

STATE OF MICHIGAN
COURT OF APPEALS

JAKE B. VLIETSTRA,

Plaintiff-Appellant,

v

AUTO-OWNERS INSURANCE GROUP,

Defendant-Appellee,

and

HILARY J. ORMOND,

Defendant.

UNPUBLISHED
November 19, 2009

No. 287001
Kent Circuit Court
LC No. 07-006360-NI

Before: Talbot, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court’s order granting summary disposition in favor of defendant in this case brought under the Michigan no-fault act, MCL 500.3101 *et seq.* We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On June 26, 2004, plaintiff, then 17 years old, was riding in a car driven by Hilary Ormond when the car left the road and rolled several times. X-rays revealed that plaintiff suffered multiple fractures in his lower spine. Plaintiff later settled his auto negligence claim against Ormond for \$20,000, the limit of Ormond’s insurance.

Plaintiff treated with Dr. Stubbart, an orthopedic surgeon, for several months following the accident. Initially, Dr. Stubbart restricted plaintiff from engaging in any “strenuous activity” for three months. For this period, plaintiff was unable work as a lifeguard or at his part-time job at AllRout, a machine shop, or to participate in many activities that he had engaged in prior to the accident, including jogging, volleyball, water skiing or knee boarding, off-roading in his Jeep, riding quads, mowing the lawn, participating in marching band, biking, and rollerblading.

In August 2004, Dr. Stubbart restricted plaintiff to sit-down work.¹ In September 2004, Stubbart authorized plaintiff to return to work without restrictions and prescribed physical therapy and a home exercise program three times a week for six weeks. In December 2004, Dr. Stubbart noted that plaintiff was continuing to have “activity-related back pain,” that tended to improve with rest, and that plaintiff was taking ibuprofen intermittently. X-rays indicated that the fractures had healed. Dr. Stubbart issued plaintiff a pain-based restriction, which meant that plaintiff should not engage in any activity that caused him discomfort.

After graduating from high school, plaintiff enrolled in community college and continued to work part-time at AllRout. During the summers, plaintiff worked full-time. Eventually, plaintiff transferred to Ferris State University to pursue a degree in manufacturing engineering technology. According to plaintiff, his accident and the injuries he sustained did not have any impact on his choices regarding his education or career path. Plaintiff never lost his ability to drive a car or to attend to matters of personal hygiene. Plaintiff’s mother cooked and cleaned for him during the summer of 2004, but plaintiff resumed those duties himself by August 2004.

However, prior to the automobile accident, plaintiff jogged at least three times a week. After the accident, plaintiff eventually resumed running, though in a more limited fashion. Plaintiff admitted that no physician restricted his jogging, but his physical therapist strongly suggested that plaintiff stop jogging outside and instead run on a low-impact “elliptical” machine. Presently, when time permits, plaintiff runs on an elliptical machine for 35 to 40 minutes. Plaintiff stopped participating in other activities golf, snowboarding, and tubing because they caused pain in his back. Plaintiff testified that the pain in his back prevented him from carrying all the books he needs for a full day of classes at Ferris; as a result, he makes trips back and forth to his apartment. Plaintiff indicated that remaining in one position for a long period of time caused him discomfort, but he can typically alleviate the discomfort by changing positions.

Plaintiff brought this action seeking to recover underinsured motorist benefits against defendant Auto-Owners under a policy issued to his parents. The trial court granted defendant’s motion for summary disposition pursuant to MCR 2.116(C)(10), finding that plaintiff did not suffer a serious impairment of body function. The trial court also denied plaintiff’s request for judgment on his “permanent serious disfigurement” claim and granted judgment on that issue in favor of defendant pursuant to MCR 2.116(I)(2).² We find a genuine issue of material fact.

We review de novo a trial court's grant or denial of a motion for summary disposition. *Latham v Barton Malow Co.*, 480 Mich 105, 111; 746 NW2d 868 (2008). In reviewing a decision on a motion brought under MCR 2.116(C)(10), we consider the pleadings, admissions, and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* Summary disposition is appropriate if there is no genuine issue regarding any material fact and

¹ Plaintiff returned to work at AllRout in August 2004 and performed light duty work. He continued to work at AllRout until he graduated from high school in May 2005.

² Plaintiff does not challenge this portion of the trial court’s decision on appeal.

the moving party is entitled to judgment as a matter of law. *Id.* The court may decide as a matter of law whether a person has suffered a serious impairment of body function if the nature and extent of the persons' injuries are factually undisputed or are immaterial to whether the person has suffered a serious impairment of body function. MCL 500.3135(2)(a)(i)-(ii); *Kreiner v Fischer*, 471 Mich 109, 131-132; 683 NW2d 611 (2004).

Under the no-fault act, a serious impairment of body function requires (1) impairment of a body function, (2) objective manifestation of that impairment, and (3) that the impairment affects the person's general ability to lead his or her normal life. MCL 500.3135(7); *Kreiner, supra* at 121. There is no dispute here that plaintiff suffered multiple fractures in his lower spine, as documented by x-rays. This constitutes an impairment of an important body function that was objectively manifested. See *Netter v Bowman*, 272 Mich App 289, 306; 725 NW2d 353 (2006) (holding that the movement of one's back is an important body function).

Whether an impairment affects a person's general ability to lead his or her normal life turns on a comparison between a plaintiff's life before and after the accident. *Kreiner, supra* at 131-132. The evaluation must be made on a case-by-case basis, analyzing the specific activities affected by the impairment, with the understanding that each life is unique and any given activity may have a different significance to different lives. *Id.* at 131 and 134 n 19. The *Kreiner* Court elaborated:

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.]

Kreiner provided a list of factors for a court to consider when analyzing whether an impairment "affects the person's general ability to conduct the course of his or her normal life": (1) the nature and extent of the impairment, (2) the type and length of treatment required, (3) the duration of the impairment, (4) the extent of any residual impairment, and (5) the prognosis for eventual recovery. *Id.* at 133. The list is not exhaustive and no individual factor is meant to be dispositive on its own. *Id.* at 133-134.

We note that some of plaintiff's claim that his impairment affected his general ability to lead his normal life rests on the restrictions he experienced in the first few months after his injury, and we also note that plaintiff was never unable to care for himself at a basic level. Plaintiff was able to return to school and to work, albeit with some limitations. Plaintiff was even able to return to jogging, although his physical therapist strongly suggested that plaintiff stop jogging outside and instead run on a low-impact "elliptical" machine. However, it is also clear that plaintiff enjoyed an active lifestyle prior to the accident, with a strong emphasis on highly physical outdoor activities – e.g., rollerblading or water-skiing. He testified that he is no longer capable of engaging in many of those activities. We would not lightly dismiss such a fundamental reduction in a person's lifestyle. Furthermore, plaintiff testified that the ability to work with heavy objects is an important element of his work in his chosen career. Even if the reduction in his ability to carry heavy objects is relatively minor, it appears pervasive. We are convinced that plaintiff's general ability to lead his normal life has been affected. Consequently,

we conclude that the trial court erred in granting summary disposition to defendant on the basis of finding no serious impairment of bodily function.

Reversed and remanded. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Alton T. Davis