

STATE OF MICHIGAN
COURT OF APPEALS

DIANA L. LENK,

Plaintiff-Appellant,

v

FRANKENMUTH MUTUAL INSURANCE
COMPANY and HOME-OWNERS INSURANCE
COMPANY,

Defendants-Appellees,

and

AARON BURTON, DENNIS K. BURTON, and
DEBORAH J. KARLIN,

Defendants.

UNPUBLISHED
November 25, 2014

No. 317014
Kent Circuit Court
LC No. 12-000664-NI

Before: BOONSTRA P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

In this automobile negligence case, plaintiff Diana L. Lenk appeals as of right a circuit court order granting summary disposition to defendants Home-Owners Insurance Company and Frankenmuth Mutual Insurance Company. The circuit court ruled that Lenk failed to demonstrate an “objectively manifested impairment” as required by MCL 500.3135(5).¹ We affirm.

In October 2010, a vehicle driven by Deborah Karlin struck Lenk’s car while both traveled on I-96. At the accident scene, Lenk denied injury. Later that day, however, she sought treatment for neck and back pain. CT scans of her cervical and thoracic spine revealed no abnormalities. A physician prescribed an anti-inflammatory medication.

¹ The parties cited MCL 500.3135(7) for the definition of “serious impairment of a body function.” The statute was amended and the definition moved to subsection (5) in 2012, before the current lawsuit was resolved.

Lenk's back and neck pain persisted. More sophisticated imaging studies were performed, but again revealed no spinal injuries or irregularities. Nevertheless, Lenk's physicians recommended that she undergo a series of facet injections, followed by thermal radiofrequency neurotomies. According to Lenk, these therapies only temporarily allayed her pain. In January 2012, she filed this lawsuit.²

Defendants sought summary disposition under MCR 2.116(C)(10), contending that Lenk had failed to demonstrate a serious impairment of body function as required by MCL 500.3135(1). The circuit court issued a written opinion granting defendants' motion, and Lenk appeals.

We review de novo the circuit court's summary disposition ruling. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may grant summary disposition under subrule (C)(10) if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). When the record leaves open an issue on which reasonable minds could differ, a genuine issue of material fact exists that precludes summary disposition. *West*, 469 Mich at 183.

The Legislature has limited tort liability for noneconomic loss to cases in which an injured plaintiff "has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). MCL 500.3135(5) defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." In *McCormick v Carrier*, 487 Mich 180, 193; 795 NW2d 517 (2010), the Supreme Court instructed that when no factual dispute exists regarding the nature and extent of a plaintiff's injuries, "the threshold question whether the person has suffered a serious impairment of body function should be determined by the court as a matter of law." A three-pronged analysis dictates whether a plaintiff has established a serious impairment. *Id.* at 195. A plaintiff must show: "(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." *Id.*

Here, we discern no genuine factual dispute regarding the nature and extent of Lenk's accident-related injuries. Multiple diagnostic studies performed during the two years immediately following the accident failed to identify any abnormality that accounts for Lenk's pain complaints. While a 2013 MRI revealed a "[r]ight paracentral disc herniation at T9-T10," Lenk presented no evidence linking this new finding with her 2010 automobile accident. Thus, no genuine issue of material fact stands in the way of deciding as a matter of law whether Lenk has established an injury satisfying the tort liability threshold set forth in MCL 500.3135(5).

² The vehicle that struck Lenk was uninsured. Lenk is insured under two policies which afford her uninsured motorist benefits.

The first *McCormick* prong requires a determination of whether the plaintiff has established “an objectively manifested impairment.” This requirement is met by evidence of “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.” *McCormick*, 487 Mich at 196. The Supreme Court emphasized in *McCormick* that “the proper inquiry is whether the *impairment* is objectively manifested, not the *injury* or its symptoms.” *Id.* at 197 (emphasis in original). When considering whether record evidence substantiates the existence of an “impairment,” a court must focus “not on the injuries themselves, but how the injuries affected a particular body function.” *Id.* (quotation marks and citation omitted).

Applying these principles, the *McCormick* Court held that the plaintiff demonstrated an objectively manifested impairment by presenting evidence “that he suffered a broken ankle and actual symptoms or conditions that someone else would perceive as impairing body functions, such as walking, crouching, climbing, and lifting weight.” *Id.* at 218. Evidence that “[e]ven 14 months after the accident” the plaintiff’s ankle pain and reduced range of ankle motion “inhibited these body functions” substantiated the objective nature of the plaintiff’s impairment. *Id.*

In contrast, Lenk provided no objective support for her claim that she suffered a threshold injury as a result of the 2010 accident. Despite Lenk’s back and neck pain, she missed only five days of work as a mill operator. Other than a snow-shoveling restriction issued at her specific request, Lenk’s activities are medically unlimited. And according to her medical records, Lenk has no obvious or measurable neurologic deficits. Lenk predicates her impairment claim on wholly subjective symptoms and complaints, such as neck stiffness and pain with movement. Accordingly, she has failed to advance any evidence of an *objective* impairment that would satisfy *McCormick*’s first prong.

We affirm.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher