STATE OF MICHIGAN

COURT OF APPEALS

CHIQUITA TAYLOR,

Plaintiff-Appellant,

v

MARCUS FRANCIS TAYLOR and HIGHLAND CHRYSLER PLYMOUTH COMPANY,

Defendants-Appellees.

UNPUBLISHED
January 13, 2011

No. 295594
Kent Circuit Court
LC No. 08-009335-NI

Before: MARKEY, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

In this action to recover noneconomic damages under the no-fault act, plaintiff appeals as of right from a circuit court order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We reverse and remand.

Plaintiff claims she was injured on January 10, 2007, when a vehicle operated by defendant Marcus Taylor and owned by defendant Highland Chrysler Plymouth Company hit the driver's side of plaintiff's vehicle as she sat in her parked (though idling) car in her high school parking lot. Plaintiff had previously been in an automobile accident in 2004 in which she also allegedly injured her back. Plaintiff's pediatric orthopedic physician, Dr. Reinhart, had treated the alleged 2004 injury, and examined her on November 27, 2006. He reported that plaintiff "still has some pain with hypertension, especially with the left leg elevated, and assessed plaintiff with "lower back pain." Dr. Reinhart sent plaintiff to eight weeks of "physical therapy for truncal stability for the back pain . . . "

Plaintiff was not hospitalized following the instant accident, and the police report did not indicate that plaintiff was injured or complained of pain at the scene. On January 15, 2007, plaintiff attended a physical therapy session and there is no evidence that she mentioned any aggravation of her condition. However, on January 22, 2007, plaintiff saw Dr. Reinhardt who diagnosed plaintiff with "low back pain" and a "[n]ew onset of back pain secondary to motor vehicle accident." Dr. Reinhardt reported that "she does have what feels like spasmodic changes in the paraspinal muscles on her left side." In addition to continued physical therapy and "heat packs" plaintiff was prescribed ibuprofen. Dr. Reinhardt sent plaintiff for an MRI examination which revealed a herniated disk. In a letter to plaintiff's automobile insurance company, Dr. Reinhardt wrote that, "I do feel that the accident in January 2007 exacerbated her pain, because it

seemed as if her back pain was getting better with therapy, and then she had a new injury which incited this new pain which caused her to require additional treatment by another physician." Plaintiff also saw Kevin Fitzgerald, M.D., of Michigan Pain Consultants, who opined that "in January [2007 plaintiff's] pain got progressively worse." Last, Lisa B. Green, M.D., examined plaintiff on February 8, 2008, and indicated that plaintiff "may . . . have had a disk herniation at [the time of the accident]. There is no way of proving that there was a disk herniation at that time, but I think this is likely the case given this significant worsening of pain."

Plaintiff filed a complaint against defendants, alleging that Marcus Taylor's negligence caused her "[s]evere low back pain," and "L5-S1 disk bulge; requiring epidural injections and physical therapy." Defendants moved for summary disposition pursuant to MCR 2.116(C)(10) on the basis that plaintiff's injuries did not meet the statutory threshold for recovery of noneconomic damages because her impairment did not affect her general ability to lead her normal life under then controlling precedent *Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004), reh den 471 Mich 1201 (2004). Notably, defendants' conceded for purposes of their motion for summary disposition that plaintiff's injuries were objectively manifested and affected an important body function. The trial court granted the defendants' motion for summary disposition, finding that plaintiff's new impairment did not affect her general ability to lead her normal life.

On appeal, a court's decision on a motion for summary disposition is reviewed de novo. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion under MCR 2.116(C)(10) tests the factual support for a claim. When reviewing a motion under MCR2.116(C)(10), a court must examine the documentary evidence presented and, draw all reasonable inferences in favor of the nonmoving party, and determine whether a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The nonmoving party has the burden of establishing through affidavits, depositions, admissions, or other documentary evidence that a genuine issue of disputed fact exists. *Id*. A question of fact exists when reasonable minds can differ on the conclusions to be drawn from the evidence. *Glittenberg v Doughboy Recreational Industries (On Rehearing)*, 441 Mich 379, 398-399; 491 NW2d 208 (1992). Summary disposition is properly granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Maiden*, 461 Mich at 120.

Here, given defendants' above noted concessions for purposes of summary disposition, the only relevant question on appeal in this case is whether the trial court properly determined whether plaintiff's alleged back injuries can establish that she suffered a serious impairment of body function. We also recognize that at the time the trial court rendered its decision, the controlling standard used to make this determination was *Kreiner*, 471 Mich at 130-131, and that *Kreiner* has since been reversed by the Supreme Court's decision in *McCormick v Carrier*, 487 Mich 180; ___ NW2d ___ (2010). Because *McCormick* established a new standard for evaluating third-party claims under MCL 500.3135(1) and (7), we are compelled to reverse the

trial court's decision in this regard and remand for further proceedings consistent with *McCormick*'s directives. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Pat M. Donofrio