

STATE OF MICHIGAN
COURT OF APPEALS

DONALD A. CAIGER,

Plaintiff-Appellant,

v

JASON A. OAKLEY and PORT HURON
AUTO GLASS,

Defendants-Appellees,

and

FARMERS INSURANCE,

Defendant.

FOR PUBLICATION

August 25, 2009

9:00 a.m.

No. 285549

St. Clair Circuit Court

LC No. 06-002250-NI

Before: Owens, P.J., and Servitto and Gleicher, JJ.

OWENS, P.J.

Plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendants Jason Oakley and Port Huron Auto Glass in this automobile negligence claim.¹ We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On May 10, 2005, plaintiff was in an automobile accident with Oakley, who was driving a van owned by his employer, Port Huron Auto Glass. Plaintiff went to the hospital. He reported soreness throughout his body. Thereafter, he began experiencing pain in his right knee. Plaintiff suffered from hyperextension of the knee, and stated that he "would fall backwards when [he] was walking." An MRI revealed a meniscal tear. Plaintiff underwent arthroscopic surgery on July 22, 2005. After the surgery, the pain diminished in intensity generally, but plaintiff's knee continued to hyperextend. This hyperextension, and the pain associated with it, led plaintiff's physician to perform knee replacement surgery on plaintiff on April 20, 2006.

¹ Defendant's claim against defendant Farmers Insurance was settled, and Farmers Insurance is not a party to this appeal.

Plaintiff filed suit seeking first-party benefits from Farmers Insurance, and noneconomic benefits from defendants. Defendants moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff's knee problems were not related to the accident, and that even if they were, they did not constitute a substantial impairment. The trial court granted defendants' motion. The trial court held that, even were it to consider plaintiff's knee injuries to be accident-related, plaintiff had not shown that he suffered a threshold injury. The trial court found that plaintiff had essentially abandoned his painting career for financial reasons, and that plaintiff could find other employment, even with the physician-imposed restrictions placed on him by independent medical examiners. The trial court also found that plaintiff led the same life he did prior to the accident, albeit with minor restrictions.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Pursuant to MCL 500.3135, a person is subject to tort liability for noneconomic loss caused by his use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. A "serious impairment of body function" 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).

Under *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the reviewing court is to 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. If a factual dispute exists, 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, the question is one of law. *Id.* at 132.

When a court decides the issue as a matter of law, it must then proceed to the second step in the analysis and determine whether "an 'important body function' of the plaintiff has been impaired." *Id.* at 132. When a court finds an objectively manifested impairment of an important body function, "it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life." *Id.* This process involves an examination of the plaintiff's life before and after the accident. The court should objectively determine whether any change in lifestyle "has actually affected the plaintiff's '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. The *Kreiner* Court provided a non-exclusive list of objective factors that may be used in making this determination. These factors 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.*]

In addition, "[s]pecific activities should be examined with an understanding that not all activities have the same significance in a person's overall life." *Id.* at 131. Thus, where limitations on sporting activities "might not rise to the level of a serious impairment of body function for some people, in a person who regularly participates in sporting activities that require a full range of motion, these impairments may rise to the level of a serious impairment of a body function."

Williams v Medukas, 266 Mich App 505, 509; 702 NW2d 667 (2005). However, “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.” *Kreiner*, *supra* at 137.

Specifically in regard to residual impairments, the *Kreiner* Court noted, “Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point.” *Id.* at 133 n 17. However, this Court has held that “[t]he necessary corollary of this language is that physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment.” *McDaniel v Hemker*, 268 Mich App 269, 282-283; 707 NW2d 211 (2005). A physician need not offer a medically identifiable or physiological basis for imposing restrictions based on pain; however, a recitation of a physiological basis provides support for the conclusion that the restrictions are physician-imposed, rather than self-imposed. *Id.* at 284. In addition, this Court has recognized the difference between self-imposed limitations due to pain, and self-imposed limitations based on physical inability, which can support a finding that the plaintiff has suffered a threshold injury. *Id.* at 284.

We hold that the trial court erred in granting defendants’ motion for summary disposition.

Defendants argue that plaintiff presented no evidence that his knee problems resulted from the accident, or were exacerbated by it. Plaintiff argues that at a minimum, he presented a question of fact concerning this issue. We agree with plaintiff. Plaintiff presented a letter from his physician that stated in pertinent part that the car accident “more likely than not caused the pain in [plaintiff’s] knee which resulted in total knee arthroplasty.”² This is consistent with a statement concerning the source of the injury in another surgical note presented by plaintiff.

The trial court erred when it found that, even if plaintiff demonstrated that his knee injury was caused or exacerbated by the accident, plaintiff could not meet the test of establishing a threshold injury. Plaintiff showed that he suffered an impairment of an important body function and that this impairment was objectively manifested. Plaintiff has further demonstrated that his general ability to conduct the course of his life has been affected.

Plaintiff suffered pain for a year after the accident, was forced to undergo major reconstructive surgery, and had great difficulty walking for seven weeks following the surgery. He underwent physical therapy from the surgery until October of 2006. Thus, the “nature and extent of the impairment” and “the type and length of treatment required” factors involved in this case support plaintiff’s position that he suffered a threshold injury. Plaintiff suffers continued, and presumably permanent, residual effects. Although plaintiff’s level of pain has apparently diminished since the knee replacement surgery, he still reports discomfort that occurs five or six times each day.

² Defendants’ assertion on appeal that this evidence was not properly submitted to the trial court is contradicted both by defendants’ attorney’s statements during the motion hearing regarding the receipt of this material, and plaintiff’s facsimile transmission records.

The trial court correctly noted that plaintiff had ended his career as a commercial painter due to financial reasons, however, painting was still plaintiff's trade and he has now lost the option of returning to that trade in better economic times. One of plaintiff's physicians stated that plaintiff was employable in a career that involved "no repetitive bending or prolonged standing." This restriction would prevent plaintiff from returning to work as a painter. Furthermore, plaintiff formerly enjoyed woodworking, including restoring cabinetry, and had been offered a contract to restore the cabinets in a house, but could not do so because of the accident. He claimed that he could no longer participate in this activity because he could not walk up and down to varnish pieces of wood.

Plaintiff's injury caused him to have to make a decision between a lifetime of knee hyperextensions resulting in "sharp screaming pain" and having his knee joint replaced with synthetic parts. While the knee replacement has led to some improvement in his ability to function, plaintiff is still missing a portion of his body that he will never retrieve. Plaintiff must forever depend on an artificial joint for his mobility and continues to suffer from chronic pain in his knee which will prevent him from returning to work in his previous occupation and prevents him from enjoying his woodworking hobby.

Therefore, we conclude that plaintiff has established an objectively manifested impairment of an important body function and has also established that the impairment affects his general ability to lead his normal life under MCL 500.3135.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher