

STATE OF MICHIGAN
COURT OF APPEALS

ROBERT E. ELLIOTT, JR.,

Plaintiff-Appellant,

v

JASON M. BARCKHOLTZ,

Defendant-Appellee,

and

HARTFORD UNDERWRITERS INSURANCE
COMPANY,

Defendant.

UNPUBLISHED

May 16, 2006

No. 259255

Saginaw Circuit Court

LC No. 04-051296-NI

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed suit alleging that injuries he sustained in a vehicular accident constituted a serious impairment of body function. The trial court granted summary disposition in favor of defendant, concluding that no genuine issue of material fact existed regarding plaintiff's inability to meet the no-fault threshold for recovery. MCL 500.3135; *Kreiner v Fischer*, 471 Mich 109, 130-134; 683 NW2d 611 (2004).

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When reviewing a motion for summary disposition under MCR 2.116(C)(10), we review the affidavits, pleadings, depositions, admissions, and documentary evidence submitted by the parties in a light most favorable to the nonmoving party. *Stevenson v Reese*, 239 Mich App 513, 516; 609 NW2d 195 (2000). Summary disposition is appropriate when all evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Alsbaugh v Comm on Law Enforcement Standards*, 246 Mich App 547, 567; 634 NW2d 161 (2001).

Under the No-Fault Act, a plaintiff may recover non-economic damages from a negligent driver for injuries sustained in an automobile accident only where he has suffered “death, serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1); *Stephens v Dixon*, 449 Mich 531, 539; 536 NW2d 755 (1995). A serious impairment of body function is defined as “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). In *Kreiner, supra*, our Supreme Court outlined a “multi-step process” for determining whether a plaintiff meets the serious impairment threshold. A court must first determine whether 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, a court may decide as a matter of law whether the plaintiff has suffered a serious impairment of a body function. MCL 500.3135(2)(a)(i), (ii); *Kreiner, supra* at 132. Important body functions include the use of a person’s back, legs, or even the ability to walk. *Kreiner, supra* at 136; *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000). Plaintiff sustained injuries to his left foot, including a fracture of his left heel, which has caused a loss of ambulation and chronic pain. Plaintiff has sufficiently alleged impairments to an important body function.

A court must not only establish whether an important body function has been affected, but must also determine whether it has been “impaired,” and not merely “injured.” *Kreiner, supra* at 132. If a court finds that an important body function has been impaired, it must then determine whether the impairment has been objectively manifested. *Id.* 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, 652-653; 654 NW2d 604 (2002). Subjective complaints unsupported by medical documentation are not sufficient to prove that the important body function has been impaired. *Kreiner, supra* at 132. In the present case, the parties do not dispute the fact that plaintiff’s injuries have been objectively manifested through medical diagnostic testing such as MRI, bone scan and CT.

Finally, if a court is able to find 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. *Id.* In ascertaining whether the course of a plaintiff’s normal life has been affected, a court should engage in an objective inquiry, “comparing the plaintiff’s life before and after the accident as well as the significance of any affected aspects on the course of the plaintiff’s overall life.” *Id.* at 132-133. The *Kreiner* Court established a non-exhaustive list of objective factors on which a court may rely to determine whether an injury has affected a claimant’s ability to lead his normal life, 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. *Id.* at 133. None of these factors are meant to be exclusive or dispositive by themselves. *Id.* at 133-34.

Viewing the evidence in a light most favorable to plaintiff, we conclude that plaintiff failed to offer evidence sufficient to establish that the injuries incurred from the automobile accident have affected his general ability to live a normal life. Plaintiff’s injuries, while unfortunate, have done little to preclude plaintiff from living his life in a normal manner. Plaintiff is a professional pianist dependent on market demand to sustain a living. His failure to procure work comes from a lack of need for his services, instead of a lack of ability on his part to

perform due to injury. Moreover, plaintiff has not been limited in any of his daily living activities other than by limitations he has imposed upon himself. Such self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish the existence of any residual impairment. *Id.* at 133 n17; cf. *McDaniels v Hemker*, 268 Mich App 269, 282-284; 707 NW2d 211 (2005) (finding that self-imposed restrictions based on something other than pain, such as physical incapacity, may establish the existence of a serious impairment of body function). Plaintiff has not been medically restricted from driving a car, which he has done in excess of four-hour spans after the accident, nor has he been forced to abandon all household activities, including remodeling projects. The fact that plaintiff may not be able to work as he did prior to his injury does not necessitate the conclusion that his injuries have negatively affected his ability to lead his normal life. *Kreiner, supra* at 137.

Both parties acknowledge that plaintiff needs recurring treatment to facilitate any recovery or mitigation of pain from the injury. However, it is equally clear that plaintiff, through his own choices, has sufficiently mitigated the effects of the injury so as to continue on his original course of life with minimal deleterious effects.

We conclude that plaintiff has failed to establish a genuine issue of material fact regarding whether he suffered a serious impairment of body function that affected his general ability to lead his normal life. The trial court correctly granted defendant's motion for summary disposition.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot