STATE OF MICHIGAN

COURT OF APPEALS

DANIEL L. PRZYGOCKI and ELAINE PRZYGOCKI,

Plaintiffs-Appellees,

v

ALEXANDER J. MARIN and STEPHEN C. MARIN,

Defendants-Appellants.

UNPUBLISHED
August 23, 2005

No. 261530
Eaton Circuit Court
LC No. 04-000444-NI

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

In this interlocutory appeal, defendants appeal by leave granted from the circuit court's order denying their motion for summary disposition. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff[1] Daniel L. Przygocki was injured while a passenger in a car driven by plaintiff Elaine Przygocki. Their car collided with a car owned by defendant Stephen Marin and driven by defendant Alexander Marin. Plaintiff complained of minor neck and back pain at the accident scene, and subsequent medical examination revealed that he was suffering from serious back conditions. Plaintiff had suffered back problems before the accident, but his physician opined that the accident likely exacerbated his pre-existing condition.

Shortly before the accident, plaintiff was taken off work because of stress, insomnia, and depression, and was diagnosed with recurrent major depressive disorder. Plaintiff was terminated from his employment, but he testified candidly on deposition that the accident was not a factor in his losing his job.

[1] Because the serious impairment issue involves only Daniel L. Przygocki, references to the singular "plaintiff" in this opinion will refer exclusively to him.

In January 2004, plaintiff underwent back surgery, the need for which his surgeon attributed to the accident. Plaintiff testified on deposition that the accident had left him with serious problems walking and sleeping, but that the surgery resolved the walking problem.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), asserting that there was no genuine issue of fact concerning whether plaintiff's injuries rose to the level of serious impairment of body function. Defendants contended that given plaintiff's prior condition, the motor vehicle accident did not affect his general ability to lead his normal life. The trial court denied the motion, explaining as follows:

> . . . I think it's clear that there was an objective manifestation of a significant injury that related to a[n] important bodily function. Whether the trajectory of his life was changed is somewhat subjective. But I think that's the nature of exacerbated injuries. Clearly he had surgery, which the Doctor relates to the accident—or the injury which the surgery was performed related to the accident.
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> . . . [C]ertainly from the testimony that he makes, which the exacerbation manifests itself in sufficient pain which had a profound effect upon his ability to walk and ability to sleep, I cannot say that that Plaintiff has not met the threshold. Seems to me there's issues of fact, given the discussion regarding . . . how much pain he was in and the effect that that had that makes this . . . an issue for the trier of fact to determine whether or not the threshold has been met.

Defendants argue that the trial court erred in failing to hold, as a matter of law, that plaintiff failed to show that injuries from the accident left him unable to lead his normal life. We agree.

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), [we consider] the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Where the moving party has produced evidence in support of the motion, the opposing party bears the burden of producing evidence to establish that a genuine issue of disputed fact exists. *Skinner v Square D Co*, 445 Mich 153, 160; 516 NW2d 475 (1994), citing MCR 2.116(G)(4).

MCL 500.3135(1) provides that a person "remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." Subsection (7) states that "'serious impairment of body function' means an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." Subsection (2) establishes that whether a person has suffered serious impairment of a body function is a question of law for the court, where there is no factual dispute concerning the nature and extent of the injuries, or where no such factual dispute is material to the question whether the person has suffered serious impairment of a body function. Accordingly, "the issue . . . should be submitted to the jury only when the trial court

determines that an 'outcome-determinative genuine factual dispute' exists." *Miller v Purcell*, 246 Mich App 244, 247; 631 NW2d 760 (2001), quoting *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000).

Plaintiffs submitted sufficient evidence that injuries from the accident significantly exacerbated plaintiff's physical condition to support the trial court's conclusion that there was "objective manifestation of a significant injury that related to a[n] important bodily function." However, the trial court apparently regarded the question whether the resulting physical limitations affected his general ability to lead his normal life as a closer call.

Our Supreme Court's decision in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), indicates that the conditions reinstating tort liability under the no-fault act are not lightly to be found.

> The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery. [*Id*. at 133 (footnote omitted).]

The focus is not on the plaintiff's subjective pain and suffering, but on injuries that actually affect the functioning of the body. *Miller, supra* at 249. To be actionable, residual impairments based on perceived pain must be "physician-imposed restrictions," not "[s]elf-imposed restrictions." *Kreiner, supra* at 133 n 17.

Plaintiffs recount plaintiff's post-accident medical diagnoses and need for surgery, but point to few limitations after plaintiff recovered from his surgery. There was abundant evidence that plaintiff had serious difficulty walking before the surgery, but he himself described that problem as "resolved" by the operation. Plaintiffs admit that the surgery "made [plaintiff's] back significantly better," but argue that "he still has limitations," and that "the surgery added complications to [plaintiff's] life, such as [plaintiff's] return to work was delayed and he was subsequently fired because he could not return to work."

However, plaintiff had back problems before the accident, was off work, and eventually was terminated for reasons unrelated to the accident. Plaintiffs further admit that plaintiff is under no medically imposed restrictions. Again, actionable impairments based on perceived pain must be "physician-imposed restrictions," not "[s]elf-imposed restrictions." *Id*.

Plaintiff reported that he still had difficulty sleeping. But he suffered from insomnia before the accident, and he fails to specify how any intensification of this problem now prevents him from leading his normal, pre-accident life.

A comparison of the lingering injuries, and hindrances, of which plaintiff complains, with those found not to be actionable in *Kreiner, supra*, confirms that the trial court in this case was overly generous in finding an issue for trial concerning whether plaintiff's injuries are affecting his ability to lead his normal life.

One plaintiff in *Kreiner*, *supra*, initially needed surgery, a cast, pain medicines, and physical therapy, then returned to full-time work three months after the accident, and eventually rejoined a band for which he played bass guitar, but continued to complain of reduced gripping strength in his left hand, along with an inability to straighten one finger or close the hand completely. *Kreiner*, *supra* at 122-123, 135-136. The other plaintiff in that case continued to suffer mild nerve irritation and a degenerative disc condition several weeks after the accident, underwent three weeks of physical therapy nine months after the accident, and continued seeing a doctor while complaining of back and leg pain almost two years after the accident. *Id*. at 124-125. This plaintiff, a self-employed carpenter and construction worker, had to shorten his work day from eight hours to six, could not stand on a ladder longer than twenty minutes, could not lift over eighty pounds, and could no longer perform roofing jobs. *Id*. at 125-126, 137. He additionally felt obliged to rest after walking one-half mile, and could no longer hunt rabbit. *Id*. at 126.

The Supreme Court concluded that these impairments did not affect the respective plaintiffs' *general* ability to lead their normal lives. *Id*. at 135-137. If the plaintiffs in *Kreiner*, *supra*, did not satisfy this requirement for reinstating tort liability under the no-fault act, neither did plaintiff in the instant case, who complains of minor, self-imposed limitations on his normal activities, now that he has had successful surgery.[2]

Reversed and remanded for entry of an order granting defendants' motion for summary disposition. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens

[2] Plaintiffs additionally assert in passing that there is a factual dispute concerning whether plaintiff has suffered a permanent serious disfigurement, but this was not decided below and thus is not properly before us in this interlocutory appeal.