

STATE OF MICHIGAN
COURT OF APPEALS

SANDRA J. DANIEL,

Plaintiff-Appellant,

v

MAXWELL G. DANIELS, d/b/a
DANIELS ROOFING & SIDING COMPANY,

Defendant-Appellee.

April 5, 1991

No. 125832

Before: Gillis, P.J., and Weaver and Doctoroff, JJ.

PER CURIAM.

This action arose out of an automobile accident which occurred on March 25, 1988. Plaintiff appeals as of right the grant of defendant's motion for summary disposition. Plaintiff argues that the trial court erred in granting summary disposition to defendant before the deposition of the treating physician was obtained. We affirm.

On March 25, 1988, plaintiff was stopped at a red light when a pickup truck, driven by defendant, collided with the rear end of the car she was driving. In a complaint filed on February 6, 1989, plaintiff alleged that she had suffered permanent and disabling injuries to her neck and back which caused great pain and suffering and prevented her from employment. Plaintiff's claim against defendant for noneconomic loss resulting from defendant's negligent operation of a motor vehicle was made under §3135(1) of the no-fault insurance act, MCL 500.3135(1); MSA 24.13135(1).

On December 27, 1989, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), contending that plaintiff failed to show that she had suffered a serious impairment of body function. A hearing was held on January 22, 1990. The trial court granted defendant's motion, finding that, as a matter of law, plaintiff had not suffered a serious impairment of body function.

On appeal, plaintiff contends that the trial court erred in granting summary disposition before the deposition of the treating physician was obtained.

A motion for summary disposition may be granted pursuant to MCR 2.116(C)(10) when, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. The party opposing the motion must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. Ewers v Stroh Brewery Co., 178 Mich App 371, 375; 443 NW2d 504 (1989), MCR 2.116(G)(4). The court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. Major v Auto Club Ins Ass'n, 185 Mich App 437, 440; ___ NW2d ___ (1990). Giving the benefit of reasonable doubt to the opponent, the court must determine whether a record might be developed which would leave open an issue upon which reasonable minds might differ. Amorello v Monsanto Corp., 186 Mich App 324; ___ NW2d ___ (1990).

The Michigan Supreme Court has held that in deciding motions for summary disposition in an action under MCL 500.3135(1); MSA 24.13135(1), the trial court must view the evidence in a light most favorable to the nonmoving party and determine whether a material factual dispute exists as to the nature and extent of plaintiff's injuries and whether reasonable minds could differ regarding whether plaintiff had sustained a

serious impairment of body function. DiFranco v Pickard, 427 Mich 32, 38-39; 398 NW2d 896 (1986). Generally, medical testimony is needed to establish the existence, extent and permanency of the impairment. Id., p 39. Even where there is no material factual dispute as to the nature and extent of the plaintiff's injuries, the question whether the plaintiff suffered a serious impairment of a body function must be submitted to the trier of fact whenever the evidence would cause reasonable minds to differ as to the answer. Id.

In moving for summary disposition, defendant asserted that there was no objective medical evidence indicating that plaintiff suffered a clinically demonstrable injury other than pain from sprain, that defendant testified in deposition that she returned to work three weeks after the accident, was thereafter able to obtain medical assistant certification and obtain full-time employment as a medical assistant. Furthermore, plaintiff indicated on the career school application, dated May 17, 1988, that she was not suffering any disability or injury and the doctor who examined her in connection with the school admission found no problems that would interfere with schooling or working in health care.

Plaintiff's response asserted that she continued to suffer muscle spasms and headaches and indicated that these symptoms could be satisfactorily treated with medication. In addition, plaintiff admitted that she was able to do everything she could do prior to the accident. Plaintiff's response did not include any documentary evidence showing the existence of a genuine issue for trial, as required by MCR 2.116(G)(4). Furthermore, plaintiff did not assert in the response or argue at the hearing that summary disposition was premature because discovery had not been completed nor did she assert that she intended to depose the treating physician. By raising this argument for the first time on appeal, plaintiff has failed to preserve the issue for review. Petrus v Dickinson County Bd of Comm'rs, 184 Mich App 282, 288; 457 NW2d 359 (1990), lv den 435 Mich 878 (1990). Even if plaintiff had properly preserved this issue, we would find that the trial court properly granted summary disposition to defendant. Based upon our review of the record, we conclude that reasonable minds could not differ regarding whether plaintiff had sustained a serious impairment of body function.

Affirmed.

/s/ John H. Gillis
/s/ Elizabeth A. Weaver
/s/ Martin M. Doctoroff