

STATE OF MICHIGAN
COURT OF APPEALS

ANDRE H. GARRETT,

Plaintiff-Appellee,

v

WAYNE COUNTY,

Defendant-Appellant,

and

KENNETH TRAIL,

Defendant.

UNPUBLISHED

September 11, 2008

No. 279078

Wayne Circuit Court

LC No. 05-533143-NI

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

In this automobile negligence action brought under the motor vehicle exception to the governmental immunity act, MCL 691.1405, defendant Wayne County appeals as of right from the trial court order denying its motion for summary disposition. Because material questions of fact remain on the record the trial court did not err when it denied defendant's motion for summary disposition, and we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I

On January 23, 2005, plaintiff was driving eastbound on the I-96 service drive near Telegraph Road when his car was hit by a snowplow owned by defendant and operated by Kenneth Trail. Plaintiff testified that, following the initial collision, the snowplow pushed his car approximately twenty feet. Plaintiff testified that he hit his head on the driver's side window and that his "neck was messed up." A post-accident photograph of plaintiff's car shows several dents in the passenger side.

Plaintiff instituted this action against defendant and Trail¹ to recover for injuries he claimed he suffered as a result of the accident alleging that Trail had negligently collided with plaintiff's vehicle and that defendant was liable pursuant to the doctrine of respondeat superior. Plaintiff further alleged that defendant's careless, negligent, or reckless entrustment of the snowplow to Trail constituted negligence. Finally, plaintiff alleged that he was entitled to recover noneconomic damages under the Michigan No-Fault Act, MCL 500.3135. The trial court entered an order limiting plaintiff's claims to theories of liability under the motor-vehicle exception to governmental immunity, MCL 691.1405.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis of governmental immunity. Defendant asserted that plaintiff was unable to establish that the accident was the proximate cause of his injury and that the evidence demonstrated that plaintiff's condition was degenerative and not caused by the accident. Defendant further maintained that plaintiff had not sustained a serious impairment of bodily function as required by MCL 500.3135(1). After conducting a hearing on defendant's motion, the trial court concluded that issues of fact exist regarding the proximate cause of plaintiff's injuries and regarding whether plaintiff had sustained a serious impairment of bodily function. Accordingly, the trial court denied defendant's motion pursuant to MCR 2.116(C)(7) and/or MCR 2.116(C)(10). Because an order denying governmental immunity to a governmental party is a final order pursuant to MCR 7.202(6)(a)(v), defendant now appeals of right

II

This Court reviews de novo decisions to grant or deny summary disposition. Summary disposition under MCR 2.116(C)(7) is proper when a claim is barred by immunity granted by law. In order to get past such a motion, the plaintiff must allege facts justifying the application of an exception to governmental immunity. *Marchyok v Ann Arbor*, 260 Mich App 684, 687; 679 NW2d 703 (2004). A motion pursuant to MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Robinson v Ford Motor Co*, 277 Mich App 146, 150-151; 744 NW2d 363 (2007).

III

While defendant asserts in its first issue that the trial court improperly denied its motion for summary disposition because plaintiff's claims are barred by governmental immunity, its sole claim of error is that the trial court incorrectly evaluated the question of whether plaintiff suffered serious impairment of a body function pursuant to the standard of MCR 2.116(C)(10), rather than MCR 2.116(C)(7). However, defendant's brief contains only the bare assertion of error. Defendant has neither provided explanation regarding the appropriateness of the MCR 2.116(C)(10) standard nor indicated how the utilization of the MCR 2.116(C)(7) standard would

¹ Kenneth Trail is not participating in this appeal.

have led to a different result. Accordingly, we conclude that defendant has effectively abandoned this issue. “An appellant may not merely announce its position or assert an error and leave it to this Court to discover and rationalize the basis for its claims, unravel or elaborate its argument, or search for authority for its position.” *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 499; 668 NW2d 402 (2003). “Insufficiently briefed issues are deemed abandoned on appeal.” *Etefia v Credit Technologies, Inc*, 245 Mich App 466, 471; 628 NW2d 577 (2001).

