

STATE OF MICHIGAN
COURT OF APPEALS

KIM DAVID EICHLER and KATHRYN KAY
EICHLER,

UNPUBLISHED
April 18, 2006

Plaintiffs-Appellants,

v

MICHAEL JIM WALTKE and PENNY SUE
WALTKE,

No. 266291
Branch Circuit Court
LC No. 04-006357-NO

Defendants-Appellees.

Before: Cooper, P.J., and Cavanagh and Fitzgerald, JJ.

PER CURIAM.

In this action to recover third-party noneconomic damages under the no-fault act, plaintiffs appeal as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs challenge the trial court's determinations that plaintiff Kim Eichler failed to show that the auto accident caused his injuries and that neither Kim nor plaintiff Kathryn Eichler suffered a serious impairment of body function under MCL 500.3135(1). We affirm.

This Court reviews de novo the trial court's decision on a motion for summary disposition. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003); *Payne v Farm Bureau Ins*, 263 Mich App 521, 524; 688 NW2d 327 (2004). A motion for summary disposition brought under MCR 2.116(C)(10) is appropriately granted when, viewed in the light most favorable to the non-moving party, the evidence submitted fails to establish a genuine issue of material fact on which reasonable minds could differ, and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). This Court examines all relevant affidavits, depositions, admissions, and other documentary evidence and construes the evidence in favor of the non-moving party. MCR 2.116(G)(5); *Maiden, supra* at 120. Review is limited to evidence presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

To establish a prima facie case of negligence, a plaintiff must show (1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach of duty proximately caused the plaintiff's injury; and (4) that the plaintiff suffered damages. *Case v Consumer Powers*, 463 Mich 1, 6; 615 NW2d 17 (2000). To establish

causation between an alleged wrongful act and the resulting damage, the plaintiff must show that the defendant's conduct was both a cause in fact and a legal or proximate cause of plaintiff's damages. *Haliw v City of Sterling Heights*, 464 Mich 297, 310; 627 NW2d 581 (2001); *Holton v A+ Ins Associates, Inc*, 255 Mich App 318, 326; 661 NW2d 248 (2003). Establishing cause in fact requires evidence that the harm would not have happened but for defendant's negligent conduct. *Id.* Legal or proximate cause involves examining the foreseeability of consequences and whether defendant should be held responsible for those consequences. *Haliw, supra*, 464 Mich 310.

In *Skinner v Square D Co*, 445 Mich 153, 164-165; 516 NW2d 475 (1994), the Supreme Court discussed causation at length:

[A]t a minimum, a causation theory must have some basis in established fact. However, a basis in only slight evidence is not enough. Nor is it sufficient to submit a causation theory that, while factually supported, is, at best, just as possible as another theory. Rather, the plaintiff must present substantial evidence from which a jury may conclude that more likely than not, but for defendant's conduct, the plaintiff's injuries would not have occurred.

Causation theories that are mere possibilities or, at most, equally as probable as other theories do not justify denying defendant's motion for summary disposition. *Id.* at 172-173. In other words, "[w]e cannot permit the jury to guess." *Id.* at 166, quoting *Daigneau v Young*, 349 Mich 632, 636; 85 NW2d 88 (1957).

Causation is generally a factual issue to be decided by the trier of fact; but, if there is no issue of material fact, then the question is one of law for the court. *Holton, supra* at 326. The burden of establishing causation is on the plaintiff, and the mere fact of an accident does not create a presumption of causation. *Skinner, supra* at 164.

Here, viewing the record evidence in the light most favorable to plaintiffs, plaintiffs did not present sufficient evidence to support a genuine issue of material fact that the auto accident caused Kim's back problems. The offered evidence establishes that an automobile accident took place on May 2, 2003. Plaintiff first went to the emergency room on May 26, 2003, with the complaint of "low back pain after lifting the trashcan" on May 24. Plaintiff indicated that he had a "history of similar type back pain, but not quite as severe as this." X-rays taken on that date revealed degenerative conditions of the spine. Plaintiff was diagnosed with acute back pain and instructed to follow-up with his doctor.

On May 28, 2003, Kim consulted with Dr. A.M. Manohar, an orthopedic surgeon. Kim reported to Dr. Manohar that he lifted a trashcan on May 24, 2003, and began experiencing pain in his lower back with radiation down the sacroiliac joints. A physical examination showed signs of a herniated disc at L4-5. Dr. Manohar testified that the cause of the herniation is unknown but that such a herniation is consistent with the lifting of a trashcan. Dr. Manohar also testified that the history provided by Kim did not reflect any other source of injury. On May 30, 2003, an MRI confirmed a small to moderate central disc herniation at L4-5, as well as degenerative disc disease. Although a June 2, 2003, report to Dr. Manohar from physical therapist Diane Harmon indicates "Patient notes that he was in a car accident on 5-2-03 but did not believe there was a problem at that time," Kim never mentioned the accident to Dr. Manohar.

At the time of the physical therapy, Kim apparently attributed his pain to working during mid-May “in a small space for 6 – 8 hours attempting to work on a well pump.”

On January 8, 2004, Kim returned to Dr. Manohar and reported a “recurrence of back pain after hunting.” A repeat MRI showed a “continuation of the same problem, recurrence of the same problem, at the 4-5 level.” A January 15, 2004, report by physical therapist Bridget Bommarito describes Kim’s chief complaint as follows: “Slipped on ice in the end of December, ever since then has had increased pain in the left leg and buttock . . .”

Dr. Manohar testified that he does not know whether the auto accident caused Kim’s herniation. He also testified that if the trauma from the accident were as severe as described by plaintiffs’ counsel, he would expect immediate symptoms as opposed to a “silent herniation.”

Plaintiffs pointed to Kim’s comment to a physical therapist on June 2, 2003, regarding the auto accident, as well as his claim that he did not suffer previously from back problems, to support the causal connection between his disc herniation and the accident. However, this evidence is insufficient because Kim did not attribute the injury to the accident, never mentioned the accident to the emergency room doctor on May 26 or to Dr. Manohar at any time, and never attributed his back problems to the accident. Rather, Kim attributed the back problems first to lifting a trashcan, and second to hunting and/or slipping on ice. And Kim informed the emergency room doctor that he had a history of “similar type” back problems. Additionally, Dr. Manohar was not able to conclude that Kim’s back problems were caused by the accident. To the extent that plaintiff’s own testimony indicates the cause of his injury, it amounts to speculation. Under these circumstances, plaintiffs did not meet their burden of showing sufficient evidence to create a genuine issue of material fact that the back problems he reported beginning on May 26, 2003, arose from the traffic accident that occurred on May 2, 2003. The trial court properly found that plaintiffs had not met their burden of establishing causation and properly granted defendants’ motion for summary disposition as to Kim.

Even if the auto accident caused Kim’s back problems, the injury does not meet the threshold for serious impairment of a body function. To recover non-economic damages from a car accident, a plaintiff must have suffered a serious impairment of a body function, which is (1) an objectively manifested impairment of an important body function that (2) affects the person’s general ability to lead his or her normal life. MCL 500.3135(7).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the Michigan Supreme Court outlined several principles that a court must consider in determining whether a plaintiff who alleges serious impairment of a body function as a result of a car accident meets the statutory threshold for third-party tort recovery. First, a court must determine that there is no material factual dispute concerning the nature and extent of the person’s injuries. *Id.* at 131-132. If there is a material dispute, the court may not decide the issue of whether plaintiff’s injuries are a serious impairment of a body function as a matter of law. MCL 500.3135(2)(a)(i) and (ii); *Id.* at 132. Second, the court must 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. *Kreiner, supra* at 132. This is a multifaceted inquiry comparing the plaintiff’s life before and after the accident to determine whether any difference between pre- and post- accident lifestyle has actually affected plaintiff’s

general ability to conduct the course of his or her 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.

Assuming that Kim's back problems constitute an objective manifestation of an impairment of an important body function, the issue is whether the impairment has affected Kim's general ability to live his life. A negative effect on a particular aspect of an injured person's life is not sufficient itself to meet the tort threshold, so long as the injured is generally able to lead his or her normal life. *Kreiner, supra* at 137. In *Kreiner*, the Court found no affect on the plaintiff's general ability to lead his life simply because the plaintiff, a carpenter, could no longer stand on a ladder for more than twenty minutes, could no longer lift anything over eighty pounds, was forced to limit his workday to six hours from his usual eight hours, had difficulty walking more than a half mile, and could no longer hunt rabbits. *Id.*

Looking at Kim's life as a whole, before and after the auto accident, and the nature and extent of his injuries, his impairment did not affect his overall ability to conduct the course of his normal life. Kim continues to be employed with the same employer doing the same job as before the accident. His treatment merely consists of wearing a back brace at work, and he is no longer under a doctor's care. He has no physician-imposed work or activity restrictions. Although he no longer works the overtime that he did before the accident and no longer plays softball or basketball, refraining from these activities was Kim's personal decision based on his subjective belief that he could be injured again if he engages in these activities. Such self-imposed restrictions are not sufficient under the objective standards required by *Kreiner, supra* at 133, n 17; *Moore v Cregeur*, 266 Mich App 515; 702 NW2d 648 (2005). Although he may have been more restricted for a period of time after the accident, he has recovered such that, compared to his pre-impairment life, his post-impairment life is not so different that his "general ability" to conduct the course of his normal life has been affected. See *Kreiner, supra* at 137. Because plaintiffs failed to establish that Kim's impairment affected his general ability to conduct the course of his normal life, he did not satisfy the serious impairment of body function threshold for recovery of non-economic damages under Michigan's No-Fault Statute. MCL 500.3135.

The dispute with regard to Kathryn is whether her impairment¹ has affected her general ability to lead her normal life. She continued to work at her regular employment after the accident until taking a Family Medical Leave Act leave of absence to care first for her husband and then for her ailing parents. She continued to do her regular housework consisting of doing dishes, window washing, laundry, vacuuming, and floor scrubbing. She continues to garden, though she testified that she may plant a smaller garden because too much bending causes her pain. She also suffers from headaches. Kathryn briefly treated with Dr. Manofar on three occasions between March and May 2004 regarding her pain, and treated with Dr. Dafnis regarding her headaches in 2004. Dr. Manofar testified that an MRI did not show anything that

¹ There is no dispute that Kathryn suffered a chip fracture in her right hip as a result of the accident.

would warrant the symptomatology that Kathryn was having and that he did not think that the chip fracture could be a pain generator.² Dr. Dafnis opined that her headaches could be related to tension. Plaintiffs were unable to submit evidence pinpointing a physiological basis for Kathryn's pain. Kathryn no longer treats with a physician, and has no restriction on her activities. Any restriction, such as not engaging in the craft hobby, is self-imposed instead of physician-imposed. Self-imposed restrictions based on real or perceived pain do not establish the extent of any residual impairment. *Kreiner, supra* at 133 n 17. As noted by the Court in *Kreiner*, "the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment 'affects the person's general ability to conduct the course of his or her normal life.'" *Id.* at 134. Considering the totality of the circumstances here, Kathryn's general ability to conduct the course of her normal life has not been affected.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald

² The MRI of Kathryn's lumbar spine showed spinal canal stenosis, an age-related degenerative condition that is not caused by trauma.