

STATE OF MICHIGAN
COURT OF APPEALS

DANIEL J. FLYNN,

Plaintiff-Appellant,

v

SUSAN OPPERMAN and MSPC, LLC, d/b/a
BOGEY'S BAR AND GRILL,

Defendant-Appellees.

UNPUBLISHED

February 3, 2004

No. 242017

Oakland Circuit Court

LC No. 00-027726-NI

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

Plaintiff appeals from an order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff says that the trial court erred by ruling that, as a matter of law, plaintiff did not suffer a serious impairment of a body function. We disagree.

A grant of summary disposition¹ under MCR 2.116(C)(10) is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). As our Supreme Court explained in *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999):

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

¹ Opperman filed the original motion for summary disposition on June 22, 2001. Bogey's Bar and Grill filed a brief to join in Opperman's motion on July 17, 2001. The August 31, 2001, order merely states that it is granting "defendant's" motion for summary disposition; however, it goes on to say that the case is dismissed "in its entirety with prejudice."

At the outset, we note that both parties have attempted to expand the record on appeal by submitting evidence first produced for plaintiff's motion for reconsideration. This evidence was not before the trial court when it decided the motion for summary disposition and we will not consider it on appeal. *Quinto v Cross and Peters Co*, 451 Mich 358, 366-367 n 5; 547 NW2d 314 (1996).

The no-fault act (Act), MCL 500.3101 *et seq.*, generally abolished tort liability with regard to the ownership, maintenance, or use of a motor vehicle. MCL 500.3135(3). However, under MCL 500.5135(1), tort liability remains for noneconomic loss if the injured person suffered a "serious impairment of a body function." Whether an injured person has suffered a serious impairment of a body function presents a question of law for the court if the court finds either that (1) there is no factual dispute concerning the nature and extent of the injuries, or (2) there is a factual dispute concerning the nature and extent of the injuries, but the dispute is not material to the determination of whether the person has suffered serious a impairment of body function or permanent serious disfigurement. MCL 500.3135(2)(a)(i) – (ii); *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

Under MCL 500.3135(7), "serious impairment of body function" is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." "[T]he existence of an impairment of an important body function is measured by an objective standard and the effect of the impairment on the injured person is measured by a subjective standard." *Straub v Collette*, 258 Mich App 456, 459-460; 670 NW2d 725 (2003), lv gtd ___ Mich ___ (2003).

In *Kreiner v Fischer (On Remand)*, 256 Mich App 680, 686; ___ NW2d ___ (2002), lv gtd ___ Mich ___ (2003) (restating part of *Kreiner v Fischer*, 251 Mich App 513; 651 NW2d 433 (2002), vacated ___ Mich ___ (2003)), this Court stated:

[T]he third prong of the statutory definition [of the term 'serious impairment'] explicitly requires only that the impairment 'affect[] the person's general ability to lead his or her normal life.' MCL 500.3135(7) does not require any additional proof. It would be improper for us to read any more requirements, limitations, or language into the unambiguous statutory definition.

Our Supreme Court, in addressing the issue of what types of impairments qualify as serious impairments under the Act, declared that: "Although a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one's *general* ability to lead his normal life." *Kreiner v Fischer*, ___ Mich ___; 661 NW2d 234 (2003) (emphasis in original). On remand, this Court again reversed the trial court's judgment granting the defendant's motion for summary disposition. *Kreiner (On Remand)*, *supra*, 256 Mich App 680. In so doing, the Court stated:

We find that one's general ability to lead his or her normal life can be affected by an injury that impacts the person's ability to work at a job, where the job plays a significant role in that individual's normal life An injury affecting one's employment and ability to work, under the right factual circumstances, can be equated to affecting the person's *general* ability to lead his or her normal life. . . .

The Supreme Court's remand order can be read to require that when considering a person's "general" ability to lead a normal life, the focus must be on multiple aspects of the person's life, i.e., home life, relationships, daily activities, recreational activities, and employment, and not solely on one area of the person's life such as employment. However, our discussion in the preceding paragraph regarding the significance of employment is not contrary to such a position. [*Id.* at 688-689 (emphasis in original).]

Applying the principles stated in these recent cases, here, the trial court was correct in holding that, as a matter of law, defendants were entitled to summary disposition under MCR 2.116(C)(10).

Plaintiff produced medical records indicating that, at some point, x-rays and at least one MRI of his spine, detected an objectively manifested impairment. Plaintiff produced medical records from a physician who noted that plaintiff exhibited "neck pain with disc degeneration changes at C5-6," and that an x-ray image of plaintiff's "cervical spine demonstrates some degenerative changes at C5-6 but no evidence of any segmental instability." Contrary to the trial court's finding, this is sufficient evidence that that plaintiff had an objectively identifiable injury. See *Kreiner (On Remand), supra*, 256 Mich App 680 (objective manifestations of back injury can be established through x-rays indicating an abnormal spine). Defendants do not appear to contest plaintiff's assertion that the movement of one's neck is an important body function. Given that this Court has held that "[t]he movement of one's back is an important body function," *Kreiner (On Remand), supra*, 256 Mich App 685 n 4, the movement of one's neck would also be deemed an important body function.

Having satisfied the first two prongs of the test for a "serious impairment," plaintiff's appeal ultimately rests on the question whether his impairment affects his "general ability to lead his . . . normal life." *Kreiner (On Remand), supra*, 256 Mich App 680. Viewed in the light most favorable to plaintiff, the evidence does not support this contention. "In measuring the effect of the impairment on the injured person's general ability to lead his or her normal life, it is appropriate to compare the person's 'lifestyle before and after the accident.'" *Straub, supra*, slip op, p 3 (citing *May v Sommerfield (After Remand)*, 240 Mich App 504, 506; 617 NW2d 920 (2000)). In considering the effect an impairment has on one's ability to lead his normal life, this Court must "consider all aspects of plaintiff's life, including employment, home life, relationships, daily activities, and recreational activities." *Id.*

In his deposition, plaintiff explained how his injuries changed his life. He testified that he is in a great deal of pain from his injuries, and his injuries interfere with the movement of his neck. He states that he has not "had a good night's sleep in a long time" because of the pain in his neck. He also states that his bicep twitches, sometimes for a "week straight." The pain also interferes with his ability to exercise.

However, these impairments have not interfered with his general ability to lead his normal life. Viewing the evidence in the light most favorable to him, plaintiff's life seems to have changed little as a result of the collision. He performs the same work he did before the collision, and he acknowledges that, due to his injuries, he is not under any limitations or restrictions in his work as a deputy sheriff. Plaintiff acknowledges that he can perform all of the household tasks that he could before the collision. He has also continued to vacation as he did

before the collision. Plaintiff also continues to exercise, as he did before the collision, though he cannot exercise as much as he could before.

Based on the evidence plaintiff produced, the only two activities that appear to have been affected by plaintiff's injuries are his exercise and his ability to get a "good night's sleep." While one's general ability to lead his normal life can be affected by an injury that has an impact on his ability to engage in one activity, that activity must "play[] a significant role in that individual's normal life." *Kreiner (On Remand), supra*, 256 Mich App 688. Plaintiff cites no authority for his position that not being able to perform the same exercise after an injury as before, and the inability to get a good night's sleep after an injury are effects sufficient to support a holding that one cannot live his normal life. In holding that "one's general ability to lead his or her normal life can be affected by an injury that impacts the person's ability to work at a job," *id.*, this Court emphasized the importance and centrality of employment in a worker's life, and stated that "the inability to work necessarily affects many aspects and areas of a person's life outside the job itself. There can be no doubt that the inability to work affects home life and relationships and creates and places monetary limits on daily and recreational activities." *Id.* The same cannot reasonably be said of the activities on which plaintiff bases his claim that he can no longer live his normal life, and consequently, his argument must fail.

Viewing the evidence in the light most favorable to plaintiff, the trial court did not err in granting defendants summary disposition under MCR 2.116(C)(10), because plaintiff's injuries, as a matter of law, did not affect his general ability to lead his normal life.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly