

STATE OF MICHIGAN
COURT OF APPEALS

ERIC WILSON,

Plaintiff-Appellant,

v

RODNEY JAMES LATHROP,

Defendant-Appellee,

and

ESURANCE INSURANCE COMPANY,

Defendant.

UNPUBLISHED
February 14, 2013

No. 305718
Macomb Circuit Court
LC No. 2010-002568-NI

Before: FORT HOOD, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court opinion and order granting defendant's motion for summary disposition. We affirm.

On October 2, 2008, plaintiff was stopped in his vehicle when he was rear-ended by a truck driven by defendant. A police report was prepared, indicating that there was minor damage to plaintiff's vehicle. At the scene, plaintiff declined medical treatment, but later that day went to the hospital, seeking treatment for pain. Within a week of the accident, plaintiff reported that he was no longer able to work, shut his business down, and moved out of the marital home to live with his parents where his mother cared for him. Although plaintiff treated with two physicians who supported his need for medication, physical therapy, and work restrictions, and attributed his pain to the accident, three independent medical examiners essentially concluded that the physical complaints were inconsistent with plaintiff's presentation. Additionally, plaintiff testified that his condition affected his general ability to lead a normal life because he could no longer work, perform basic tasks, or play with his children. However, in his deposition, plaintiff acknowledged that he could still motivate and train people in the course of his employment and did not even attempt to perform basic tasks for himself, such as prepare a bowl of cereal. Defendant moved for summary disposition, alleging that plaintiff did not establish an objective manifestation of an important body function that affected his general ability to lead a

normal life. Plaintiff opposed the dispositive motion, claiming that conflicts in the evidence prevented the trial court from granting the motion. The trial court held that there was no material factual dispute regarding the evidence, and plaintiff failed to objectively demonstrate a serious impairment that affected his ability to lead a normal life. Plaintiff now appeals that decision.

A trial court's ruling on a motion for summary disposition presents a question of law subject to review de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). Initially, the moving party must support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id.* "The nonmoving party may not rely on mere allegations or denials in the pleadings." *Id.* The documentation offered in support of and in opposition to the dispositive motion must be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). "The affidavits must be made on the basis of personal knowledge and must set forth with particularity such facts as would be admissible as evidence to establish or deny the grounds stated in the motion." *SSC Assoc Ltd Partnership v Gen Retirement Sys*, 192 Mich App 360, 364; 480 NW2d 275 (1991). Mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A party opposing a motion for summary disposition must present more than conjecture and speculation to meet its burden of providing evidentiary proof establishing a genuine issue of material fact." *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995). When the opposing party provides mere conclusions without supporting its position with underlying foundation, summary disposition in favor of the moving party is proper. See *Rose v National Auction Group*, 466 Mich 453, 470; 646 NW2d 455 (2002).

"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(1). "Serious impairment of body function" is defined as "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). The question whether an injured party has suffered a serious impairment presents a question of law for the court if there is no factual dispute surrounding the nature and extent of the person's injuries or any factual dispute is immaterial to determining whether the standard was met. MCL 500.3135(2)(a); *McCormick v Carrier*, 487 Mich 180, 190-191; 795 NW2d 517 (2010).

The plain and unambiguous language of the statute contains three requirements that are necessary to establish a serious impairment of body function: "(1) an objectively manifested impairment (2) of an important body function that (3) affects the person's general ability to lead his or her normal life." *McCormick*, 487 Mich at 195. "Objectively manifested" is "an impairment that is evidenced by actual symptoms or conditions that someone other than the injured person would observe or perceive as impairing a body function." *Id.* at 196. The term "impairment" relates to the impact of damage that arises from an injury. *Id.* at 197. Therefore, when addressing "impairment," the focus is not on the injuries, but on how the injuries affected a particular body function. *Id.* A plaintiff must introduce evidence demonstrating a physical basis

for their subjective complaints of pain and suffering, and this showing generally, but not always, requires medical documentation. *Id.* at 198. Important body function refers to a function of significance and will vary depending on the person. *Id.* at 199. Therefore, the inquiry regarding an important body function is “an inherently subjective inquiry that must be decided on a case-by-case basis, because what may seem to be a trivial body function for most people may be subjectively important to some, depending on the relationship of that function to the person’s life.” *Id.*

The phrase “affect the person’s ability to lead his or her normal life” means “to have an influence on some of the person’s capacity to live in his or her normal manner of living.” *Id.* at 202. This is a subjective, fact specific inquiry to be resolved on a case-by-case basis. *Id.* “Determining the effect or influence that the impairment has had on a plaintiff’s ability to lead a normal life necessarily requires a comparison of the plaintiff’s life before and after the accident.” *Id.* The ability to lead a normal life only need be affected, not destroyed. *Id.* There is no temporal requirement on the length of the impact on the ability to lead a normal life. *Id.* at 203.

Although we conclude that the trial court erred by holding that there was no genuine issue of material fact regarding the objective manifestation because of the conflicts in the medical evidence, the trial court properly granted summary disposition because plaintiff failed to establish an affect upon his ability to lead a normal life. A review of the record reveals that plaintiff testified that he worked eighty hours per week, but completely shut his business down because he could not lift 10 to 20 pounds or go to the post office. However, plaintiff did not delegate any responsibility to his twenty employees, for which he did not maintain personnel files, and could not recall the name of any suppliers at his deposition. Additionally, although plaintiff testified that his mother did “everything” for him, he admitted that he never tried to perform basic tasks such as making breakfast, washing clothes, or grocery shopping. One cannot simply surmise that he lacks the ability to accomplish a basic task absent any attempt to perform it.¹ A party must oppose a motion for summary disposition with admissible documentary evidence that must contain a factual foundation without relying on speculation and conjecture. *Rose*, 466 Mich at 470; *Cloverleaf Car Co*, 213 Mich App at 192-193. In comparing plaintiff’s life before and after the accident, plaintiff did not meet his evidentiary burden of proof.

Affirmed. Defendant, the prevailing party, may tax costs, MCR 7.219.

/s/ Karen M. Fort Hood
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

¹ The tasks at issue could have been attempted as they did not exceed the restrictions imposed by doctors. We also note that, although plaintiff claimed that he lived with his mother who performed all of his tasks for him, surveillance located plaintiff at his wife’s residence where he was observed performing basic tasks such as driving and running errands.