

STATE OF MICHIGAN
COURT OF APPEALS

RAYMOND L. SCOTT,

Plaintiff-Appellant,

v

PETER J. GAVRUN, DARLA JEAN GAVRUN,
and JOCELYN R. FOUTH,

Defendant-Appellee.

UNPUBLISHED

May17, 2007

No. 274128

Allegan Circuit Court

LC No. 06-039008-NI

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

PER CURIAM.

Plaintiff Raymond L. Scott appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

On July 9, 2004, defendant Jocelyn R. Fouth drove a 1988 GMC Jimmy owned by defendants Peter J. Gavrun and Darla Jean Gavrun north on 10th Street in Plainwell, Michigan. Plaintiff was driving north his 1986 Buick Century on 10th Street, but had stopped behind a line of traffic. As Fouth approached the intersection of 10th Street and 106th Avenue, she failed to stop and hit the rear of plaintiff's Century. Apparently, at the time of impact, plaintiff hit the gas pedal of his car. The Century accelerated, ran off the road, and hit a tree. The Century was totaled, but plaintiff appeared uninjured and declined the paramedics' offer to take him to the hospital.

The next morning, plaintiff noticed constant, throbbing pain in his neck, back, and left knee and went to his local hospital for treatment. Attending physicians took x-rays of plaintiff's chest and cervical spine, which did not indicate that plaintiff injured his chest or spine in the accident. The attending physicians concluded that plaintiff had merely strained his chest and neck and discharged him. Although plaintiff claimed that the physicians were concerned about his knee, he admitted that that they did not take x-rays of the knee.

Plaintiff claimed that he developed knee pain in the months following the accident. Apparently plaintiff received a course of physical therapy to address injuries to his left knee at

this time, but he claimed that he derived no benefit from the treatment. Magnetic resonance imaging (MRI) of plaintiff's left knee indicated that he had linear tears to the posterior horn of the medial meniscus and to the anterior horn of the lateral meniscus.¹ These tears were addressed with two arthroscopic surgeries in 2005. However, plaintiff continued to complain of pain in his left knee. Approximately two months after his second arthroscopic surgery, plaintiff also began complaining of worsening pain in his left hip. He claimed that the pain in both his left knee and left hip was proximately caused by the July 9, 2004, accident and affected his general ability to lead his life by causing him pain and limiting his mobility.

On appeal, plaintiff challenges the trial court's order granting defendants' motion for MCR 2.116(C)(10) summary disposition of his claim on the grounds that plaintiff did not suffer a serious impairment of body function as a result of the July 9, 2004, accident. In particular, he argues that a genuine issue of material fact exists regarding whether his hip injuries were proximately caused by the July 9, 2004, accident and that the trial court erred when it dismissed his cause of action because the injuries to, and pain in, his left hip and knee affected his general ability to lead his normal life. We disagree.

We review de novo the trial court's grant of summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). "A trial court tests the factual support of a plaintiff's claim when it rules upon a motion for summary disposition filed under MCR 2.116(C)(10)." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "The court's task is to review the record evidence, and all reasonable inferences therefrom, and determine whether a genuine issue of material fact exists to warrant a trial." *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. [*Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996) (citations omitted). See also MCR 2.116(G)(3) & (4).]

Documentary evidence submitted by the parties is viewed in the light most favorable to the nonmoving party. *Greene v A P Products, Ltd*, 475 Mich 502, 507; 717 NW2d 855 (2006).

"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). "In deciding motions for

¹ The meniscus is the cartilage located in the knee joint.

summary disposition, “[t]he court may not make factual findings or weigh credibility.” *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999), quoting *Manning v Hazel Park*, 202 Mich App 685, 689; 509 NW2d 874 (1993). “Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.” *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

“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.” MCL 500.3135(1). A serious impairment of body function is established when there 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).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), our Supreme Court developed a three-step analysis to determine whether a plaintiff has suffered a serious impairment of body function. First, a court must determine whether a factual dispute exists “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.” *Id.* at 131-132. Next, the court must determine whether “an ‘important body function’ of the plaintiff has been impaired.” *Id.* at 132. This impairment must be “objectively manifested.” *Id.* Finally, the court must determine if the impairment has affected the plaintiff’s general ability to lead his normal life. *Id.*

Plaintiff presents a twofold argument. First, he argues that a genuine issue of material fact exists regarding the nature and extent of his hip injuries. Specifically, he argues that a question of fact exists regarding whether his hip injuries were proximately caused by the July 9, 2004, accident. Second, he argues that the trial court erred when it dismissed his cause of action because the injuries to, and pain in, his left hip and knee affected his general ability to lead his normal life.

Admittedly, a question of fact exists regarding the nature and extent of plaintiff’s knee and hip injuries and whether his hip injuries were proximately caused by the accident. In *Moore v Cregeur*, 266 Mich App 515, 518; 702 NW2d 648 (2005), this Court noted,

If there are material factual disputes, a court may not decide the issue as a matter of law. If no material question of fact exists regarding the nature and extent of the plaintiff’s injuries, whether plaintiff’s injuries constitute a serious impairment of body function is a matter of law.

Despite the existence of these questions of fact, however, the trial court did not err when it granted defendants’ motion for summary disposition because these questions of fact were not material to the determination whether plaintiff suffered a serious impairment of body function. Even after assuming that plaintiff’s knee and hip injuries were proximately caused by the July 9, 2004, accident and considering the evidence regarding the nature and extent of these injuries in a light most favorable to plaintiff, *Greene, supra* at 507, plaintiff fails to establish that these impairments affected his general ability to lead his normal life. See *Kreiner, supra* at 136 n 21.

If a plaintiff is “generally able” to lead his normal life after suffering an impairment, “then his general ability to lead his normal life has not been affected by the impairment.” *Id.* at 130. To determine if an impairment has affected a plaintiff’s general ability to lead his normal life, the trial court must examine the plaintiff’s life before and after the accident and objectively determine whether any change in his lifestyle “has actually affected [his] ‘general ability’ to conduct the course of his life.” *Id.* at 132-133. “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.” *Id.* at 133 (emphasis in original). The *Kreiner* Court explained,

the effect of the impairment on the course of a plaintiff’s entire normal life must be considered. 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.* at 131.]

The *Kreiner* Court provided the following factors to consider when determining whether an impairment has affected a plaintiff’s general ability to lead his normal life: “(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.* When considering these factors, however, the focus “is not on the plaintiff’s subjective pain and suffering, but on injuries that actually affect the functioning of the body.” *Netter v Bowman*, 272 Mich App 289, 295; 725 NW2d 353 (2006). Further, these factors are not exclusive nor is any particular factor meant to be dispositive. *Kreiner, supra* at 133-134.

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 134.]

Plaintiff claims that as a result of the accident, he suffers from chronic pain in his knee and hip, limiting his ability to ambulate and making certain activities more difficult. However, plaintiff fails to establish that these injuries constitute a serious impairment of body function because the evidence, taken in a light most favorable to plaintiff, does not establish that his alleged injuries have affected his ability to lead his normal life.

Plaintiff’s life was not generally affected by the alleged injuries to his hip and knee. Plaintiff was unemployed and received disability benefits for some time before the accident, and he did not present evidence indicating that the accident thwarted any plans or attempts to return to a previous occupation in construction or on a factory line or to train for a new career. Plaintiff’s alleged injuries have not affected his ability to bathe, groom, and dress himself without assistance, to perform household chores, or even to mow his lawn. Apparently both before and after the accident, plaintiff spent his days socializing with friends, shooting guns, and shopping. Plaintiff does not claim that his alleged injuries caused by the accident affected his involvement in these activities. Further, plaintiff suffered from chronic pain in his back and neck for some time before the accident and was taking painkillers, including Vicodin, and seeing a

chiropractor to alleviate these symptoms. Accordingly, even before the accident, plaintiff lived with chronic pain and found ways to address his condition.

Plaintiff primarily argues that his knee and hip injuries have affected his ability to lead his normal life because he can no longer hunt deer or turkey, bowl, fish, ride his motorcycle, engage in pain-free sexual intercourse, or move without pain. However, plaintiff provides no documentation indicating that medical restrictions were placed on him to prevent him from participating in these or any other activities.

Plaintiff claims that his physician instructed him on March 23, 2005, to “diminish his weight bearing” and argues that this constitutes “a physician imposed restriction because [plaintiff’s physician] had a psychological basis upon which to conclude Plaintiff-Appellant was suffering from real pain.” Apparently plaintiff is referring to his physician’s proposed plan for plaintiff’s continued recovery that he noted in plaintiff’s medical records. In his notes regarding a March 23, 2005, examination, plaintiff’s physician commented, “I think he is doing well. We need to try to do some weight reduction, leg strengthening. We are going to see him back on an as-needed basis.” We do not believe that this statement indicates that plaintiff was under a physician-imposed restriction limiting him from carrying more than a certain amount of weight. Instead, this statement merely indicates that plaintiff’s physician planned to treat plaintiff’s knee by helping him strengthen his left leg and by encouraging him to lose some weight.²

The only other evidence that plaintiff’s physician placed restrictions on plaintiff’s activities comes from plaintiff’s testimony that his physician gave him some verbal, “common sense” instructions regarding restrictions on his activities. However, plaintiff’s testimony is self-serving statement and, in the absence of other evidence (such as an affidavit by his physician corroborating plaintiff’s claims), it is insufficient to establish that plaintiff’s physician imposed restrictions on plaintiff’s activities because of the alleged injuries to his hip and knee. Further, plaintiff described his physician’s alleged comments as “common sense” instructions to not lift something that was too heavy and to set an object down if he began to ache when carrying it. These comments do not constitute specific, physician-imposed restrictions precluding plaintiff from engaging in activities that a healthy, uninjured individual could perform. Instead, they communicate general medical advice that any individual should follow to prevent serious injury.

Accordingly, plaintiff places self-imposed restrictions on his involvement in the aforementioned activities. Plaintiff admits that he restricted his involvement because he has difficulty moving his leg and hip and because of pain.

“Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain” do not establish the extent of a residual impairment for purposes of evaluating whether an injury has affected a plaintiff’s general ability to conduct the course of his life. *Kreiner, supra* at 133 n 17. Although in *McDaniel v Hemker*, 268 Mich App 269; 707 NW2d 211 (2005), this Court identified circumstances under which the statement in *Kreiner* regarding self-imposed restrictions did and did not apply, the *McDaniel* Court indicated that a plaintiff

² In April 2005, plaintiff was six feet, two inches tall and weighed 256 pounds.

may not use self-imposed restrictions based on real or perceived pain to establish that he is residually impaired as a result of the accident in question. *Id.* at 283. The *McDaniels* Court explained,

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. [*Id.* at 284 (emphasis omitted).]

Plaintiff admitted that he restricted his involvement in certain activities (namely, sexual activity and motorcycle riding) because these activities aggravated the chronic pain in his knee and hip. Yet plaintiff admitted to participating in these activities after the accident, just not as much as he would have liked. Accordingly, plaintiff's self-imposed restrictions on his involvement in these activities because of pain are insufficient to establish that his reduced involvement in these activities has affected his general ability to lead his normal life. See *id.* at 283-284.

In addition, plaintiff's self-imposed restrictions on hunting, fishing, bowling, and general movement have not affected his ability to lead his normal life. Notably, plaintiff has not *tried* to hunt, fish, or bowl since the accident. Accordingly, plaintiff's assertions that he can no longer hunt, fish, or bowl are not based on failed attempts to participate in these activities, but on plaintiff's conclusions, unsupported by a doctor's opinion or recommendation, that he would be unable to perform these activities.

Further, plaintiff does not claim that he can no longer hunt or fish because he would be unable to shoot a gun or cast a rod, but because he would be unable to perform activities contingent to hunting and fishing, specifically, dragging a dead deer from the woods and launching a fishing boat off a carrier. Conceivably, plaintiff could still enjoy these activities if he modified his pre-accident hunting and fishing routine in order to receive assistance with these contingent activities. In light of his failure to attempt to find an alternate method of or assistance in performing these contingent activities, plaintiff's decision not to hunt and fish after the accident because he concluded that he could no longer perform activities contingent to hunting and fishing is insufficient to establish that the accident affected his general ability to lead his normal life by rendering him "unable" to hunt or fish.

Further, plaintiff's self-proclaimed inability to bowl because of his leg and hip injuries is insufficient to establish that his general ability to lead his normal life has been affected. Again, plaintiff has not attempted to bowl since the accident and, in the absence of a doctor's recommendation that he not bowl, his decision not to attempt to bowl is based on his unsubstantiated conclusion that he cannot bowl the way he used to. In fact, plaintiff appears to have decided to give up bowling because of concerns that his injuries have affected his game, not because of concerns that he would be unable to lift a bowling ball and roll it down the lane. Further, the question whether the alleged impediments to plaintiff's bowling game as a result of his knee and hip injuries constitute a serious impairment of body function depends on the circumstances surrounding this case. The *Kreiner* Court noted,

[T]he “serious impairment of body function” inquiry must “proceed[] on a case-by-case basis because the statute requires inherently fact-specific and circumstantial determinations.” Whether an impairment that precludes a person from throwing a ninety-five miles-an-hour fastball is a “serious impairment of body function” may depend on whether the person is a professional baseball player or an accountant who likes to play catch with his son every once in a while. [*Kreiner, supra* at 134 n 19 (citation omitted).]

Plaintiff does not claim to be a professional or competitive bowler. Instead, he claims that, before the accident, he would bowl biweekly as a recreational activity. Plaintiff provides no evidence indicating that he could not bowl under any circumstances. Accordingly, the alleged hindrance that plaintiff claims his knee and hip injuries have placed on his recreational bowling game has not affected his general ability to lead his normal life.

Finally, plaintiff alleges that the injuries to his knee and hip have affected his ability to ambulate. Specifically, plaintiff claims that because of his injuries, he has difficulty lifting his legs and bending over, making ascending stairs or stepping into his bathtub more time-consuming and difficult. Yet although plaintiff’s movement is slowed as a result of the injuries to his knee and hip, plaintiff fails to establish that his allegedly decreased ambulation has affected his general ability to partake in the same activities and lifestyle as before his accident. Plaintiff’s hindered ambulation has not appreciably diminished his ability to lead his normal life.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens