S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

NATHANIEL CUNNINGHAM,

Plaintiff-Appellee,

v

FARM BUREAU GENERAL INSURANCE COMPANY,

Defendant-Appellant,

and

AUTO CLUB INSURANCE ASSOCIATION and CHIREST THOMPSON,

Defendants.

UNPUBLISHED
March 6, 2007

No. 271201
Wayne Circuit Court
LC No. 04-436648-NI

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

PER CURIAM.

Defendant appeals by leave granted from the circuit court's order denying its motion for summary disposition. We reverse. This case is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiff elected to use a company car to pick up his girlfriend when she called to say that she needed assistance. En route, plaintiff was injured when an uninsured motorist rear-ended him. Plaintiff maintains that he was never told he was not allowed to use the vehicle for a personal errand, but plaintiff's employer testified on deposition that he had expressly and repeatedly denied plaintiff's request for permission for that particular use.

Plaintiff sought compensatory damages from defendant under the uninsured motorist coverage included with his employer's insurance contract with defendant. The latter denied liability on the grounds that plaintiff was driving the subject vehicle without permission at the time and that plaintiff had not suffered a serious impairment of body function. The trial court rejected both arguments, and so denied defendant's motion for summary disposition. We agree with defendant that plaintiff has failed to show a serious impairment of body function for purposes of restoring tort liability under the no-fault act, MCL 500.3101 *et seq*.

MCL 500.3135(1) provides that "[a] person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." Subsection (7) states that, "'serious impairment of body function' means 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). Subsection (2)(a) establishes that whether a person has suffered serious impairment of a body function is a question of law for the court where there is no factual dispute concerning the nature and extent of the injuries, or where such factual dispute is not material to the question whether the person has suffered serious impairment of a body function. MCL 500.3135(2)(a). Accordingly, "the issue . . . should be submitted to the jury only when the trial court determines that an 'outcome-determinative genuine factual dispute' exists." *Miller v Purcell*, 246 Mich App 244, 247; 631 NW2d 760 (2001), quoting *Kern v Blethen-Coluni*, 240 Mich App 333, 341; 612 NW2d 838 (2000).

Our Supreme Court's decision in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), indicates that the conditions reinstating tort liability under the no-fault act are not lightly to be found. "Although some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if . . . 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" for purposes of establishing a serious impairment. *Id.* at 131. The focus is not on the plaintiff's subjective pain and suffering, but on injuries that actually affect the functioning of the body. *Miller*, *supra* at 249. Residual impairments based on perceived pain are a function of "physician-imposed restrictions," not "[s]elf-imposed restrictions." *Kreiner*, *supra* at 133 n 17.

> 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. [*Id.* at 133. (Footnote omitted).]

Plaintiff testified at deposition that he could no longer lift over 50 pounds, play basketball, or engage in weight lifting, but admitted that no physician had restricted him from any of those activities. Plaintiff additionally protests that he was unable to return to work until after five months after the accident. But the disability certificates in the record indicate that plaintiff was deemed totally disabled only from the time of the accident until several weeks later, and that thereafter he was only partially disabled, while making steady progress on his ability to lift, stand, and drive. For all but the first few weeks, then, plaintiff suffered only partial disabilities of a sort that should have left him eligible for many kinds of employment, perhaps including his original line of work. Moreover, plaintiff points to no evidence of any job opportunity he was obliged to refuse because of his injuries.

Because the record indicates that medically imposed restrictions diminished to nothing over a period of just five months, and concerned mostly partial disabilities relating to certain household chores, we conclude that plaintiff has failed to present evidence sufficient to create a question of fact concerning whether the accident in question seriously affected plaintiff's general ability to lead his normal life. Accordingly, the trial court erred in failing to grant defendant's motion for summary disposition on that ground.

In light of our resolution of this case, we need not reach the question whether the trial court additionally erred in concluding as a matter of law that the policy exclusion for persons using the insured vehicle without permission did not apply.

Reversed. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kurtis T. Wilder