

STATE OF MICHIGAN
COURT OF APPEALS

LEON FAIRFAX,

Plaintiff-Appellant,

v

NASHAWN HABIB YALDO and SALWAN
YALDO,

Defendants-Appellees,

and

FELIX YOUNG and COUNCIL OF ACTION
UNITED,¹

Defendants.

UNPUBLISHED
September 1, 2005

No. 261443
Wayne Circuit Court
LC No. 04-400228-NI

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In this action to recover noneconomic damages under the no-fault act, plaintiff appeals the trial court's order that granted summary disposition to defendants. We affirm.

This Court reviews de novo the grant or denial of summary disposition to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).²

¹ Defendants Felix Young and Council of Action United were dismissed with prejudice from this action before summary disposition was granted.

² As the *Maiden* Court further explained:

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,

(continued...)

Plaintiff challenges the trial court's determination that he did not suffer a serious impairment of a body function. "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." MCL 500.3135(1) (emphasis added). 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).³

Here, defendants do not contest that plaintiff's injuries were objective manifestations of an impairment of an important body function, but focused instead on whether plaintiff's injury affected his general ability to lead his normal life.⁴ Plaintiff stated in his deposition that, as a result of his rib injury, there were recreational activities that he could no longer perform, such as tennis, basketball, bowling and running. He also reported that he could not do heavy work around his house. However, viewing the evidence in a light most favorable to plaintiff, his general ability to lead a normal life was not impaired. Two months after the accident, plaintiff returned to the same job he held before the accident, without restrictions. Although his job requires lifting over fifteen pounds, he has not missed any work because of his injuries. He never hired anyone to do any chores around his house. Plaintiff never sought physical therapy and did not present evidence that he continued to take any medicine. After the accident, plaintiff continued to ride his bicycle.

The evidence also established that all changes to plaintiff's activities are self-imposed restrictions of his prior recreational activities. Plaintiff admitted that he avoided the activities to prevent pain. The *Kreiner* Court stated that self-imposed restrictions based solely on pain are

(...continued)

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. [*Maiden, supra* at 120.]

³ As outlined in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), to determine whether a plaintiff meets the statutory threshold, a court must first determine that there is no material factual dispute concerning the nature and extent of the plaintiff's injuries. *Id.* at 131-132. If a material dispute exists, the court may not decide, as a matter of law, the issue of whether plaintiff's injuries are a serious impairment of a body function. MCL 500.3135(2)(a)(i) and (ii); *Kreiner, supra* at 132. The court must then determine if an important body function is impaired and if that impairment is objectively manifested. *Id.* "Subjective complaints that are not medically documented are insufficient." *Id.* Third, the court must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. *Id.* Factors to consider include: (a) the nature and extent of 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.

⁴ Shortly after plaintiff filed his complaint, he was diagnosed with a restrictive lung disease, pulmonary sarcoidosis. Though defendants presented evidence that this lung disease caused plaintiff's decreased capacity to exercise, the trial court did not dismiss plaintiff's claim based on causation and we need not address that issue.

insufficient to establish the extent of residual impairment. *Id.* at 133 n 17. Thus, plaintiff did not create a genuine issue of material fact regarding whether he suffered a serious impairment of body function. Accordingly, the trial court properly granted defendants' motion for summary disposition because plaintiff failed to create a genuine issue of material fact that his injuries impacted his general ability to lead his normal life.

Plaintiff also argues that the trial court erred because it did not take into consideration his unique status also as a deaf person when it analyzed whether his injuries met the threshold for serious impairment of a body function. He argues that because he is deaf, his social outlets are limited and the loss of sports and other recreational interactions affected him more profoundly than such losses would affect a hearing person. The *Kreiner* Court stated, "Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life." *Id.* at 131. He contends that, unlike the plaintiff in *Kreiner*, who could hunt deer instead of rabbit, he has no suitable substitution for the activities he lost. However, plaintiff can bicycle, work full-time, and all of his restrictions are self-imposed. Moreover, while the loss of a recreational activity is unfortunate, it does not meet the threshold for serious impairment of a body function unless the loss affects the plaintiff's overall ability to lead his or her normal life.⁵

Finally, plaintiff argues that the trial court erred when it found that a scar on plaintiff's face stemming from the car accident was not a permanent serious disfigurement. The determination whether someone has suffered a permanent serious disfigurement is a question of law for the court if there is a factual dispute concerning the nature and extent of the injury, but the dispute is not material to whether the plaintiff suffered a permanent serious disfigurement. MCL 500.3135(2)(a). In *Nelson v Myers*, 146 Mich App 444, 446 n 1; 381 NW2d 407 (1985), this Court determined that a three centimeter, slightly depressed, scar that was lighter than the surrounding skin was not a serious permanent disfigurement. On the other hand, in *Earls v Herrick*, 107 Mich App 657, 668; 309 NW2d 694 (1981), this Court stated, "Almost any facial scar which is immediately noticeable might result in serious emotional effects for the individual who must bear the scar."

Here, the trial court viewed photographs of plaintiff's scar and determined that it was not a *serious* permanent disfigurement. The photographs reveal a discernible scar about 1½ centimeters long. The scar is on the tip of plaintiff's nose, above the right nostril, and is darker than the surrounding skin. When asked whether the scar bothered him, plaintiff said, "I don't like it, but it's there." However, plaintiff stated that he would need a mirror to be able to describe the scar. Further, plaintiff never sought cosmetic surgery because he testified that he did not need it. Based on the photographs and plaintiff's apparent lack of serious emotional

⁵ Plaintiff contends that the trial court should have granted summary disposition in his favor on the serious impairment of body function issue. However, the trial court properly granted defendants' motion for summary disposition because there was no genuine issue of material fact with respect to whether plaintiff's injuries met the threshold for serious impairment of body function. Thus, the trial court did not err when it denied plaintiff's motion for summary disposition on the same issue.

impact from the scar, the trial court correctly concluded that the scar was not a serious permanent disfigurement and properly granted defendant's motion for summary disposition.

Affirmed.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Jane E. Markey