

STATE OF MICHIGAN
COURT OF APPEALS

KEVIN WALLACE,

Plaintiff-Appellant,

V

BETTY CAROL NANCE-BACAN,

Defendant-Appellee.

UNPUBLISHED

August 6, 2013

No. 309852

Wayne Circuit Court

LC No. 10-011429-NI

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals by right the order denying plaintiff's motion for reconsideration of the order granting summary disposition in favor of defendant. We reverse and remand for proceedings consistent with this opinion.

On May 17, 2008, plaintiff was traveling in his vehicle and stopped at a red light, but the traffic signal changed to a green light. He proceeded to drive through the intersection when he was struck by a car driven by defendant. Plaintiff was unable to breathe due to the injuries that he sustained in the accident, which included a collapsed lung and fractured ribs. The accident also caused him to suffer from neck and back pain. Plaintiff was hospitalized for seven days. Approximately, a month after his discharge from the hospital, he returned to the emergency room because of chest pain and had fluid drained from his lungs. Plaintiff received physical therapy for his injuries after the accident. At the time of his deposition in June 2011, plaintiff treated with a chiropractor for his neck, back, and lower lumbar area.

The case was originally assigned to Judge Daphne Means Curtis, but was transferred to Judge Daniel Patrick Ryan. Defendant filed her motion for summary disposition. Plaintiff's counsel did not file a timely response to the motion, but alleged that permission to file a late pleading was erroneously received from the office of Judge Curtis. Judge Ryan granted the motion for summary disposition, stating that if the answer was not timely filed, he "automatically grant[s] the motion." The motion for reconsideration was also denied. This appeal followed.

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). 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, 371-372; 547 NW2d 314 (1996). When the opposing party fails to respond to a motion for summary disposition, judgment shall be entered in favor of the moving party only if appropriate. MCR 2.116(G)(4). When deciding a motion for summary disposition premised on MCR 2.116(C)(10), the court must consider the affidavits, pleadings, depositions, admissions and other documentary evidence then filed in the action or submitted by the parties. MCR 2.116(G)(5); *Majestic Golf, LLC v Lake Walden Country Club, Inc*, 297 Mich App 305, 320; 823 NW2d 610 (2012). A ruling on a motion for reconsideration is reviewed for an abuse of discretion. *Yoost v Caspari*, 295 Mich App 209, 219; 813 NW2d 783 (2012). When the decision results in an outcome falling outside the range of principled outcomes, an abuse of discretion has occurred. *Id.* at 219-220.

“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.

The trial court erred in granting defendant’s motion for summary disposition because plaintiff did not timely file a response to the dispositive motion and further erred in denying plaintiff’s motion for reconsideration. Irrespective of the timeliness of the filing of the response, defendant’s proofs did not demonstrate entitlement to summary disposition as a matter of law in light of *McCormick*. The moving party must make and support its claim for summary disposition. *McCoig Materials, LLC*, 295 Mich App at 693. The burden shifts to the nonmoving party to create a genuine issue of material fact only after the moving party demonstrates entitlement to summary disposition. *Id.* In the present case, a review of the lower court record reveals that defendant submitted the entire transcript of plaintiff’s deposition testimony. Therein, plaintiff testified regarding the extent of his injuries and the impact on his life before and after the accident. He testified regarding his collapsed lung that impacted his ability to breath, the complications that continued causing his return to the emergency room, and the physical therapy and chiropractic visits that followed. Although plaintiff was not employed immediately before the accident, the impact on his ability to lead a normal life need only be affected, not destroyed. *McCormick*, 487 Mich at 202-203. He testified regarding restrictions imposed by his doctor, his limitation on his own activities such as exercise, his ability to play and participate in events with his child, and his ability to drive due to a neck injury following the accident. He testified that his injury to his back and tingling in his hands impacted his ability to work. Pursuant to the requirements established in *McCormick*, 487 Mich at 195, defendant did not establish entitlement to summary disposition in light of the submission of plaintiff’s deposition testimony in its entirety. The trial court erred in concluding that the failure to file a timely answer warranted summary disposition in favor of defendant. See MCR 2.116(G)(4), (G)(5); *McCoig Materials, LLC*, 295 Mich App at 693.¹

¹ Because the record does not contain documentary evidence addressing the misfiling before Judge Curtis, we do not address it. We also note that plaintiff addressed additional issues regarding other claims such as whether plaintiff suffered a permanent serious disfigurement. Defendant disputed the sufficiency of the allegations contained in the complaint to raise such a claim. In light of our holding that the trial court erred in granting defendant’s motion for summary disposition premised on the failure to file a timely response and denying plaintiff’s motion for reconsideration, we need not address these issues. Moreover, we note that the court rules provide for amendments to the pleadings, MCR 2.118(A), and amendments to conform to the evidence, MCR 2.118(C).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Plaintiff, the prevailing party, may tax costs. MCR 7.219.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause