

STATE OF MICHIGAN
COURT OF APPEALS

AGHATA MANSOR,

Plaintiff-Appellant,

v

VERONICA GIRNET and MARIUS GIRNET,

Defendants-Appellees.

UNPUBLISHED

October 25, 2005

No. 262713

Macomb Circuit Court

LC No. 04-001905-NI

Before: Saad, P.J., and Jansen and Markey, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent from the majority opinion, and would reverse and remand for further proceedings. I believe genuine issues of material fact exist with regard to whether plaintiff suffered a serious impairment of body function.

The question before this Court is whether plaintiff has raised a genuine issue of material fact with regard to whether she suffered a tort liability threshold serious impairment of body function pursuant to MCL 500.3135(1). The trial court found that no genuine issue of material fact existed in this regard, and granted defendants' motion for summary disposition.

This Court reviews a trial court's decision on a motion for summary disposition *de novo*. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001). When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). All reasonable inferences are to be drawn in favor of the nonmovant. *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005). This Court is liberal in finding a genuine issue of material fact. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 306; 701 NW2d 756 (2005). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). Circumstantial evidence may present a factual issue. *Bergen v Baker*, 264 Mich App 376, 387; 691 NW2d 770 (2004).

Under the no-fault automobile insurance act, MCL 500.3101 *et seq.*, tort liability for noneconomic losses is generally limited to instances in which the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement. MCL 3135(1);

Hardy v Oakland Co, 461 Mich 561, 565; 607 NW2d 718 (2000). A serious impairment of body function is “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). For an impairment to be objectively manifested, there must be a medically identifiable injury or a condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 652-653; 654 NW2d 604 (2002). Whether a person has suffered a serious impairment of body function is a question of law for the court if there is no factual dispute concerning the nature and extent of the injuries, or if there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to whether the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a). If there is a factual dispute concerning the nature and extent of the injuries that is material to whether plaintiff has suffered a serious impairment of body function, the determination whether the plaintiff suffered a serious impairment of body function is a question of fact for the jury. *Miller v Purcell*, 246 Mich App 244, 247; 631 NW2d 760 (2001).

Determining whether a person is generally able to lead his or her normal life requires considering whether the objectively manifested impairment has affected the course of the person’s life. In determining whether an injury constitutes impairment of an important body function, a court should consider the totality of the circumstances, including the extent of the injury, the treatment required, the duration of the disability, the extent of residual impairment and the prognosis for eventual recovery. *Kreiner v Fischer*, 471 Mich 109, 133-134; 683 NW2d 611 (2004). The court must examine the plaintiff’s life before and after the accident, and consider the significance of the affected aspects on the course of the plaintiff’s life. *Id.* at 132. An injury need not be permanent to be an impairment of an important body function, *id.* at 135, but if the person’s general ability to lead his normal life has not been affected, he has not suffered a serious impairment, *id.* at 130.

I would reverse the trial court’s grant of summary disposition and remand for further proceedings because I believe there is a material factual dispute concerning the nature and extent of the injuries suffered by plaintiff and that the dispute is material to whether plaintiff suffered a serious impairment of body function.

An objectively manifested impairment consists of a medically identifiable injury or a condition that has a physical basis. *Jackson, supra* at 652-653. A muscle spasm is an objectively identifiable injury, and the ability to use the back is an important body function. *Chumley v Chrysler Corp*, 156 Mich App 474, 481-482; 401 NW2d 879 (1986). Following the accident, plaintiff complained of headaches, dizziness, and neck and back pain. Six months after the accident, Dr. A. Rayes, a neurologist, diagnosed paraspinal muscle spasm and tenderness. A few months prior, Dr. Rayes had diagnosed plaintiff with “Closed head injury, post concussion syndrome with vestibular dysfunction” and “Traumatic cervical/lumbar strain.” In addition, plaintiff’s back injuries were objectively manifested via an magnetic resonance imaging (MRI) that revealed: (1) a “broad-based disc/osteophyte complex that symmetrically flattens the ventral sac without producing central canal stenosis. There is mild narrowing of the bilateral foramina, right-side slightly greater than left,” for C5-C6 of the cervical spine; (2) “Posterior disc-bulging minimally effaces the ventral thecal-sac. The central canal and foramina remain patent,” for C6-C7 of the cervical spine; (3) “Subligamentous disc-protrusion exhibits lateralization towards both foramina. There is symmetric flattening of the ventral sac, and bilateral foramina impingement that is in the mild-to-moderate range,” for L3-L4 of the lumbar spine; and (4) “There is a small

tear in the left posterolateral disc-annulus, but no significant narrowing of the central canal or foramina. Minor bulging minimally flattens the ventral thecal sac,” for L4-L5 of the lumbar spine. Thus, in addition to the muscle spasms there was objectively manifested bulging and other impairments related to plaintiff’s back.

For these reasons, I believe there is a question of fact with regard to whether plaintiff suffered a serious impairment of a body function. The majority discusses the opinions of defendants’ experts with regard to whether the MRI findings support an objective manifestation of impairment of an important body function. However, this is a credibility issue and leaves questions of fact. When the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted. *Metropolitan Life Ins Co v Reist*, 167 Mich App 112, 121; 421 NW2d 592 (1988).

Plaintiff testified that prior to the accident, she did the bulk of the cooking and housecleaning activities for a household of five adults, walked two to four miles per day, and frequently traveled by car to Toronto to visit her children. She stated that following the accident, the headaches, dizziness, and neck and back pain she experienced precluded her from doing any but the lightest of cooking and housecleaning activities. She could no longer walk up and down steps to do laundry. She could no longer walk more than one block, and thus could not walk to the grocery store or carry bags of groceries.¹ Two physicians indicated that plaintiff required assistance with daily living activities. She was required to take prescription medication to control pain and dizziness. Self-imposed restrictions do not constitute evidence of a serious impairment of body function, *Kreiner, supra* at 133 n 17; however, contrary to defendants’ assertions, plaintiff’s restrictions were not entirely self-imposed.

I also believe a question of fact exists with regard to whether the alleged impairment affected plaintiff’s general ability to lead her normal life. In this case, the activities in which plaintiff engaged prior to the accident were not as strenuous as those engaged in by the plaintiff in *Kreiner, supra*, and her limitations following the accident differed from those suffered by the plaintiff in that case. *Id.* at 137-138. However, I would conclude that plaintiff presented evidence in opposition to defendants’ motion for summary disposition that created an issue of fact as to whether her injuries affected her general ability to lead her normal life. As such, I would find that defendants were not entitled to summary disposition. MCL 500.3135(2)(a).

I would reverse and remand for further proceedings.

/s/ Kathleen Jansen

¹ Plaintiff does not drive a vehicle.