

MAR 07 2008

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

VICKIE BAYLOR,

Plaintiff - Appellant,

v.

TRIDENT SEAFOODS CORPORATION,

Defendant,

and

ICICLE SEAFOODS, INC.,

Defendant - Appellee.

No. 06-35113

D.C. No. CV-04-02272-MJP

MEMORANDUM\*

Appeal from the United States District Court  
for the Western District of Washington  
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted October 18, 2007  
Seattle, Washington

Before: D.W. NELSON, BEAM\*\*, and RYMER, Circuit Judges.

---

\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The Honorable C. Arlen Beam, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Vickie Baylor appeals the summary judgment entered in favor of Icicle Seafoods, Inc. We affirm.

Baylor's arguments for compensatory damages for pain and suffering fail because she produced insufficient evidence to raise a triable issue of fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986) (noting that the nonmoving party cannot rely on its pleadings, but must submit evidence showing that there is a genuine issue for trial). She produced no evidence at all that financial hardship impacted her mental state. While Dr. Peterson did say that delay would likely cause a negative effect on Baylor's prognosis, his view was unsubstantiated and he admitted that he couldn't prove it.

Baylor also contends that the district court ignored her contention that delay prolonged her pain and suffering and that prolongation is compensable. We do not need to decide whether or under what circumstances pain and suffering caused by delay is compensable, because we disagree that the district court erred. Both the theory Baylor pled, and the responses she gave in discovery, focus on *aggravation* of the underlying condition caused by delay. *Cf. Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291-92 (9<sup>th</sup> Cir. 2000). Neither put prolongation of pain and suffering at issue. Nor did her opposition to Icicle's motion for summary judgment present, or develop, the issue such that the district court should have addressed it. Her

citation to an out-of-circuit district court decision for the proposition that prolongation of pain and suffering is compensable, and the observation that Baylor suffered before an MRI was authorized, were subsidiary to the topic point she stated in her memorandum: “Plaintiff has alleged a claim for aggravation of the underlying condition because Defendant did not timely provide maintenance and cure.” Accordingly, the district court did not err in failing to consider the issue.

Remaining disputes are immaterial in light of this disposition.

**AFFIRMED.**