

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD LEE SWARTZ,

Plaintiff-Appellant,

v

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Defendant-Appellee,

and

ROBERT E. BATES, JR.,

Defendant.

UNPUBLISHED

December 28, 2004

No. 250205

Hillsdale Circuit Court

LC No. 02-000510-NI

Before: Murphy, P.J., and White and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendant State Farm Mutual Automobile Insurance Company's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff filed this action to recover noneconomic damages under an uninsured motorist endorsement for injuries he sustained in an automobile accident. Defendant moved for summary disposition on the ground that plaintiff's injuries did not meet the no-fault threshold of a "serious impairment of body function." MCL 500.3135(1) and (7). The circuit court agreed and granted defendant's motion.

This Court reviews a decision on a motion for summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

MCL 500.3135(7) provides that 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." The only issue in this case is whether plaintiff's injuries affected his general ability to lead his normal life.

Our Supreme Court recently analyzed MCL 500.3135(7) in *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004). In addressing the question whether an injury affects a person's general ability to lead his normal life, the Court stated:

If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. In determining whether the course of plaintiff's normal life has been affected, a court should engage in a multifaceted inquiry, comparing the plaintiff's life before and after the accident as well as the significance of any affected aspects on the course of plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between plaintiff's pre- and post-accident lifestyle has actually affected the plaintiff's "general ability" to conduct the course of his life. Merely "any effect" on the plaintiff's life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life.

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (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. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in order to determine whether one has suffered a "serious impairment of body function," the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life." [*Kreiner, supra* at 132-134 (footnotes omitted).]

Although the circuit court did not have the benefit of our Supreme Court's decision in *Kreiner*, we conclude that it correctly determined that plaintiff could not establish that his injuries affect his general ability to lead his normal life.

Before the automobile accident, plaintiff was receiving Social Security disability benefits for a back injury he sustained in 1990. It is undisputed that plaintiff was under medical restrictions as a result of that injury. He was not able to lift items weighing more than five or ten pounds and was also restricted from bending or twisting. In addition, in statements to the Social Security Administration (SSA) in support of his application for disability benefits, plaintiff represented that his back injury affected his upper body strength, and also restricted his use of his

arms and hands. Plaintiff had not worked since 1990, because of his back injury, and, as recently as 2002, a physician with the Social Security Administration confirmed that plaintiff was still totally disabled as a result of his back injury and his condition had not appreciably changed since 1990.

There is no dispute that plaintiff suffered an injury to his neck as a result of the automobile accident and now suffers from neck pain. Although plaintiff did not have regular problems with his neck before the accident, the evidence demonstrated that the impact of this additional pain has not affected plaintiff's general ability to lead his normal life. Plaintiff's neck injury affects his upper body usage, particularly his arms and hands. In terms of activities, plaintiff claims that he cannot sleep through the night because of his neck pain and also cannot perform many household tasks. But plaintiff failed to show that any restrictions on his activities are appreciably different from those that existed before the automobile accident.

It is apparent from our Supreme Court's decision in *Kreiner* that it is not enough for plaintiff to show that his recent injury has had some effect on his life, but rather he must show that his general ability to lead his normal life has been affected. "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. In order for a person to have his general ability to lead his normal life affected, "the objectively manifested impairment of an important body function must affect the *course* of a person's life." *Id.* at 130-131. Because the evidence showed that plaintiff is still generally able to lead his normal life since the accident, the circuit court did not err in concluding that he failed to meet the threshold of a serious impairment of body function.

We reject plaintiff's argument that the circuit court improperly compared its own life experiences to plaintiff's. Plaintiff points to the judge's comment questioning plaintiff's claim that, before the auto accident, he was able to operate a seventy-five to eighty-pound rototiller. The judge stated that he was familiar with the amount of strength it took to operate a rototiller. Viewed in context, however, it is apparent that the judge rejected this claim because it was refuted by the SSA record regarding the scope of plaintiff's disability. The judge did not improperly compare his own life to plaintiff's life as a basis for deciding whether plaintiff's general ability to lead his normal life was affected.

Affirmed.

/s/ William B. Murphy

/s/ Helene N. White

/s/ Kirsten Frank Kelly