

STATE OF MICHIGAN
COURT OF APPEALS

MALCOLM S. GARCIA,

Plaintiff-Appellant

v

RICHARD M. WALKER,

Defendant-Appellee.

UNPUBLISHED

August 21, 2007

No. 273773

Jackson Circuit Court

LC No. 05-005749-NI

ON RECONSIDERATION

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Plaintiff initially appealed as of right from an October 2006 order entered by Judge Schmucker of the Jackson Circuit Court granting defendant's motion for summary disposition. On May 8, 2007, this Court issued an opinion affirming the trial court's ruling with Judge Jansen dissenting. Shortly thereafter, plaintiff brought a motion for reconsideration, which was granted by this Court. On reconsideration, we reverse the decision of the trial court and remand the matter for further proceedings consistent with this opinion.

This case arises out of defendant striking the plaintiff with his motor vehicle three times.¹ As a result of the incident, plaintiff suffered from Achilles tendonitis of the left ankle which led to plaintiff wearing a short leg cast and being restricted to a "sit down job" from December 23, 2004 through February 22, 2005. In addition to wearing the cast and the work restrictions, following complaints of increased pain by plaintiff, when the cast was removed on January 13, 2005, one of plaintiff's treating physicians noted a "small palpable mass" along the Achilles tendon. As a result of these findings, plaintiff was required to attend three physical therapy sessions for four weeks. After months of reporting intermittent pain, usually associated with prolonged activities, plaintiff elected surgical debridement of the Achilles tendon. By January 2006, plaintiff began to heal from the accident and the following surgical procedure. His treating physician stated, in summary, that while plaintiff may suffer problems in the ankle in the future, for the most part, his injuries were not permanent.

¹ Defendant was plaintiff's landlord. The record is replete with evidence that there was hostility between the parties prior to the defendant striking plaintiff with his motor vehicle.

Based on these facts, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), asserting that plaintiff did not meet the serious impairment threshold for recovering noneconomic damages. Defendant disputed that the accident had caused the injury to plaintiff's Achilles² tendon but argued that even if the injury were causally related to the accident, plaintiff was generally able to lead his normal life.

Following arguments, the trial court concluded that the injury necessitated out-patient surgery and resulted in minor physician-imposed restrictions of less than four months. The trial court also found that the only continuing restrictions appeared to be self-imposed. Therefore, the trial court concluded that plaintiff's impairment was not serious and granted defendant's motion.

We review the trial court's ruling de novo. *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 357; 597 NW2d 250 (1999), lv den 463 Mich 910 (2000). Summary disposition under MCR 2.116 (C)(10) is appropriate only if the opposing party fails to present documentary evidence establishing the existence of a material factual dispute. *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 26 (1999).

A plaintiff may recover noneconomic damages under the no-fault act only where the plaintiff has suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). "[S]erious 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).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), our Supreme Court established a "multi-step process . . . to provide the lower courts with a basic framework for separating out those plaintiffs who meet the statutory threshold from those who do not." *Id.* at 131.³ The first factor requires the court to determine if there is a factual dispute regarding the nature and extent of the plaintiff's injuries. *Kreiner, supra* at 131-132. If there is no factual dispute, or the factual dispute is not material to the determination whether the person has

² Plaintiff had an MRI done which revealed, according to plaintiff's physician, that the ankle showed "some deformity involving the medial malleolus with small bony fragments involving the tip," which plaintiff's physician stated he "felt to be old trauma," thereby, according to plaintiff, raising the question of whether the accident caused the injuries to plaintiff's left ankle.

³ Plaintiff argues that the trial court did not analyze each of the four factors set forth in *Kreiner* to determine if plaintiff had suffered a serious impairment of an important bodily function, despite a holding of this Court that the trial court's failure to address the relevant factors necessitates remand regardless of the sufficiency of the record. See *May v Sommerfield*, 239 Mich App 197, 202-203; 607 NW2d 422 (1999). However, because this court has also held that a remand is unnecessary if the evidence is not conflicting, see *Kern v Blethen-Coluni*, 240 Mich App 333, 344 n 3; 612 NW2d 838 (2000) and because both of the afore-mentioned cases pre-date our Supreme Court's decision in *Kreiner*, we shall engage in the statutorily mandated inquiries, without comment as to whether the trial court considered all of the enumerated factors.

suffered a serious impairment of a body function, the court may proceed to the next step. But if the court determines that there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of a body function, the court may not decide the issue as a matter of law. *Id.* at 132.

In this case, there is a factual dispute regarding the nature of plaintiff's injuries. Specifically, there is a question whether the accident caused the deformity to the medial malleolus and the OCD, and those questions are material to determine whether plaintiff has suffered a serious impairment of a body function. Plaintiff therefore argues that due to the nature and extent of the material questions of fact, in accordance with our Supreme Court's opinion in *Kreiner, supra*, the trial court was precluded from deciding this issue as a matter of law. For the reasons set forth more fully in this opinion we now find ourselves in agreement with plaintiff.

The second factor requires the court to determine if an "important body function" has been impaired. That term has been defined to mean that the affected body function must be important as opposed to unimportant, and that the body function is not merely injured but is impaired. *Id.* Defendant did not dispute this element and we find that the evidence showed that the injuries impaired plaintiff's ability to walk and stand. Walking is an important body function. *Cassidy v McGovern*, 415 Mich 483, 505; 330 NW2d 22 (1982), *Kern, supra*, 240 Mich App at 343. This Court has also recognized that "[t]he use of a foot and associated ability to stand" are important body functions.⁴

If a court determines that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. *Kreiner, supra* at 132. An objectively manifested injury is a medically identifiable injury or condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002). Thus, the 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 the use of medical testing." *Netter v Bowman*, 272 Mich App 289, 305; 725 NW2d 353 (2006) (footnote omitted). In this case, x-rays and MRIs determined that the injuries were objectively manifested.

If an important body function has been impaired and the impairment is objectively manifested, the next question is whether the impairment affected the plaintiff's general ability to lead his or her normal life. *Kreiner, supra* at 132. It is on this question where the parties have their most profound disagreements.

In order to adequately answer this question, the court must compare the plaintiff's life before and after the accident and consider "the significance of any affected aspects on the course of plaintiff's overall life." *Id.* at 132-133. Factors to consider include "(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.

⁴ See *Reddy v Sweetland*, unpublished per curiam opinion of the Court of Appeals, issued March 23, 2001 (Docket No. 217852), slip op at 2.

An injury need not be permanent in order to be serious, *Kern, supra* at 341, but it must be of sufficient duration to affect the course of plaintiff's life, *Kreiner, supra* at 134. In our initial opinion, Judge Jansen opined that the the evidence presented created a genuine issue of material fact concerning whether the injuries affected the course or trajectory of plaintiff's life. On reconsideration, we concur with Judge Jansen. In this case, plaintiff was forced into a cast, put on crutches, and was restricted from doing most, if not all, of his normal life functions for six weeks. He had profound difficulty walking or placing any weight on his leg. Following removal of his cast, plaintiff was still having difficulty walking and bearing any weight on his leg and was given a short-leg cast, prescribed pain medication, and told he could not work for an additional two weeks. Consequently, although plaintiff's injuries were fixed in their duration, the nature and extent of plaintiff's injuries do, at a minimum, create a question of fact as to whether plaintiff's injuries affected the course or trajectory of his life. Because such questions are left to the trier of fact, we reverse the grant of summary disposition to defendant and remand this matter for proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello