

STATE OF MICHIGAN
COURT OF APPEALS

ANDREW PAUL TURNER,
Plaintiff-Appellee,

UNPUBLISHED
June 19, 2007

v

RICHARD WALTER WYSZYNSKI,
Defendant-Appellant.

No. 270862
Roscommon Circuit Court
LC No. 05-725517-NI

Before: Meter, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying his motion for summary disposition of this third party no fault action. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On October 14, 2004, plaintiff, who was working at an oil change facility, attempted to guide a vehicle being driven by defendant into a garage. Defendant's foot slipped off the brake, causing the vehicle to accelerate and strike plaintiff. Plaintiff, who suffered numerous bruises and abrasions as well as injuries to his back and left elbow, filed suit seeking damages. Defendant concedes negligence, but asserts that plaintiff's injuries fail to meet the serious impairment of a body function threshold for noneconomic damages under the no fault act. The trial court disagreed with this argument and denied defendant's motion for summary disposition.

On appeal, defendant asserts that the trial court erred in denying his motion for summary disposition because plaintiff has not suffered a serious impairment of a body function as defined in MCL 500.3135.

The decision to grant or deny summary disposition presents a question of law that we review de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Summary disposition is appropriate under MCR 2.116(C)(10) when there is "no genuine issue as to any material fact." A question 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 General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

The goal of the no fault insurance act, MCL 500.3101 *et seq.*, is to "provide victims of motor vehicle accidents with assured, adequate and prompt reparation for certain economic losses." *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 41; 528 NW2d 681 (1995) (internal citation

and quotation marks omitted). To maintain an action for noneconomic tort damages, a plaintiff must satisfy the “serious impairment of body function” threshold set by the act or the other thresholds set by the act. *Kreiner v Fischer*, 471 Mich 109, 127; 471 Mich 1201, 683 NW2d 611 (2004). MCL 500.3135(1) provides:

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.

In the instant case, plaintiff asserts that his injuries have caused a serious impairment of a body function. Such an impairment consists of “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); see also *Kreiner, supra*, 129. When there is no factual dispute concerning the nature and extent of the injuries, or when no such factual dispute is material to the question of whether the person has suffered a serious impairment of a body function, whether a person has suffered a serious impairment of a body function is a question of law for the court. MCL 500.3135(2)(a)(i) and (ii); *Kreiner, supra*, 131-132. Thus, the trial court should not submit the issue to the jury unless it “determines that an outcome-determinative genuine factual dispute exists.” *Netter v Bowman*, 272 Mich App 289, 294; 725 NW2d 353 (2006) (internal citations and quotation marks omitted).

In *Kreiner, supra*, 132, our Supreme Court explained that, when a court may decide the issue as a matter of law, it must first determine if the plaintiff’s injury has impaired an “important body function.” It is insufficient “if the impairment is of an unimportant body function” or “if an important body function has been injured but not impaired.” *Id.* If such an impairment exists, the court must next “determine if the impairment is objectively manifested.” *Id.* Subjective complaints unsupported by medical documentation are insufficient. *Id.*

Finally, if the impairment of an important body function is objectively manifested, the court must then decide whether the impairment affects the plaintiff’s general ability to lead his or her normal life. *Id.*

Here, no material issue of fact exists regarding the nature and extent of plaintiff’s injuries. Consequently, we must first determine whether plaintiff has suffered a serious impairment of a body function. *Id.*, 131-132.

In *Kreiner*, one of the plaintiffs suffered an injury to his non-dominant hand while the other injured his lower back. *Id.*, 122, 124-125. The Supreme Court determined that both of these injuries constituted impairments of important body functions. *Id.*, 134, 136. Here, plaintiff testified that injuries to his back and non-dominant arm have limited his activities. Thus, we find that plaintiff’s injuries have resulted in alleged impairments to important body functions.

The next step in the analysis concerns whether plaintiff’s impairments are objectively manifested. For there to be an objectively manifested impairment, “a plaintiff’s injury must be capable of objective verification by a qualified medical person either because the injury is

visually apparent or because it is capable of detection through the use of medical testing.” *Netter, supra*, 305 (internal citation omitted).

Here, the evidence fails to establish the existence of an impairment capable of being verified by qualified medical personnel. The initial emergency room x-rays of plaintiff’s left arm showed a possible “occult fracture.” However, the subsequent x-rays showed no abnormalities. When plaintiff’s orthopedic surgeon examined him in December 2004, the doctor found that defendant’s left elbow had full range of motion with no pain or discomfort. Moreover, although an initial assessment by a nurse practitioner evidenced swelling and muscle spasms along plaintiff’s rib cage, no evidence exists to suggest that this injury contributed to an impairment of his elbow or back. Further, plaintiff’s doctor noted that there was no evidence of muscle spasms. Additionally, although plaintiff claimed he was told that an MRI revealed “some kind of tendonitis” in his back, the doctor’s report states that x-rays of plaintiff’s thoracic spine revealed no obvious abnormalities and that there “is no evidence of spinal stenosis or any compression fractures.”

The trial court appears to have determined that an objectively manifested impairment existed based on the January 26, 2005, report of plaintiff’s doctor. In the “history of present illness” section, the doctor stated that plaintiff admitted that his back pain was 60 to 70 percent better when he was going to physical therapy but had decreased to a 40 to 50 percent improvement since he stopped. Rather than being a diagnosis of plaintiff’s condition, it is clear that this statement was merely intended to record plaintiff’s own evaluation of his level of back pain. Under *Kreiner, supra*, 132, such subjective complaints are insufficient to establish an objectively manifested impairment. Consequently, the trial court erred in determining that plaintiff satisfied the serious impairment of body function threshold under MCL 500.3135(1). We therefore reverse its decision and remand the instant case for entry of an order granting defendant’s motion for summary disposition.

Reversed and remanded for entry of an order of summary disposition in favor of defendant. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood