

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN SWITZER,

Plaintiff-Appellant,

v

VAUGHN SHADE,

Defendant-Appellee.

UNPUBLISHED

May 22, 2007

No. 272907

Kent Circuit Court

LC No. 05-012728-NI

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

PER CURIAM.

Plaintiff filed a complaint in the trial court seeking damages under the no-fault insurance act, MCL 500.3101 *et seq.* The trial court granted defendant's motion for summary disposition according to MCR 2.116(C)(10). Plaintiff appeals as of right. We affirm.

We review a summary disposition order de novo. *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 166; 713 NW2d 717 (2006). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim and should be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). When deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence in the light most favorable to the opposing party. *Id.*

In a no-fault action, our review requires us to determine whether the plaintiff has sustained a "serious impairment of body function" within the meaning of the no-fault act. MCL 500.3135(1); *Kreiner v Fischer*, 471 Mich 109, 134; 683 NW2d 611 (2004). The first step is to determine whether there is a factual dispute concerning the nature and extent of the plaintiff's injury. See *Kreiner, supra* at 131-132. Here, there is no factual dispute. Both parties rely on the same medical records and deposition testimony to support their respective positions. Neither party challenges the accuracy of the factual statements in that evidence.

Because there is no factual dispute, we must decide as a matter of law whether plaintiff's injuries constitute a serious impairment of body function. MCL 500.3135(2)(a). The no-fault act 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." MCL 500.3135(7). Thus, the record must contain evidence that plaintiff's impairment (1) is

objectively manifested, (2) involves an important body function, and (3) affects his general ability to lead his normal life. See *Kreiner*, *supra* at 121.

Defendant concedes that plaintiff's injuries meet the first two components of the inquiry, and the record supports this concession. The objective medical evidence showed broken bones in plaintiff's nondominant, left wrist. Because the bones were broken, plaintiff could not fully use his left hand for at least three months. The use of the hand, though nondominant, qualifies as an important body function. See *id.* at 134 (observing that the plaintiff's injuries to his "nondominant hand . . . constituted an impairment of an important body function that was objectively manifested"). Given that plaintiff had an objectively manifested impairment of an important body function, the resolution of his claim turns on whether the impairment affects his general ability to lead his normal life.

In *Kreiner*, the Court explained that this third component requires consideration of the totality of a plaintiff's circumstances. *Id.* *Kreiner* offered the following nonexhaustive list of factors that could be useful in making this objective determination: "(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. The parties' arguments focus primarily on the length of plaintiff's treatment, the extent of his original, short-term impairment, and the extent of his residual impairment.

We turn first to plaintiff's short-term impairment. Plaintiff's nondominant hand was temporarily impaired as a result of the accident, but the evidence does not support the conclusion that the impairment affected his general ability to lead his normal life. *Id.* at 132-133. In the companion case to *Kreiner*, *Straub v Collette*, our Supreme Court concluded that hand injuries comparable to the injuries at bar did not satisfy the temporary impairment threshold. *Id.* at 136. Like plaintiff here, the *Straub* plaintiff had hand surgery on his nondominant hand shortly after his accident and returned to unrestricted work approximately three months after the surgery. *Id.* at 122. While the *Straub* plaintiff had been prevented from pursuing secondary employment operating his archery shop and playing bass guitar in a band, the Court concluded that those temporary limitations did not constitute a serious impairment of body function. *Id.* at 136.

Like the *Straub* plaintiff, plaintiff here returned to work without restrictions within three months of his first surgery. Although plaintiff had a second surgery, that surgery was arthroscopic and plaintiff returned to right-handed work within a week and a half. He could work without restrictions three weeks later. As of the time of the summary disposition, he was still working at the same job. Nothing in the record indicates that plaintiff's temporary impairment affected the course of his life. Accordingly, his temporary impairment does not support a finding of serious body impairment within the meaning of the no-fault act. See *Nicke v Miller*, 477 Mich 954; 723 NW2d 908 (2006).

We turn next to plaintiff's arguments concerning residual impairment and the length of his treatment. He notes that he has required medical treatment for wrist pain for more than a year after his accident. He maintains that ongoing restrictions on his activities are physician-imposed and that as such he has presented sufficient proof of the extent of his residual impairment.

In support of his contention, plaintiff cites *McDaniel v Hemker*, 268 Mich App 269; 707 NW2d 211 (2005). In *McDaniel*, this Court described the plaintiff's residual impairment as follows:

The impairment here can be best described as the inability of McDaniel, in many situations, to position or maneuver her upper body, extremities, and neck and head in such a way that avoids pain from ligamentous injuries of the cervical spine, thereby interfering with or precluding various activities in McDaniel's life. This claimed impairment is continuing or ongoing and remains to discomfort McDaniel following the injury; therefore, it qualifies as a "residual" impairment. [*Id.* at 283.]

This passage clearly indicates that residual pain and the impact it has on activity constitutes a residual impairment. Accepting plaintiff's assertions as true, the existence of a residual impairment for purposes of considering this summary disposition motion is established.

Moreover, although defendant is correct that self-imposed restrictions based on pain cannot establish the extent of any residual impairment, *Kreiner, supra* at 133 n 17, we do not agree that the subjective nature of plaintiff's complaints of pain serve to render the limitations by which he lives "self-imposed." As recognized by this Court in *McDaniel, supra* at 283, "physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment." There, in concluding that the restrictions by which the plaintiff lived were physician-, as opposed to self-, imposed, this Court noted that the plaintiff's treating physician had "instruct[ed] her to adjust her activities based on her level of pain." *Id.* at 284. Here, the treating physician similarly directed that plaintiff use his wrist only "as tolerated." That plaintiff's physician cannot identify a physiological basis for plaintiff's pain is irrelevant to the "physician-imposed" nature of the restrictions. As noted by the *McDaniel* Court, although "evidence that the physician has pinpointed a physiological basis for the pain or believes that the patient is truly suffering pain . . . lends support to a conclusion that instructions by the physician constitute physician-imposed restrictions," *id.* at 284-285, *Kreiner* "does not require that the doctor offer a medically identifiable or physiological basis for imposing the restrictions," *id.* at 284. Thus, we conclude that, when viewed objectively and in a light most favorable to plaintiff, the record supports that plaintiff's restrictions are physician-, rather than self-, imposed.

Nonetheless, an objective view of plaintiff's pre- and post-accident life does not support that his general ability to lead his normal life has been affected by his injury. The record contains evidence of three circumstances that have changed in plaintiff's life: less video game playing, less bicycle riding, and a decision against pursuing a job as a firefighter. None of these changed circumstances, however, warrant a finding of serious impairment under the no-fault act. Regarding the asserted loss of a firefighting career, the sole evidence to support the assertion is plaintiff's testimony. He stated that firefighters must be able to crawl, and that because of his wrist pain he cannot crawl. He offered no medical proof, however, that his wrist injury prevents him from crawling, nor any proof that it prevents him from performing other firefighting activities. Moreover, given his physician's view that plaintiff should "see how he does over time," there is no indication that the wrist injury permanently foreclosed the prospect of a firefighting career. Similarly, the record contains no evidence that the changes in plaintiff's recreational activities have affected his general ability to lead his normal life. As the Court

explained in *Kreiner*, “not all activities have the same significance in a person’s overall life.” *Kreiner, supra* at 131.

We acknowledge that the accident and the resulting wrist pain have had negative effect on certain aspects of plaintiff’s life. Nonetheless, as the Court explained in *Kreiner*, “[a] negative effect on a particular aspect of an injured person’s life is not sufficient in itself to meet the tort threshold, as long as the injured person is still generally able to lead his normal life.” *Id.* at 137. Here, plaintiff testified that the injury had a negative effect on a few recreational aspects of his life, and on one career trajectory. Nonetheless, plaintiff is able to continue working in his pre-accident job. Moreover, there is no definitive medical evidence that his injury has permanently foreclosed the option of an emergency services career. As such, the accident did not cause a serious impairment of body function within the meaning of the no-fault act. Summary disposition in favor of defendant was, therefore, proper.

Affirmed.

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