

STATE OF MICHIGAN
COURT OF APPEALS

EVELYN M. LESTER,

Plaintiff-Appellant,

v

WILLIAM F. CASTLE,

Defendant/Third-Party Plaintiff-
Appellee,

and

FRANK EDWARD LESTER,

Third-Party Defendant-Appellee.

UNPUBLISHED

June 15, 2006

No. 267640

Kent Circuit Court

LC No. 04-007109-NI

Before: O'Connell, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's order granting summary disposition in favor of defendant, William F. Castle, in this automobile negligence action. We affirm in part and reverse in part.

This case arises out of an automobile accident that occurred on May 21, 2003. Plaintiff was a passenger in a vehicle driven by her husband, third-party defendant, Frank Edward Lester, which collided with Castle's vehicle as Castle was attempting to make a left-hand turn. Plaintiff filed this automobile negligence action, alleging to have suffered a serious impairment of body function and permanent serious disfigurement.

At the time of the accident at issue in this case, plaintiff was treating with medical personnel as a result of a previous automobile accident that occurred on June 21, 2002. The trial court granted summary disposition for Castle on the basis that plaintiff's right shoulder injury and resulting lifestyle effects occurred as a result of the 2002 accident, not the 2003 accident. The trial court further determined that plaintiff's shoulder injury and resulting surgery did not affect her general ability to lead her normal life. We note that the trial court also presided over litigation arising out of the 2002 accident, and it granted summary disposition in favor of the defendants in that first action, finding that there was a failure to show some objective manifestation of injury after the first accident and prior to the second accident so that causation

could be determined without the need to speculate. The trial court essentially found a lack of causation in both actions. This Court affirmed the dismissal of the first lawsuit, stating that “the first accident in fact seems less likely than the second to be the cause of any condition affecting plaintiff’s normal life at present.” *Lester v Morningstar*, unpublished opinion per curiam of the Court of Appeals, issued April 4, 2006 (Docket No. 258368), slip op at 3. This Court further stated, “Because the first [accident] generated no medical evidence suggesting an objectively manifested impairment of an important body function occurring over the thirteen months that followed, the second [accident] rendered it impossible to trace any such manifestation to the first [accident] except through recourse to speculation and conjecture.” *Id.*

Here, plaintiff argues that the trial court erred by granting summary disposition for Castle. This Court reviews de novo a trial court’s decision on a motion for summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass’n*, 252 Mich App 25, 31; 651 NW2d 188 (2002). In deciding a motion under subrule (C)(10), a court considers the affidavits, pleadings, admissions, and all of the other documentary evidence in the light most favorable to the nonmoving party. *Id.* at 30-31. To survive a motion for summary disposition, the opposing party must present documentary evidence establishing the existence of a genuine issue of material fact for resolution at trial. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The nonmoving party must present more than mere allegations to establish a genuine issue of material fact. *Rice, supra* at 31.

Section 3135(1) of the no-fault act, MCL 500.3135(1), provides:

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. [Emphasis added.]

Thus, pursuant to this statutory language, causation is a factor in determining whether a person is subject to liability for noneconomic damages.

We hold that the trial court erred in determining, as a matter of law, that there was no genuine issue of material fact that plaintiff’s right shoulder injury was attributable to her 2002 accident and not the 2003 accident. Considering the medical records, deposition testimony, and other documentary evidence in a light most favorable to plaintiff, we conclude that an issue of fact exists with respect to whether plaintiff’s shoulder injury arose from, or was aggravated by, the second accident.¹ Among other evidence, an MRI taken after the second accident revealed a partial tear of the rotator cuff, a doctor testified that if the injury to plaintiff’s shoulder was

¹ There may be more than one proximate cause, and a particular defendant’s negligence need not be the sole cause in order for a plaintiff to recover. *Grof v Michigan*, 126 Mich App 427, 437; 337 NW2d 345 (1983). A tortfeasor can be held responsible for the aggravation of a plaintiff’s previous injury. See *Belue v Uniroyal, Inc*, 114 Mich App 589, 594; 319 NW2d 369 (1982).

caused in the 2002 accident, it could have been aggravated by the 2003 accident, and plaintiff testified that she injured her shoulder in the second accident. While there was also evidence to the contrary, which indicated that the shoulder injury was associated with the first accident, the evidence overall was conflicting, and resolution by a jury on the issue of causation is appropriate.

We also conclude, however, that plaintiff did not suffer a serious impairment of body function. “[W]hether a person has suffered a serious impairment of body function is a question of law for the trial court to decide where the court finds that there is no factual dispute concerning the nature and extent of the person’s injuries or where 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.” *McDaniel v Hemker*, 268 Mich App 269, 273-274; 707 NW2d 211 (2005). A “serious impairment of body function” must “affect[] the person’s general ability to lead his or her normal life.” MCL 500.3135(7). In *Kreiner v Fischer*, 471 Mich 109, 131; 683 NW2d 611 (2004), our Supreme Court stated:

The starting point in analyzing whether an impairment affects a person’s “general,” i.e., overall, ability to lead his normal life should be identifying how his life has been affected, by how much, and for how long. Specific activities should be examined with an understanding that not all activities have the same significance in a person’s overall life. Also, minor changes in how a person performs a specific activity may not change the fact that the person may still “generally” be able to perform that activity.

Thus, in determining whether an injury affects a person’s general ability to lead his or her normal life, courts must examine the person’s life before and after the accident and determine whether any difference between the person’s pre- and post-accident lifestyle has affected the person’s “general ability” to “conduct the course of his life.” *Id.* at 132-133. The *Kreiner* Court stated that a mere “de minimus” effect is insufficient because such an effect would not affect a person’s “general ability” to lead his or her life. *Id.* at 133.

Here, plaintiff was not working at the time of the 2003 accident. When asked the impact that her shoulder injury had on her lifestyle, plaintiff replied that she has a scar and that the mobility in her right arm is no longer fluid. She also testified that her stamina has decreased and that she does not have as much energy as she did before the 2003 accident. Plaintiff stated that on a regular day, she performs “basically the same things” that she was doing before the 2003 accident, but that she is exhausted by 5:00 p.m. while doing those same activities. She testified that she is able to assist with the laundry, cooking, and gardening, and is able to read and use her computer. Plaintiff also testified that she had been painting the walls of her house “a lot.” In addition, she reopened her day care center in approximately April or May 2004. Thus, based on plaintiff’s own testimony, any injuries suffered in the 2003 accident did not affect her general ability to lead her normal life. Although plaintiff testified that she has less energy than she did before the accident, she also admitted that she was able to perform the same functions that she was able to perform before the accident. In addition, plaintiff’s right arm was in a sling for only two weeks following her surgery, and the doctor restricted plaintiff from lifting with her right arm for only four weeks after the surgery. Accordingly, the accident did not affect her general ability to lead her normal life, and the trial court properly granted summary disposition on this claim.

We do find that a factual dispute exists with regard to the claim of permanent serious disfigurement based on the surgery scar. Whether a scar is a permanent serious disfigurement depends on the scar's physical characteristics rather than its effect on a plaintiff's ability to lead a normal life. *Kosack v Moore*, 144 Mich App 485, 491; 375 NW2d 742 (1985). Whether a scar is serious is a question to be answered by resorting to common knowledge and experience. *Nelson v Meyers*, 146 Mich App 444, 446 n 2; 381 NW2d 407 (1985). A hardly discernible scar does not meet the statutory threshold. *Petaja v Guck*, 178 Mich App 577, 580; 444 NW2d 209 (1989). A court, not a jury, determines whether a permanent serious disfigurement exists unless there is an outcome-determinative factual dispute concerning the nature and extent of the person's injuries. MCL 500.3135(2)(a). The nature of the injury, in the context of a claim of permanent serious disfigurement, relates to the requirement that it be serious and permanent. Here, taking into consideration the scar's physical characteristics, along with common knowledge and experience, and viewing all of the documentary evidence in a light most favorable to plaintiff, we hold that reasonable minds could differ regarding whether the scar is serious. Therefore, a factual dispute exists. Although defendants argue that plaintiff presented no evidence that the scar was permanent, defendants did not present any evidence that it was not permanent, and defendants had the burden of providing supporting documentary evidence on the issue prior to any requirement that plaintiff submit contrary evidence. MCR 2.116(G)(3) and (4).

Affirmed with respect to serious impairment of body function, but reversed and remanded with respect to permanent serious disfigurement. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ William B. Murphy

/s/ Kurtis T. Wilder