniels*, *supra* at 272. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmoving party, show that there is no genuine issue regarding any material fact. *Id.* at 272-273. The moving party has the initial burden of supporting its position with documentary evidence. *Id.* at 273. The burden then shifts to the nonmoving party to establish the existence of a genuine issue of disputed fact. *Id.*

Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set out specific facts showing the existence of a genuine issue of

material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Where the nonmoving party fails to present documentary evidence establishing the existence of a material factual dispute, a grant of summary disposition is appropriate. *Id.* at 363. A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the nonmoving party, leaves open an issue on which reasonable minds might differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

“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 . . . serious impairment of body function,” i.e., “an objectively manifested impairment of an important body function that affects the person’s general ability to lead . . . her normal life.” MCL 500.3135(1), (7). “The issue whether a person has suffered a serious impairment of body function is a question of law for the trial court to decide where the court finds that there is no factual dispute concerning the nature and extent of the person’s injuries or where there is a factual dispute concerning the nature and extent of the person’s injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function.” *McDaniel*, *supra* at 273-274.

Here, while there is a factual dispute concerning the nature and extent of plaintiff’s injuries, the dispute is not material to a determination whether plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a)(ii). Therefore, it is appropriate to determine as a question of law whether plaintiff sustained a serious impairment of body function, i.e., whether the impairment affected plaintiff’s general ability to lead her normal life. *Kriener v Fischer*, 471 Mich 109, 130; 683 NW2d 611 (2004).

In *Kriener*, our Supreme Court explained that “the ‘objectively manifested impairment of an important body function’ that the plaintiff has suffered must affect his ‘general ability’ to lead his normal life,” and that “[d]etermining whether the impairment affects a plaintiff’s ‘general ability’ to lead his normal life requires considering whether the plaintiff is ‘generally able’ to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.” *Id.* Stated another way, “the objectively manifested impairment of an important body function must affect the *course* of a person’s life”; that is, “the effect of the impairment on the course of a plaintiff’s entire normal life must be considered.” *Id.* at 130-131. While “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.” *Id.* at 131.

Our Supreme Court directed that, in analyzing whether an impairment affects a person’s “general” or “overall” ability to lead his normal life, the starting point is “identifying how his life has been affected, by how much, and for how long.” *Id.* In particular, “[s]pecific activities should be examined with an understanding that not all activities have the same significance in a person’s overall life,” and “minor changes in how a person performs a specific activity may not change the fact that the person may still ‘generally’ be able to perform that activity.” *Id.*

To determine whether plaintiff suffered a serious impairment of body function, we must compare her life before and after the accident and consider the significance of any affected

aspects on the course of her overall life. *Id.* at 132-133. We must then objectively analyze whether “any difference between [] plaintiff’s pre- and post-accident lifestyle has actually affected [her] ‘general ability’ to conduct the course of [her] life.” *Id.* at 133. “Merely ‘any effect’ on [] plaintiff’s life is insufficient because a de minimus effect would not, as objectively viewed, affect [] plaintiff’s ‘general ability’ to lead [her] life.” *Id.*

Our Supreme Court advised that in evaluating whether a plaintiff’s “general ability” to conduct the course of her normal life has been affected, the following objective factors may be useful: “(a) the nature and extent of the impairment, (b) the type and length of treatment, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery.” *Id.* However, “the ultimate question that must be answered is whether the impairment ‘affects the person’s general ability to conduct the course of [] her normal life.’” *Id.* at 134.

Long before the accident here, plaintiff sustained a work-related knee injury in 1992, and she developed reflex sympathetic dystrophy (RSD), a chronic neurological syndrome, as a result. Plaintiff described the symptoms as including “discoloration, extreme pain, numbness, hot and cold to touch, weakness,” “jabbing, searing pain like a knife sticking in your leg, knee, [and] swelling.” By 1994, plaintiff could no longer stand on her injured leg, and characterized herself as “permanently disabled” since that time. Plaintiff had since been receiving social security disability benefits, had not applied for any jobs, and had no intention of returning to work. The RSD grew progressively worse over the years, spreading to every part of plaintiff’s body below her neck and requiring that she take numerous medications on a daily basis.

Plaintiff sustained an ankle fracture in the automobile accident at issue here. She was scheduled for five out-patient visits and was non-invasively treated with a cast, boot, and brace from December 2003 until May 2004. The medical records reveal that, within weeks of the accident, she was allowed to walk with the aid of a walker and a four-prong cane. Her ankle was designated “healed” without physical therapy at her May 2004 doctor visit. Plaintiff’s ankle injury itself did not sufficiently affect her “general ability” to conduct her life under the *Kreiner* standard.

While plaintiff admits to suffering from RSD before the accident, she further argues that the accident exacerbated her condition. However, she has come forward with insufficient evidence to demonstrate that the impact of the accident on her progressively worsening RSD affected her general ability to lead her normal life. Plaintiff had no hobbies before the accident, and has not engaged in hobbies since the accident. Plaintiff walked with a cane before the accident, and has walked with a cane since the accident. Plaintiff reduced the frequency with which she drove after accident; however, this was due to the fact that she had not been able to replace her vehicle which was rendered inoperable in the accident, and not because of her physical inability to do so. Indeed, plaintiff had driven her son’s car on two occasions since the accident. Although plaintiff claims she reduced the amount of times she washed dishes from approximately three times a week to two times a week, such a change does not evidence any limitation in her activities sufficiently different from that which existed before the automobile accident.

We disagree with plaintiff’s contention that the trial court’s holding essentially amounted to a rule that persons with pre-existing disabilities will never be able to meet the serious

impairment of body function threshold necessary to sustain an action for noneconomic damages. Rather, based on the facts of this particular case, plaintiff has not demonstrated that her “entire normal life,” as unfortunately limited and painful as it may be, is appreciably different than her life before the automobile accident. *Id.* at 131. While we empathize with the amount of suffering plaintiff has had to endure since 1992 because of RSD, the fact remains that “the course or trajectory of [] plaintiff’s normal life has not been affected” by the later accident here. *Id.* The trial court properly granted summary disposition in favor of defendants.

We affirm.

/s/ Richard A. Bandstra

/s/ Karen M. Fort Hood