

STATE OF MICHIGAN
COURT OF APPEALS

MARQUESHA BLAIR,

Plaintiff-Appellant,

v

ROBERT LEWIS JONES,

Defendant-Appellee.

UNPUBLISHED

February 18, 2021

No. 350769

Washtenaw Circuit Court

LC No. 18-000730-NI

Before: MURRAY, C.J., and JANSEN and STEPHENS, JJ.

PER CURIAM.

In this third-party no-fault action, plaintiff, Marquesha Blair, appeals as of right the order granting summary disposition in favor of defendant, Robert Lewis Jones. We affirm.

I. FACTUAL BACKGROUND

Plaintiff was a passenger in a vehicle that was rear-ended by defendant. The airbags did not deploy, plaintiff had no visible injuries, and plaintiff did not seek immediate medical attention. However, sometime later, plaintiff began to complain of pain on her left side. Defendant was issued a citation for failure to stop within an assured clear distance. At the time of the accident, plaintiff held employment in three different positions: full-time at Huntington Bank and part-time at both McDonald’s and Rainbow Rehabilitation Center. Plaintiff did not return to her part-time positions after the accident.

Plaintiff sought medical attention at the emergency room on three separate occasions. Plaintiff’s chief complaints were of headaches and pain in her left side. After a negative workup and benign exam, the first emergency room discharged plaintiff and told her to follow up with “OPC/ortho,” and instructed plaintiff to return if symptoms worsened. At the second emergency room, plaintiff was given tests that ruled out “intracranial hemorrhage or other acute intracranial processes,” and tests were negative. Plaintiff had an acute posttraumatic headache and was told to follow up with neurology, orthopedic surgery, and her primary care provider. At the third emergency room visit, no imaging tests were reordered because plaintiff’s neurology was intact with no change in symptoms from the last visit. Plaintiff was instructed to follow up with a neurology specialist.

Dr. Ram Garg, a neurologist, saw plaintiff for her migraine headaches. Dr. Garg's medical assessment and plan included treating plaintiff for vertigo, double vision, blurred vision, closed-head injury, postconcussion syndrome, tinnitus, cervical radiculopathy, whiplash injury to the neck, and loss of balance. Dr. Garg recommended to avoid any activities that could cause migraines and to avoid any heavy pushing, pulling, or lifting. Dr. Garg's medical records indicated an abnormal saccade test but did not explain further how the abnormality may have related to plaintiff's headaches or the accident.

Plaintiff was also treated by a Dr. Adil Ali, who provided physical therapy for plaintiff and said that her physical examinations were objectively normal. Plaintiff was then seen for three different independent medical evaluations, which all showed that plaintiff's medical issues were either resolved or not connected to the vehicle accident.

Plaintiff filed the instant third-party no-fault action, alleging that her injuries met the no-fault injury threshold. Defendant moved for summary disposition and argued that the claimed injuries showed no objective manifestation of a serious impairment or had not been shown to be related to the accident. Plaintiff presented no testimony from medical experts at the motion hearing. The trial court granted summary disposition in favor of defendant. This appeal followed.

II. STANDARD OF REVIEW¹

¹ In her brief on appeal plaintiff relies in part on an outdated and overruled summary disposition (actually summary judgment under the 1963 court rules) standard, arguing that under MCR 2.116(C)(10) the trial court must deny a motion if "a record might be developed that will leave open an issue upon which reasonable minds could differ," citing *Betrand v Alan Ford, Inc*, 449 Mich 606, 618; 537 NW2d 185 (1995). Yet it has been almost 15 years since the Supreme Court (1) explicitly recognized that that standard was inapplicable under the Michigan Court Rules established in 1985, and (2) reversed the cases citing to that standard. Indeed, in *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999), the Supreme Court was very specific in holding that the old standard, requiring denial of a motion if "a record might be developed" that could create a question of material fact, was no longer viable:

We take this occasion to note that a number of recent decisions from this Court and the Court of Appeals have, in reviewing motions for summary disposition brought under MCR 2.116(C)(10), erroneously applied standards derived from *Rizzo v Kretschmer*, 389 Mich 363; 207 NW2d 316 (1973). These decisions have variously stated that a court must determine whether a record "might be developed" that will leave open an issue upon which reasonable minds may differ, see, e.g., *Farm Bureau Mutual Ins Co of Michigan v Stark*, 437 Mich 175, 184; 468 NW2d 498 (1991); *First Security Savings Bank v Aitken*, 226 Mich App 291, 304; 573 NW2d 307 (1997); *Osman v Summer Green Lawn Care, Inc*, 209 Mich App 703, 706; 532 NW2d 186 (1995), and that summary disposition under MCR 2.116(C)(10) is appropriate only when the court is satisfied that "it is impossible for the nonmoving party to support his claim at trial because of a deficiency that cannot be overcome."

Plaintiff argues that trial court erred by granting summary disposition in favor of defendant where a genuine issue of material fact remained regarding whether objective neurological findings showed that plaintiff suffered a head injury in accident that caused her persistent headaches.

A trial court's ruling regarding a motion for summary disposition is reviewed de novo. *Heaton v Benton Constr Co*, 286 Mich App 528, 531; 780 NW2d 618 (2009).

A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. 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. 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 might differ. [*Zaher v Miotke*, 300 Mich App 132, 139-140; 832 NW2d 266 (2013) (quotations marks and citations omitted).]

III. ANALYSIS

Under the no-fault tort liability threshold, a defendant is liable for noneconomic loss caused by the defendant's ownership, maintenance, or use of a motor vehicle only if the plaintiff has suffered death, serious impairment of body function, or permanent serious disfigurement.

Paul v Lee, 455 Mich 204, 210; 568 NW2d 510 (1997); *Horton v Verhelle*, 231 Mich App 667, 672; 588 NW2d 144 (1998).

These *Rizzo*-based standards are reflective of the summary judgment standard under the former General Court Rules of 1963, not MCR 2.116(C)(10). See *McCart*, at 115, n. 4. Under MCR 2.116, it is no longer sufficient for plaintiffs to promise to offer factual support for their claims at trial. As stated, a party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted. MCR 2.116(G)(4).

Consequently, those prior decisions of this Court and the Court of Appeals that approve of *Rizzo*-based standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10) are overruled to the extent that they do so.

We recognized this point a decade ago in *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 350; 686 NW2d 756 (2004), yet still today we frequently receive briefs that contain this outdated, overruled, and obviously inapplicable standard. These standards simply do not apply.

MCL 500.3135(1). There is no allegation of death or permanent serious disfigurement in this case. Therefore, the inquiry is focused on whether plaintiff suffered a serious impairment of body function.

The no-fault statute has codified the Michigan Supreme Court's definition of a serious impairment of body function, which means an impairment that satisfies all the following requirements:

(a) It is objectively manifested, meaning it is observable or perceivable from actual symptoms or conditions by someone other than the injured person.

(b) It is an impairment of an important body function, which is a body function of great value, significance, or consequence to the injured person.

(c) It affects the injured person's general ability to lead his or her normal life, meaning it has had an influence on some of the person's capacity to live in his or her normal manner of living. Although temporal considerations may be relevant, there is no temporal requirement for how long an impairment must last. This examination is inherently fact and circumstance specific to each injured person, must be conducted on a case-by-case basis, and requires comparison of the injured person's life before and after the incident. [MCL 500.3135(5); see also *McCormick v Carrier*, 487 Mich 180, 195-209; 795 NW2d 517 (2010).]

The serious impairment threshold requires more than just mere subjective complaints of pain and suffering alone; the plaintiff is required to prove an objectively manifested impairment that affects the functioning of the body. *McCormick*, 487 Mich at 197.

[T]he common meaning of '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. In other words, an 'objectively manifested' impairment is commonly understood as one observable or perceivable from actual symptoms or conditions. [*Id.* at 196.]

The plaintiff must introduce evidence demonstrating a physical basis for the plaintiff's subjective complaints of pain and suffering, which generally will require medical testimony. *Id.* at 198.

The issue whether the plaintiff has suffered serious impairment of body function is a question of law for the trial court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person's injuries.

(ii) There is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function However, for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries

testifies under oath that there may be a serious neurological injury.
[MCL 500.3135(2)(a).]

In this case, the trial court limited its succinct analysis to the first requirement of objective manifestation of the impairment and concluded as follows:

I don't often grant these motions, but in this case I'm going to grant the motion. I do find it's a complete failure to establish objective evidence of any injury and therefore the motion is granted. Case is dismissed.

At the outset, we note that the trial court's holding appears to misstate the requisite standard. The trial court pointed to the lack of objective evidence of "any injury," but the statute requires that the trial court look for objective evidence of an *impairment*. See MCL 500.3135(5); see also *McCormick*, 487 Mich at 197. In fact, the *McCormick* Court noted that the statute "does not contain the word 'injury,' and, under the plain language of the statute, the proper inquiry is whether the *impairment* is objectively manifested, not the *injury* or its symptoms." *Id.* "[W]hile an injury is the actual damage or wound, an impairment generally relates to the effect of that damage. Accordingly, when considering an 'impairment,' the focus 'is not on the injuries themselves, but how the injuries affected a particular body function.'" *Id.* (quotation marks and citation omitted). Therefore, the proper focus in this case is whether plaintiff's alleged *impairment* was objectively manifested.

Plaintiff's sole substantive argument is that the ENG*plus* test results showed that there was an abnormal saccade test, which confirms an objective abnormality. The relevant part of the ENG*plus* test states as follows:

The saccade test appears to be abnormal and may be consistent with CNS Involvement. Saccadic performance is largely controlled by central neural pathways of non vestibular origin. . . . The smooth pursuit test appears to be abnormal and may be consistent with CNS Involvement. Eye tracking is controlled largely by central neural pathways. . . . The Gaze test appears to be normal in all positions with eyes open and eyes closed. The position tests appear to be within normal limits.

Plaintiff summarily argues that the ENG*plus* test is consistent with plaintiff's migraines; however, she provides no medical records, affidavits, or other medical testimony linking the ENG*plus* test and migraines. This is plaintiff's only factual argument.

In this case, plaintiff failed to show a physical basis for her subjective complaints of headaches. Plaintiff's medical records clearly document that plaintiff is in subjective pain. But other than plaintiff's subjective complaints of pain, plaintiff did not present any medical records or medical testimony to show that she has suffered an objectively manifested impairment as is required to recover noneconomic damages under the no-fault act. All imaging such as MRI scans, CT scans, and X-rays, as well as physical exams, were recorded as normal or benign. All other diagnoses appear to have been made from plaintiff's subjective complaints of pain. Plaintiff underwent three independent medical examinations, none of which indicated that plaintiff suffered an objectively manifested impairment caused by the accident at issue. Where plaintiff fails to

show any objectively manifested impairment evidenced by actual symptoms or conditions that someone other than she would observe or perceive as impairing a body function, *McCormick*, 487 Mich at 196, the trial court properly granted summary disposition in favor of defendant.

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens