

STATE OF MICHIGAN
COURT OF APPEALS

JAMES E. OSBORNE, II,

Plaintiff-Appellant,

V

JAMES GORNIAK,

Defendant-Appellee.

UNPUBLISHED

February 22, 2005

No. 251473

Oakland Circuit Court

LC No. 02-046080-NO

Before: Fort Hood, P.J. and Griffin and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition. Because the trial court appropriately applied the "*Kreiner*¹ standards" in deciding the motion for summary disposition, we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A vehicle driven by defendant collided with a vehicle driven by plaintiff.² X-rays as reviewed by the emergency room physician showed the existence of a possible "clay shoveler's" fracture³ of plaintiff's C-7 vertebra. The final report by the radiologist in the ER addendum reported, "There is no evidence of a clay shoveler's fracture." Plaintiff wore a cervical collar for several months. His orthopedist released him to return to work without restrictions six months after the accident occurred.

Plaintiff filed suit alleging that the injuries he sustained in the accident constituted a serious impairment of body function. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that, assuming plaintiff sustained an objectively manifested injury as

¹ *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004).

² At the time of the accident plaintiff had been undergoing treatment for a back injury sustained during the course of his employment as a delivery person. He had been cleared to return to work when the accident occurred.

³ Clay shoveler's fracture is defined as "an avulsion fracture of the base of spinous processes of C-7, C-6, or T-1 (in order of prevalence.)" *Stedman's Medical Dictionary* (26th ed) (1995).

a result of the accident, the injury did not affect his general ability to lead his normal life. The trial court granted the motion, finding that although an issue of fact existed as to whether plaintiff sustained an objectively manifested injury as a result of the accident, no evidence showed that any such injury affected his general ability to lead his normal life. The trial court denied plaintiff's oral motion to amend his complaint to specifically claim wage loss in excess of the three-year period provided for in the no-fault act, MCL 500.3135(3)(c), finding that excess wage loss was not at issue in the case.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Leave to amend should be freely granted when justice so requires. MCR 2.118(A)(2). Leave to amend should not be granted in the face of undue delay, bad faith, or dilatory motive on the part of the movant, or when allowance of the amendment would result in undue prejudice to the opposing party. We review a trial court's decision on a motion to amend for an abuse of discretion. *Ostroth v Warren Regency, GP, LLC*, 263 Mich App 1, 5; 687 NW2d 309 (2004).

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). For an impairment to be objectively manifested, there must be a medically identifiable injury or a condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 652-653; 654 NW2d 604 (2002). Whether a person has suffered a serious impairment of body function is a question of law for the court if there is no factual dispute concerning the nature and extent of the injuries, or if there is a factual dispute concerning the nature and extent of the injuries but the dispute is not material to whether the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a).

Determining whether a person is generally able to lead his or her normal life requires considering whether the objectively manifested impairment has affected the course of the person's life. The court must examine how, to what extent, and for how long the plaintiff's life has been affected by the impairment. The court must examine the plaintiff's life before and after the accident, and consider the significance of the affected aspects on the course of the plaintiff's life. In order to determine whether the plaintiff's general ability to lead his or her normal life has been affected by the objective impairment, the court may consider factors such as the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery. *Kreiner, supra*, 471 Mich 109, 131-134.

Plaintiff argues that the trial court erred by granting defendant's motion for summary disposition and abused its discretion by denying his motion to amend his complaint to allege excess wage loss. We disagree and affirm the trial court's decision in its entirety. An issue of fact existed as to whether plaintiff sustained a medically identifiable injury as a result of the accident. The initial diagnosis of a fracture at the C-7 vertebra was discounted, but plaintiff's orthopedist nonetheless diagnosed a possible fracture at that location. However, summary disposition was appropriate because no question of fact existed as to whether any injury suffered by plaintiff in the accident affected his general ability to lead his normal life. MCL 500.3135(2)(a). Plaintiff's orthopedist released him to return to work without restrictions six months after the accident occurred. Plaintiff did not return to the employment he held at the time

the accident occurred, and seemed to have difficulty retaining employment thereafter. He asserted that physical difficulties, particularly pain in his neck, prevented him from holding steady employment and engaging in recreational activities, such as playing basketball, as he had prior to the accident. However, after his orthopedist released him, plaintiff had no physician-imposed restrictions on his employment or recreational activities. Pain, in and of itself, is not an objectively manifested condition and cannot be relied upon to establish the existence of a serious impairment of body function. Moreover, self-imposed restrictions are not sufficient to create the existence of a serious impairment of body function. *Kreiner, supra*, at 133 n 17. No evidence created an issue of fact as to whether any injury suffered by plaintiff as a result of the accident affected his general ability to lead his normal life. The trial court did not err in determining that the issue of whether plaintiff suffered a serious impairment of body function was a question of law under the circumstances. MCL 500.3135(2)(a). Summary disposition was proper.

Plaintiff made no showing that he sustained excess wage loss as a result of any injury he sustained in the accident. MCL 500.3135(3)(c). The trial court did not abuse its discretion by denying plaintiff's oral motion to amend his complaint. MCR 2.118(A)(2); *Ostroth, supra*.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio