

STATE OF MICHIGAN  
COURT OF APPEALS

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MICHAEL JOHN ESTER,

Plaintiff-Appellant,

v

AMAL SALEEM GATIE,

Defendant-Appellee.

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UNPUBLISHED

April 10, 2008

No. 276578

Macomb Circuit Court

LC No. 2006-000453-NI

Before: Meter, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant in this third-party no-fault action. We affirm.

Plaintiff argues that the trial court erred in concluding that plaintiff, in injuring his right foot, did not sustain a serious impairment of body function that affected his general ability to live his normal life. We disagree.

This Court reviews a trial court's decision to grant or deny a motion for summary disposition de novo. *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006). In considering a motion brought under MCR 2.116(C)(10), this Court reviews the "pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Brown v Brown*, 478 Mich 545, 551-552; 739 NW2d 313 (2007). Because a mere promise to offer factual support for a party's position at trial is insufficient to overcome a motion brought under MCR 2.116(C)(10), this Court considers "the substantively admissible evidence actually proffered in opposition to the motion." *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Summary disposition is properly granted under MCR 2.116(C)(10) if there is no genuine issue of material fact for trial, aside from the amount of damages. *Zsigo v Hurley Med Ctr*, 475 Mich 215, 220; 716 NW2d 220 (2006).

This Court also reviews a trial court's interpretation of a statute de novo. *Omdahl v W Iron Co Bd of Educ*, 478 Mich 423, 426; 733 NW2d 380 (2007). In construing a statute, the primary goal of this Court is to ascertain the intent of the Legislature. *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). The language of the statute itself is the primary indicator of Legislative intent; if the plain meaning of its language is clear, this Court applies the statute as written. See *id*.

Pursuant to MCL 500.3135(1), a plaintiff may maintain a claim for noneconomic damages arising from a motor vehicle accident only if the injury sustained resulted in death, a serious impairment of body function, or permanent serious disfigurement. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). These significant obstacles to recovery evince the Legislature's intent to limit noneconomic damages to those persons who are catastrophically injured. See *Netter v Bowman*, 272 Mich App 289, 305-306; 725 NW2d 353 (2006). A primary goal of the Michigan no-fault act was to abridge the available remedies for negligence in exchange for first-party insurance protection by articulating the requirements set forth in MCL 500.3135. *Churchman v Rickerson*, 240 Mich App 223, 229; 611 NW2d 333 (2000). As such, although the no-fault act is generally construed broadly because it is remedial in nature, "a liberal construction of § 500.3135 is not warranted." *Churchman*, *supra* at 228-229.

"Serious impairment of body function" is defined by statute as "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). A threshold injury must affect the course of a plaintiff's entire normal life; therefore, even if the impairment disrupts some aspects of a plaintiff's life, noneconomic damages are foreclosed if the "course or trajectory" of a plaintiff's normal life remains unaltered. *Kreiner*, *supra* at 130-131.

When presented with a serious impairment of body function claim, the first question for the trial court is whether there is a factual dispute with respect to the nature and extent of the plaintiff's injuries. *Id.* at 131-132. If there is a factual dispute, then the trial court must determine whether the dispute is material to the question of whether the person has suffered a serious impairment of body function. *Id.* at 132. However, if the court identifies factual disputes regarding "the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law." *Id.* In the absence of these aforementioned material factual disputes, the issue can be decided as a matter of law, and the court decides whether the motor vehicle accident impaired an important body function, and, if so, whether the impairment is objectively manifested. *Id.*

After ascertaining the presence of an objectively manifested impairment that impaired an important body function, the trial court next determines whether the impairment affected the person's general ability to live his or her normal life. *Id.* Analysis of a claim that an impairment has affected a plaintiff's general ability to live his or her normal life includes a determination of how his or her life has been affected, to what extent, and for what duration. *Id.* at 131. The trial court compares the plaintiff's pre-accident and post-accident lifestyles and considers the "significance of the affected aspects on the course of the plaintiff's overall life." *Id.* at 132-133. Among the factors a trial court may consider in determining whether a serious impairment of body function has affected a plaintiff's general ability to lead his or her normal life are: "(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) prognosis for eventual recovery." *Id.* at 133.

Here, defendant does not dispute that plaintiff suffered an objectively manifested impairment of an important body function; therefore, the question before this Court is whether the impairment affected plaintiff's general ability to lead his normal life. Plaintiff's central argument, that the affidavit of his podiatrist, Dr. John Stevelinck, satisfied the no-fault threshold

or at least created a question of fact for trial, is unpersuasive. Dr. Stevelinck's statements in his affidavit, that "Mr. Ester sustained an objectively manifested impairment to an important body function that has affected his general ability to live his normal life," represent a legal conclusion and not a statement of fact. "[T]he duty to interpret the law has been allocated to the courts, not to the parties' expert witnesses." *Hottman v Hottman* 226 Mich App 171, 179; 572 NW2d 259 (1997).

Considering the evidence properly before this court in the light most favorable to plaintiff, the injuries to plaintiff's foot resulting from the motor vehicle accident impacted his employment and his participation in certain recreational activities. However, with regard to the nature and extent of the impairment, plaintiff's injuries do not constitute the catastrophic injuries envisioned by the legislature when it created the serious impairment of body function threshold. *Netter, supra* at 305-306. Plaintiff was last treated for his injuries in the summer of 2005. Although he uses an orthotic device inside his shoe, plaintiff does not use a cane, a walker, or crutches. Plaintiff did miss three weeks of work and remained in a cast for a total of six weeks, but his recovery was fairly quick and uneventful.

Plaintiff continues to experience discomfort in his foot, and the podiatrist's affidavit states: "I have instructed Mr. Ester not to engage in activities that cause pain." However, this was insufficient to bring the case within the purview of *McDaniel v Hemker*, 268 Mich App 269, 282-283; 707 NW2d 211 (2005). Although this Court held in *McDaniel* that "physician-imposed restrictions, based upon real or perceived pain, can establish the extent of a residual impairment," *id.*, the podiatrist's recommendation in this case was neither a restriction nor a genuine medical opinion. While a specific restriction concerning walking or running a certain distance, or standing for a period of time without rest, may constitute valid restrictions based upon real or perceived pain, the advice offered by the podiatrist here merely reflects common sense. It does not require specialized medical training to conclude that a person should avoid unspecified activities that cause unspecified pain for unspecified reasons.

Neither the injuries nor the residual impairments of the present plaintiff were as severe as those rejected as threshold injuries by our Supreme Court in *Kreiner, supra* at 137. Kreiner suffered injuries to his lower back, right hip, and right leg. *Id.* at 136. In deciding that he did not meet the no-fault threshold, the Court observed that Kreiner could no longer work on a ladder for over 20 minutes, was unable to lift objects in excess of 80 pounds, and could not work more than six hours a day. *Id.* at 137. However, Kreiner did not assert that the injury precluded him from performing his job. *Id.* The Court concluded that although Kreiner was unable to work to his full pre-impairment capacity, he remained generally able to live his normal life. *Id.* Because Kreiner failed to demonstrate that his post-impairment life was significantly different from his pre-impairment life, he did not show that the "impairment affected his general ability to conduct the course of his normal life," and summary disposition in that case was properly granted. *Id.* at 137-138.

Here, plaintiff suffered three fractured metatarsals, two of which were surgically repaired, and a minor foot deformity, and he walks with a slightly abnormal gait. Although when plaintiff is required to leave his desk to gather files he walks more slowly than he did before the accident, plaintiff is still generally able to perform his job. Similarly, plaintiff testified at his deposition that he played league softball, despite discomfort, for a season after the date of injury, and he indicated that he is still able to play golf, although he now uses a cart. 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.

The motor vehicle accident did not adversely impact plaintiff's ability to swim. Rollerblading and inline (rollerblade) hockey were the only recreational activities that plaintiff decided that he could no longer perform because of the difficulty of getting his foot into the skate. However, Dr. Stevelinck did not restrict plaintiff from skating, aside from his general admonition to avoid activities that cause pain. Further, there is no indication in the record that plaintiff's pre-impairment ability to skate, and post-impairment decision to abandon the activity, was a significant change in the course or trajectory of plaintiff's entire normal life.

Although Dr. Stevelinck, in his affidavit, predicted that plaintiff's gait problems would become more pronounced over time, plaintiff has not shown how these difficulties would negatively impact his general ability to lead his normal life if and when his maladies worsen. Mindful that plaintiff remains generally able to work, swim, and play softball and golf, under the totality of the circumstances, the fact that plaintiff can no longer inline skate does not indicate that the impairment affected the broad course of plaintiff's entire life. Because plaintiff has failed to demonstrate that the injury he sustained in the motor vehicle accident affected his general ability to lead his normal life, the trial court did not err in granting defendant's motion for summary disposition.

Affirmed.

/s/ Patrick M. Meter  
/s/ David H. Sawyer  
/s/ Kurtis T. Wilder