STATE OF MICHIGAN

COURT OF APPEALS

RAYMOND BENEDICT,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant,

and

EBONY MONIQUE HINES,

Defendant.

UNPUBLISHED
November 28, 2006

No. 265595
Washtenaw Circuit Court
LC No. 04-001054-CK

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Defendant State Farm[1] appeals by leave granted the trial court order denying defendant's motion for summary disposition in this case arising out of a motor vehicle accident in which plaintiff allegedly sustained serious impairment of important body functions relative to his neck, back, and head. Defendant contended, in part, that plaintiff had not suffered a serious impairment of body function under MCL 500.3135 because plaintiff was unable to establish that any impairment or injuries affected his general ability to lead his normal life. The trial court concluded that a material factual dispute existed regarding the nature and extent of the injuries, and thus summary dismissal was inappropriate. We affirm.

This Court reviews de novo a trial court's decision on a motion for summary disposition as well as questions of statutory interpretation. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).[2] Under the no-fault act, a plaintiff or an estate may recover noneconomic

[1] We shall refer to State Farm as "defendant" for the remainder of this opinion.

[2] Summary disposition was pursued under MCR 2.116(C)(10). MCR 2.116(C)(10) provides for (continued…)

losses only where the injured person "has suffered death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). MCL 500.3135(7) defines "serious impairment of body function" as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life."

For a court to render, as a matter of law, a ruling regarding whether a party has suffered a serious impairment of body function, it must first "determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function." *Kreiner, supra* at 131-132; see also MCL 500.3135(2)(a). MCL 500.3135(2)(a)(ii) does provide, however, that "for a closed-head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed-head injuries testifies under oath that there may be a serious neurological injury."

If the court can make the determination as a matter of law, it must next determine whether an important body function was impaired and, if the court finds that an important body function was impaired, it must then determine whether the impairment was objectively manifested. *Kreiner, supra* at 132. Where the court answers these questions in the affirmative, it must then determine whether "the impairment affects the plaintiff's general ability to lead his or her normal life." *Id.*

Here, plaintiff alleged that the motor vehicle accident caused an aggravation of existing neck and back injuries,[3] along with causing a closed-head injury. The trial court denied defendant's motion for summary disposition, ruling that a material factual dispute existed regarding the nature and extent of the injuries, causation, and any aggravation of existing injuries. The trial court did not render any ruling or make any statements regarding whether plaintiff's injuries affected his general ability to lead his normal life. Defendant frames three appellate arguments. First, defendant contends that plaintiff's closed-head injury claim cannot succeed because there was no testimony under oath that he may have a serious neurological injury, and it fails because there is no issue of fact that the alleged head injury did not affect plaintiff's general ability to lead his normal life as defined in *Kreiner*. Next, defendant argues that the trial court erred in failing to address the issue whether plaintiff's alleged injuries affected his general ability to lead his normal life. And finally, defendant maintains that whatever neck

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summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). "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 v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

[3] Plaintiff was injured in another automobile accident that occurred in 2001, and the accident at issue in the current litigation occurred in 2003.

and back injuries or impairments plaintiff may have sustained, they did not, as a matter of law, affect his general ability to lead his normal life.

With respect to the alleged closed-head injury, plaintiff cannot take advantage of MCL 500.3135(2)(a)(ii) because plaintiff's experts did not expressly testify "under oath that there may be a *serious* neurological injury[,]" as mandated by the statute (emphasis added), nor can it be implied from the experts' statements that they opined that plaintiff's closed-head injury may be a *serious* neurological injury. See *Churchman v Rickerson*, 240 Mich App 223, 229-231; 611 NW2d 333 (2000).[4] Therefore, the case cannot automatically proceed to trial under that provision. However, the inapplicability of MCL 500.3135(2)(a)(ii) in relation to the alleged closed-head injury does not preclude plaintiff from asserting that the closed-head injury constituted a serious impairment of body function under the general principles in MCL 500.3135. *Churchman, supra* at 232 ("The language of § 3135 does not indicate, however, that the closed-head injury exception provides the exclusive manner in which a plaintiff who has suffered a closed-head injury may establish a factual dispute precluding summary disposition. In the absence of an affidavit that satisfies the closed-head injury exception, a plaintiff may establish a factual question under the broader language set forth in subsections 3135(2)(a)(i) and (ii) . . . .").

Our focus thus turns to the issue regarding the impact of the injuries on plaintiff's general ability to lead his normal life. Plaintiff argues that it is unnecessary to reach this issue because, as the trial court found, there is a factual dispute regarding the nature and extent of plaintiff's injuries and therefore a jury must intercede. The language in *Kreiner* and MCL 500.3135(2)(a) could arguably support this position; however, we find it unnecessary to directly confront the issue. Assuming that we must address the issue of whether the impairments affected plaintiff's general ability to lead his normal life, we conclude that there is sufficient documentary evidence to leave that ultimate determination to a jury as part of the jury's overall inquiry into whether plaintiff suffered a serious impairment of body function that was caused by the accident.

With respect to the third prong of the statutory definition of serious impairment of body function, the effect of an impairment on the course of a plaintiff's entire normal life must be considered. *Kreiner, supra* at 131. "Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected and he does not meet the 'serious impairment of body function' threshold." *Id.* The *Kreiner* Court further ruled:

> In determining whether the course of plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference

[4] Plaintiff's appellate brief appears to concede that the closed-head injury provision contained in MCL 500.3135(2)(a)(ii) was not fully established.

> between plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "*any* effect" on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life.
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> The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (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. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in order to determine whether one has suffered a "serious impairment of body function," 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 132-134 (emphasis in original).]

We shall now examine the documentary evidence presented to the trial court that touched on whether plaintiff's injuries have affected his general ability to lead his normal life. There was evidence that plaintiff had been under a fifty-pound weight restriction, that he no longer runs or jogs, which he did daily before the accident, that he cannot fully perform household chores such as dusting, vacuuming, moving furniture, snow shoveling, and lawn maintenance, that plaintiff can no longer go to the gym to exercise and lift weights as he did two to three days a week before the accident, and that he at times has difficulty performing work activities because of cognitive problems. Further, there was evidence that plaintiff could not walk the couple's three dogs at the same time, although he could handle walking their smallest dog. There was testimony from plaintiff's wife that indicated that plaintiff can still fish, which he loves to do, and that he goes up to the couple's Houghton Lake property, purchased after the accident, once a month to fish.

Additionally, there was evidence that plaintiff has some memory problems, causing him to forget to do things like closing doors around the home, taking his lunch to work, telling his wife about phone messages, and letting the dogs inside. Plaintiff's wife testified that he sometimes forgets important dates, is forced to use reminder notes, has a hard time concentrating, and seems unexplainably distracted at times. Plaintiff's testimony about himself was similar in nature and indicated that these problems did not exist before the accident.[5]

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[5] Plaintiff presented neuropsychological tests that were interpreted as suggesting that plaintiff "is currently functioning in the mild range of impairment" and that there were difficulties with visual and auditory memory. Defendant presented evidence in the form of a medical opinion that plaintiff's cognitive problems were comparable to others in the general public who did not suffer
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Plaintiff claimed that the head injury has also made it difficult for him to concentrate and comprehend at school. Plaintiff further contended that he has sleep problems related to the accident in that he cannot get comfortable, which has resulted in him sleeping in another bed in a room separate from his wife and, on some nights, rising every hour or two. In the context of the factors referenced in *Kreiner*, plaintiff maintains that he has been taking various pain medicines for over two years, that he underwent several months of physical rehabilitation, that there has been no improvement, and that he continues to experience discomfort. Defendant contends that plaintiff's medical treatment was conservative in nature and that he was discharged from physical therapy with a good prognosis following only 15 visits.

With respect to plaintiff's employment, we recognize that he missed little if any work after the accident, that his work evaluation after the accident showed that he does a good job, and that evaluation notations about problems with focusing and attention to detail are somewhat comparable to pre-accident evaluation notations. We also acknowledge that, in regard to college, the evidence reveals that plaintiff continued his schooling after the accident and is excelling. However, in relation to the closed-head injury claim, plaintiff testified that he has concentration and focusing problems at work and school, which make it necessary to compensate by spending more time on completing projects and studying in order to maintain the positive results similar to those attained before the accident. Considering this testimony along with the neuropsychological tests and evidence of forgetfulness relative to plaintiff's home life, we cannot conclude, as a matter of law, that the alleged closed-head injury did not affect plaintiff's general ability to lead his normal life.

With respect to the alleged neck and back injuries, there has been a significant reduction in plaintiff's participation in athletic activities and household chores. Defendant argues, however, that plaintiff is currently under no doctor restrictions. In the often-cited footnote 17 in *Kreiner*, *supra* at 133, our Supreme Court stated, "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish [the extent of any residual impairment]." But we must limit application of this footnote in a manner consistent with this Court's opinion in *McDaniel v Hemker*, 268 Mich App 269; 707 NW2d 211 (2005). [6]

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any form of head or brain trauma.

[6] In *McDaniel, supra* at 284-285, this Court, exploring the meaning of *Kreiner*'s footnote 17, stated:

> We think it evident that our Supreme Court crafted footnote 17 in *Kreiner, in the context of establishing the extent of any residual impairment*, because the nature of pain tends to be subjective and therefore inherently questionable. While there may exist a medically identifiable or physiological basis for the pain, self-imposed restrictions because of pain, in and of themselves, fail because there is no medical expertise supporting the restrictions, which expertise would, in all likelihood, take into consideration the source of the pain before restrictions are imposed. That said, if there are physician-imposed restrictions based on real or perceived pain, footnote 17 does not require that the doctor offer a medically identifiable or physiological basis for imposing the restrictions.

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Plaintiff was subject to a doctor's restrictions on the amount of weight that he could lift, although it is unclear when and if they ended, which would have hampered participation in some of the athletic and household activities listed above. Moreover, viewing the totality of the circumstances as we must, there was also evidence of numerous physical therapy sessions, various prescriptions for pain medication, and evidence of substantial sleep disturbances.

Taking into consideration the documentary evidence, we hold that reasonable minds might differ and that there is a factual issue with respect to whether the injuries, including the alleged closed-head injury, affected plaintiff's general ability to lead his normal life.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Alton T. Davis

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> [I]t is apparent to us that in many situations where there are physician-imposed restrictions based on pain, the instructions or limitations provided by the physician will be fairly open-ended, making reference to or being dependent on the level of pain experienced by the injured party when performing a particular task. To assist the bench and bar in addressing fact patterns in which it may be difficult to ascertain whether restrictions are truly physician-imposed, in cases where 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. . . . Furthermore, evidence regarding restrictions is not the only way to establish the extent of any residual impairment. . . . [E]xpert statements and opinions themselves regarding [a party's] medical condition and the likelihood that [the] condition is permanent can be utilized to show the extent of the residual impairment.
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> Next, it is important to take notice of the fact that footnote 17 is not a general proposition enunciated by our Supreme Court, but rather it is tied directly to one factor, factor d, and the Court emphasized that the enumerated factors are "not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves." *Kreiner, supra* at 133-134. Accordingly, simply because there may be self-imposed restrictions based on pain does not mean that a plaintiff has not established a threshold injury. A trial court must examine all the evidence presented; consider, if relevant, all the *Kreiner* factors; and view "the totality of the circumstances" in determining whether an impairment has affected "the person's general ability to lead his or her normal life" as required by MCL 500.3135(7). *Kreiner, supra* at 132, 134. [Emphasis in original.]