IV

Next, defendant maintains the trial court erred in concluding that plaintiff’s injuries were caused by the collision with its snowplow that occurred on January 23, 2005. But contrary to defendant’s phrasing of the issue, the trial court did not find that plaintiff’s neck injuries had been caused by the January 23, 2005 accident. Rather, the trial court explicitly found that there was a genuine issue of material fact regarding whether plaintiff’s injury was the result of the accident, or, as asserted by the defense, a preexisting unrelated degenerative condition.

The record reveals that plaintiff presented medical records indicating that he sustained a neck injury, specifically, disk tears and bulges at the C5-C6 and C6-C7 positions that were caused by the motor vehicle accident on January 23, 2005. And, those conditions required a multi-level discectomy with arthrodesis (fusion with grafting and hardware). Several physicians reported plaintiff as permanently disabled. Plaintiff also presented affidavits from several doctors who concluded that plaintiff’s injuries were caused by the accident at issue. On the other hand, the record also reveals that defendant provided competing medical evidence showing that a degenerative disk condition rather than an accident caused plaintiff’s neck problems. In support of its theory of the case, defendant provided medical records including an MRI report that concluded plaintiff suffers from “osteophyte complex” as well as an affidavit from a doctor who opined that there is “no objective evidence that [plaintiff]’s problems were awakened from trauma, such as the accident.”

The essence of defendant’s causation argument is that its medical evidence is more credible than plaintiff’s medical evidence. However, courts may not make findings of fact or weigh credibility in deciding a summary disposition motion. See *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). The fact that the doctors consulted by the parties have conflicting interpretations of plaintiff’s medical records and disagree regarding the cause of his condition demonstrates that reasonable minds might differ with regard to these issues. Accordingly, the trial court did not err in finding there is a genuine issue of material fact with regard to whether plaintiff’s neck injuries were caused by the accident or by an unrelated degenerative condition.

V

Finally, defendant argues the trial court erred when it found that questions of fact exist regarding whether plaintiff’s injury meets the threshold of serious impairment of bodily function under MCL 500.3135(1) and (2). While defendant’s argument mainly consists of the reiteration of its contention that plaintiff’s neck problems are the result of “a degenerative condition wholly unrelated to the January 23, 2005 incident,” defendant also asserts that the evidence establishes that plaintiff’s life has not significantly changed since the incident. Plaintiff responds that he has met each of the elements of a serious impairment of bodily function under MCL 500.3135(1) and

that he has unquestionably raised a genuine issue of material fact with regard to whether the injuries he sustained have affected his general ability to lead a normal life.

A serious impairment of body function is “an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life.” MCL 500.3135(7); *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

To help determine whether a plaintiff has met the statutory threshold, the *Kreiner* Court developed a multi-step process to assist a trial court in determining whether a plaintiff has suffered a threshold injury. *Kreiner, supra* at 131. “First, a court must determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function.” *Id.* at 131-132. If a court so concludes . . . it may continue to the next step. *Id.* at 132. “Second, if a court can decide the issue as a matter of law, it must next determine if an ‘important body function’ of the plaintiff has been impaired.” *Id.* Third, if the court finds that an important body function has been impaired, the court must next determine if the impairment is objectively manifested. *Id.* An objectively manifested impairment is a “‘medically identifiable injury or condition that has a physical basis.’” *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002), quoting SJI2d 36.11. Fourth, if the court “finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life.” *Kreiner, supra* at 132. Finally, “[i]n determining whether the course of the plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff's overall life.” *Id.* at 132-133. Then “the court must engage in an objective analysis regarding whether any difference between the plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's ‘general ability’ to conduct the course of his life.” *Id.* at 133. [*Benefiel v Auto-Owners Ins Co*, 277 Mich App 412, 415-416; 745 NW2d 174 (2007).]

Again, defendant's formulation of the issue does not accurately set forth the trial court's ruling. The trial court did not render a finding that plaintiff established the existence of a serious impairment of body function under MCL 500.3135(1) and (2). Rather, the trial court explicitly found that, on the record presented, there was a genuine issue of material fact with regard to whether plaintiff sustained a serious impairment of body function. Here, the trial court did not progress past the first step of the *Kreiner* multi-step process. The trial court could not decide the issue as a matter of law because material questions of fact remained on the record regarding the nature and extent of plaintiff's injuries that were material to the determination of whether plaintiff had suffered a serious impairment of body function. *Kreiner, supra* at 131-132. Further, both parties presented conflicting evidence to the court on the *Kreiner* factors.

Thus we need only review the question of whether the trial court properly found that material questions of fact remained on the record regarding the nature and extent of plaintiff's injuries that were material to the determination of whether plaintiff had suffered a serious impairment of body function. Plaintiff's post-accident medical records contain evidence of an

objectively manifested injury. Among other things, a surgical report includes both pre- and post-operative diagnoses of “C5-6, 6-7 disk disease with disk tears and bulges.” Based on the results of an MRI and diskogram, Dr. Vaidya noted “disk bulging at C5-C6, C6-C7” and concluded that plaintiff was suffering from “[d]egenerative disk disease at C5-C6 and C6-C7 status post motor vehicle crash.” In addition, plaintiff submitted affidavits from physicians who concluded that plaintiff suffered a medically identifiable injury and opined that the injury was caused by the accident. In his affidavit, Dr. Mandel stated that plaintiff’s MRI showed “multi-level disk bulging [sic] with flatening [sic] or normal lordotic curve” and “demonstrated significant right paracentral herniation at C5-6 and C6-7, accompanied by osteophyte complex contributing to significant normal compromise.” Dr. Mandel further averred that plaintiff’s “neck injury, diagnosis, restrictions and impairments were likely caused by the motor vehicle accident of January 23, 2005.” Dr. Bleiberg concluded that plaintiff suffered from “[d]isk tears and bulges C5-C6 and C6-C7” and cervical radiculitis. Dr. Bleiberg further stated that plaintiff had sustained significant pathology to his neck in the January 23, 2005, accident. Dr. Newman diagnosed a “[p]ost-traumatic C5-6 and C6-7 historical annular tear” and “bilateral residual cervical radiculopathy.” Dr. Newman opined that plaintiff’s injuries and impairments “were caused by the motor vehicle accident of January 23, 2005, were permanent, and were permanently disabling.”

Despite the fact that in this process we consider the evidence in the light most favorable to the party opposing the motion, *Maiden v Rozwood*, 461 Mich 109, 120; 597 N.W.2d 817 (1999), we cannot ignore the medical evidence contained in the record provided by defendant regarding the nature and extent of plaintiff’s neck condition. Defendant has provided an MRI report that concluded plaintiff suffers from “osteophyte complex” which defendant maintains is a degenerative condition. It is defendant’s position that the MRI report is the most conclusive and objective report evaluating plaintiff’s impairment and it indicates that plaintiff suffered soft tissue injuries only and that he had a degenerative condition that developed prior to the incident. Defendant relies on the MRI report for its assertion that the nature and extent of plaintiff’s injuries resulting from a degenerative condition such as the one experienced by plaintiff does not satisfy the statutory threshold of a serious impairment.

Again, courts may not make findings of fact or weigh credibility in deciding a summary disposition motion. See *Skinner, supra* at 161. Based on the record before us containing a multitude of competing medical evidence, we conclude that the trial court properly found that material questions of fact remain on the record regarding the nature and extent of plaintiff’s injuries that were material to the determination of whether plaintiff had suffered a serious

impairment of body function.² *Kreiner, supra* at 131-132, *Benefiel, supra* at 415-416.

Affirmed.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Pat M. Donofrio

² While defendant argues that plaintiff's injuries have not affected the trajectory of his life, that analysis is premature in light of the material justiciable issues of fact on the nature and extent of plaintiff's injuries. We do note however, when reviewing the evidence in the light most favorable to plaintiff, the evidence suggests a fulfillment of the *Kreiner* factors.