STATE OF MICHIGAN

COURT OF APPEALS

GARNETT HATCHETT and TRACEY HATCHETT,

Plaintiffs-Appellants,

v

GABRIEL BROWN PETTIWAY and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendants-Appellees.

UNPUBLISHED
September 27, 2005

No. 261947
Wayne Circuit Court
LC No. 03-335648-NI

Before: Hoekstra, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Plaintiffs[1] appeal as of right an order granting summary disposition in favor of defendant State Farm Mutual Automobile Insurance Company ("defendant"). We affirm.

This action arises out of an automobile accident that occurred in Detroit on December 18, 2002. A vehicle driven by defendant Gabriel Brown Pettiway struck a vehicle driven by plaintiff, an on-duty police officer. Plaintiff sustained an injury to his knee, requiring surgery and physical therapy. Because the vehicle driven by Pettiway was uninsured, plaintiffs filed a lawsuit against defendant, who is their no-fault insurance carrier.

Plaintiffs argue that the trial court erred in granting defendant summary disposition and in finding that plaintiff failed to demonstrate a serious impairment of a body function under Michigan's no-fault act, MCL 500.3101 *et seq.* We review de novo a trial court's decision on a motion for summary disposition. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Rose, supra* at 461. Summary disposition is appropriately granted, "if there is no

[1] As used in this opinion, the term "plaintiff" shall refer to plaintiff Garnett Hatchett only.

genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

This appeal concerns the threshold question whether plaintiff suffered a serious impairment of a body function. Such impairment (1) must be objectively manifested, (2) must be of an important body function, and (3) must affect the plaintiff's ability to lead his normal life. MCL 500.3135(7). In determining whether any difference in the plaintiff's pre- and post-accident lifestyle affected his general ability to conduct the course of his life, we consider the following nonexhaustive list of objective factors: "(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." *Kreiner v Fischer*, 471 Mich 109, 133; 683 NW2d 611 (2004)(footnotes omitted). None of these factors is dispositive; we must consider the totality of the circumstances. *Id*. at 133-134. Whether an injured party has suffered a serious impairment of a body function is a question of law if there is no factual dispute about the nature and extent of the injuries or any such dispute is immaterial. MCL 500.3135(2); *Kern v Blethen-Coluni*, 240 Mich App 333, 343; 612 NW2d 838 (2000).

There is no material factual dispute concerning the nature and extent of plaintiff's injury. In January 2003, plaintiff underwent arthroscopic knee surgery, which included removal of a portion of a torn lateral meniscus and a bone chip. We must determine whether the alleged impairment affects plaintiff's general ability to lead his normal life. *Kreiner*, *supra* at 131. We examine specific activities in plaintiff's life, being mindful that minor changes in a particular activity may suggest that plaintiff is still generally able to perform the activity. *Id.* Plaintiff asserts that he suffered impairments of two body functions, walking and running. Walking is an important body function, and presumably running is too, especially for plaintiff, who may have to apprehend fleeing suspects in the course of his work as a patrol officer. *Kern, supra* at 343. Plaintiff was off work for approximately four months and complained of pain and difficulty walking. Plaintiff also walked with a limp, which is a relatively objective manifestation of impaired walking. Based on the facts, viewing the evidence in a light most favorable to plaintiff, plaintiff's impairment was objectively manifested.

Plaintiff could bear weight on his knee after the surgery, participated in physical therapy, and rehabilitated himself back to the ability to perform his normal activities of police duty. Plaintiff was not in a wheelchair for any period, and he did not use crutches. In May 2003, plaintiff returned to work as a patrol officer with no restrictions. Plaintiff's surgeon placed no restrictions on plaintiff's recreational or work activities, which included running. Upon his return to work, plaintiff did not experience any difficulties in the performance of his duty. In August or September 2003, plaintiff returned to playing basketball twice per week, coaching his sons' little league basketball teams, and using a StairMaster® exercise machine at home. Plaintiff's surgeon opined that he "is going to be able to continue doing what he's doing," but he "may require further treatment down the line" and "may eventually have to stop being a patrol officer."

In support of his argument that his ability to walk, be a patrol officer, and engage in recreational activities has been seriously diminished, plaintiff relies heavily on his own affidavit submitted in support of his motion for reconsideration. This reliance is misplaced because the affidavit contradicts plaintiff's deposition testimony. It is well established that "parties may not contrive factual issues merely by asserting the contrary in an affidavit after having given

damaging testimony in a deposition." *Dykes v William Beaumont Hosp*, 246 Mich App 471, 480; 633 NW2d 440 (2001)(citations omitted). Moreover, documents presented to the trial court with a motion for reconsideration of a summary disposition ruling are not properly before the court and cannot be considered in determining whether the trial court erred in granting summary disposition. *Maiden v Rozwood*, 461 Mich 109, 126 n 9; 597 NW2d 817 (1999). Plaintiff also relies on an unpublished decision of this Court in support of his argument that his injury constitutes a serious impairment of a body function. However, unpublished decisions are not binding on this Court. MCR 7.215(C)(1).

We hold that plaintiff has been generally able to lead his normal life because of the limited extent of the impairment of his work and recreational activities, his good prognosis, and relatively limited residual impairment. Accordingly, plaintiff has failed as a matter of law to demonstrate a serious impairment of body function, and summary disposition was properly granted.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Hilda R. Gage
/s/ Kurtis T. Wilder