

STATE OF MICHIGAN
COURT OF APPEALS

GREGORY L. CORNETT and DIANE A.
CORNETT,

UNPUBLISHED
March 14, 2006

Plaintiffs-Appellees,

v

No. 264248
Macomb Circuit Court
LC No. 04-003172-NI

MICAH I. BOWMAN and RCO ENGINEERING,
INC.,

Defendants-Appellees.

Before: Hoekstra, P.J., and Neff and Owens, JJ.

PER CURIAM.

Plaintiffs, Gregory L. Cornett (“Cornett”) and his wife, Diane A. Cornett, appeal as of right an order granting defendants’ motion for summary disposition. We reverse.

This third-party no-fault insurance action arises out of an automobile accident in which Cornett suffered injuries to his left foot and ankle. On appeal, plaintiffs argue that the trial court erred in finding that Cornett did not suffer a serious impairment of body function that affected his general ability to lead his normal life. We agree.

This Court reviews de novo a trial court’s grant of a motion for summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In reviewing a motion under MCR 2.116(C)(10), this Court must consider the pleadings, admissions, *affidavits*, and *other relevant documentary evidence* submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004) (emphasis added). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West, supra* at 183.

A plaintiff may recover non-economic losses only if the plaintiff has suffered “death, serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1). 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); *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004).

A “multi-step process” is used to determine whether a plaintiff has suffered a serious impairment of body function. *Id.* at 131. A court must first determine if there is a factual dispute concerning the nature and extent of the plaintiff’s injuries. *Id.* at 131-132. If there is no factual dispute concerning the nature and extent of the injuries, a court may decide whether, as a matter of law, the plaintiff has suffered a serious impairment of body function. MCL 500.3135(2)(a)(i); *Kreiner, supra* at 132. 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, the court may still determine whether the plaintiff suffered a serious impairment of body function. MCL 500.3135(2)(a)(ii); *Kreiner, supra* at 132. If the Court determines that there is a factual dispute regarding the nature and extent of the plaintiff’s injuries that is material in determining whether the plaintiff suffered a serious impairment of body function, the court may not decide the issue as a matter of law. MCL 500.3135(2)(a); *Kreiner, supra* at 132.

In the present case, plaintiffs argue that Cornett suffered a serious impairment of body function based on Cornett’s fracture of his left foot and arthritis in his left foot and ankle. The parties do not dispute the nature and extent of plaintiff’s injuries. Further, based on the extensive documentary evidence supporting Cornett’s diagnosis, we conclude that there is no factual dispute regarding the nature and extent of Cornett’s injuries. Therefore, it is proper for the court to determine, as a matter of law, whether Cornett suffered a serious impairment of body function. MCL 500.3135(2)(i); *Kreiner, supra* at 132.

The second step requires that this Court determine if an “important” body function has been impaired. *Id.* at 132. The Supreme Court noted that use of a person’s leg was an important body function. *Id.* at 136. Additionally, defendants do not dispute that the use of Cornett’s foot and ankle is an important body function. Accordingly, we conclude that Cornett’s impairments are to an important body function.

Next, we must determine if an important body function has been “impaired,” and not just “injured.” *Id.* at 132. We must also decide if the impairment of the important body function is “objectively manifested.” *Id.* “[I]n order for an impairment to be objectively manifested, there must be a medically identifiable injury or condition that has a physical basis.” *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002), quoting SJI2d 36.11. Here, Dr. Allen J. Russell, M.D., interpreted Cornett’s March 4, 2004, bone scan and noted a likely “fracture of the third cuneiform of the left foot.” On March 4, 2004, Dr. Ronald Heitmann, D.O., noted a fracture of Cornett’s left foot and a ligament tear in Cornett’s left ankle. Further, on February 24, 2005, Dr. Kevin Hanlon, D.O., noted degenerative arthritis in Cornett’s left foot, and recommended use of a supportive foot device. Thus, we conclude that Cornett has suffered an objectively manifested impairment of an important body function.

Finally, “[i]f a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff’s general ability to lead his or her normal life.” *Kreiner, supra* at 132. 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 overall life. *Id.* at 132-133. A court should consider the “totality of the circumstances,” and examine various objective factors including “(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” to determine if the impairment “affects the person's general ability to conduct the course of his or her normal life.” *Id.* at 133-134 (footnotes omitted). “Merely ‘any effect’ on the plaintiff’s life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff’s ‘general ability’ to lead his life.” *Id.* at 133 (emphasis in original).

In the present case, viewing the totality of the circumstances, and all five factors listed in *Kreiner*, we conclude that Cornett’s impairment affects his general ability to lead his normal life. Although Cornett was initially diagnosed with a left ankle sprain based on x-rays following the accident, and treated accordingly, over the course of the next several months additional testing, including an MRI and CAT scans, indicated multiple fractures in his foot. On February 9, 2004, he was diagnosed with severe lateral collateral tears and contusions, and a stress fracture to the left foot. On March 4, 2004, a three-phase bone scan revealed a fracture in the third cuneiform of the left foot. On March 12, 2004, a scan indicated linear fractures in the basal areas of the left third and fourth metatarsal bones, as well as linear fractures of the head of the left first metatarsal bone. His foot was placed in a series of casts. During this time, Cornett continued to experience swelling and pain, and had difficulty regaining use of his foot. In February 2005, Cornett was diagnosed with degenerative midfoot arthritis in his left foot, secondary to fracture/trauma. Consequently, Cornett was fitted with an Ankle Foot Arthosis (AFO) in March 2005 to stabilize his foot and ankle, which he reportedly was wearing daily as of April 12, 2005.

The record evidence indicates that the ankle injury affected Cornett’s ability to walk, and in particular, has affected his ability to perform his job and lead a normal life. In his affidavit of May 22, 2005, Cornett averred that Rolf Schroter, a certified orthotist, informed him that he would have to wear the AFO¹ for at least a year and possibly permanently. A medical-related progress record, completed on March 25, 2005, in conjunction with the fabrication of the AFO, stated with respect to “history”: “conversation [with] Dr. Kevin Hanlon indicates that this most likely is a permanent injury, and will be needing this AFO for his lifetime—duration. Dr. Hanlon agrees with prescription criteria—amended. . . .” At the time of the accident, Cornett was 41 years old.

The trial court based its conclusion in part on Cornett’s deposition, taken January 26, 2005, noting that Cornett stated that he was able to perform all his duties at work and has not been unable to work because of his foot. The court disregarded Cornett’s subsequent affidavit to the extent that it contradicted his deposition testimony. See *Peterfish v Frantz*, 168 Mich App 43, 54-55; 424 NW2d 25 (1988) (a party may not create a factual dispute by merely submitting an affidavit contradicting his own prior testimony in a deposition). However, because Cornett’s medical condition changed over the course of the proceedings below, and Cornett’s arthritis was not diagnosed until after his deposition, we find the court’s disregard of the affidavit improper. The development and subsequent diagnosis of degenerative arthritis, and the prescribed AFO, explain the differences between Cornett’s deposition and his affidavit. *Id.* at 55. Further, at the time of his deposition, Cornett also testified that his foot was not getting better, and he noted that he had pain and an altered gait. He was able to perform his job, but he was in constant pain, and the injury affected his walking ability. Further, at the end of the workday his foot was swollen.

¹ Defendants’ independent medical evaluation refers to the AFO as a “fairly substantial brace.”

His subsequent affidavit is not in conflict with this deposition testimony given the additional diagnosis and treatment.

In his affidavit, Cornett averred that the arthritis and the AFO have affected his life in numerous ways. Significantly, his ability to perform his job is affected because he cannot wear his work boots with the AFO, which presents a safety issue because as a hi-lo driver he must work with heavy tonnage on a daily basis. Further, his injury and the AFO present difficulties operating and maneuvering the hi-lo. His mobility is severely impaired and he has a constant limp.

Further, following the accident, Cornett has been unable to engage in social and recreational activities he pursued before the accident. His foot and ankle limitations prevent him from performing physical activity and household chores. Additionally, the injury has severely limited his ability to participate in activities with his wife because of walking and driving limitations. His sexual relationship with his wife has been detrimentally affected by the injury.

Cornett has continued medical follow-up for his injuries. Hanlon did not recommend surgery, which would likely require fusing Cornett's midfoot. He has restricted Cornett to activity that his foot can tolerate, but Cornett continues to have pain and consequent physical limitations.² "[W]here there is evidence that the physician has pinpointed a physiological basis for the pain or believes that the patient is truly suffering pain, such evidence, while not conclusive, lends support to a conclusion that instructions by the physician constitute physician-imposed restrictions." *McDaniels v Hemker*, 268 Mich App 269, 284-285; 707 NW2d 211 (2005). Cornett's post-impairment life is "significantly different" from his pre-accident life.

Considering the "totality of the circumstances," including the enunciated *Kreiner* factors, we conclude that plaintiffs presented evidence to establish that Cornett's injury from the accident affects his general ability to lead his normal life. *Kreiner, supra* at 134; *McDaniels, supra* at 286. The impairment of Cornett's foot and ankle, the necessity of wearing the AFO, which affects his ability to perform his job and other daily activities, and the likely permanent nature of the arthritic condition, has affected his "'general ability' to conduct the course of his normal life." *Kreiner, supra* at 133. Accordingly, the trial court erred in granting summary disposition in favor of defendants.

Reversed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Donald S. Owens

² Defendants' medical evaluation of Cornett states that Cornett has reached his maximum medical improvement from the injury.