

STATE OF MICHIGAN
COURT OF APPEALS

HANA BERISHAJ,

Plaintiff-Appellant,

v

HEIDI KATHARINA UNGER,

Defendant-Appellee.

UNPUBLISHED
December 2, 2003

No. 241327
Oakland Circuit Court
LC No. 01-030450-NI

Before: Murray, P.J., and Gage and Kelly, JJ.

MEMORANDUM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition in this no-fault action. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff suffered from preexisting conditions of hip dysplasia and degenerative disease of the spine. She was involved in two automotive accidents within a one-month period. This action arises out of the second accident. The trial court granted defendant's motion for summary disposition, finding that plaintiff failed to establish that the second accident was a proximate cause of her injuries.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In evaluating the motion, the court considers the evidence submitted by the parties in a light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.*

Under MCL 500.3135 a person remains subject to tort liability for noneconomic loss caused by his use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. The issue of whether an injured person has suffered serious impairment of body function is a question of law if there is no factual dispute concerning the nature and extent of the person's injuries, or if there is a dispute that is not material to the determination. MCL 500.3135(2)(a).

The trial court did not reach the question whether plaintiff's injuries constituted a serious impairment of a bodily function. Plaintiff was impaired before the accident, and doctors

indicated that the only remedy for her hip condition was hip replacement. She was walking with the assistance of a cane, and she had not returned to work at the time of the second accident.

Plaintiff relies on *McNabb v Green Real Estate Co*, 62 Mich App 500; 233 NW2d 811 (1975), for the proposition that a defendant who is responsible for an injury that results in inseparable damages is responsible for the entire damage. However, *McNabb* also states:

It has long been established that a wrongdoer takes an injured person as he finds him, and, that, if the defendant's wrongful conduct is proved by a preponderance of the evidence to be a proximate cause of the aggravation of a latent disability, he is liable for such aggravation. [*Id.*, 518].

The trial court properly held that plaintiff bore the burden of establishing that defendant's conduct was a proximate cause of the aggravation. Although defendant took the plaintiff as she was, with a susceptibility to aggravation of a preexisting condition, plaintiff was required to show proximate cause. *Wilkinson v Lee*, 463 Mich 388, 396-397; 617 NW2d 305 (2000). Plaintiff failed to do so, and the trial court properly granted summary disposition.

Affirmed.

/s/ Christopher M. Murray

/s/ Hilda R. Gage

/s/ Kirsten Frank Kelly