

STATE OF MICHIGAN  
COURT OF APPEALS

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JAVARIS WILLIAMS,

Plaintiff-Appellee,

v

GAIL LYNN CALECA and JOSEPH JOHN  
CALECA, JR.,

Defendant-Appellant,

and

FARM BUREAU INSURANCE COMPANY OF  
AMERICA,

Defendant.

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UNPUBLISHED

May 13, 2008

No. 273938

Isabella Circuit Court

LC No. 05-003926-NI

Before: Saad, P.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Defendants Gail and Joseph Caleca, Jr.<sup>1</sup> bring this interlocutory appeal from the trial court's order denying their motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse and remand.

This case arises under the no-fault act, MCL 500.3101 *et seq.* Plaintiff was injured when the car that he was driving was struck by a car driven by defendant Gail Caleca. He alleges that he sustained a serious impairment of body function, thus satisfying the threshold for residual tort liability under § 3101. Defendants moved for summary disposition, arguing that there was no genuine issue of material fact that plaintiff failed to satisfy that threshold. The trial court denied the motion, and we granted defendants leave to appeal.

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<sup>1</sup> Because defendant Farm Bureau Insurance Company of America is not implicated in this appeal, any further reference to "defendants" in this opinion refers only to Gail and Joseph Caleca Jr.

We review a trial court's decision on a motion for summary disposition de novo. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). Summary disposition should be granted under MCR 2.116(C)(10) if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Roberson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). A genuine issue of material fact exists when, giving the benefit of reasonable doubt to the opposing party, the record leaves open an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When deciding such a motion, a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley, supra* at 278.

Under the no-fault insurance act, a plaintiff may recover noneconomic damages only when the plaintiff has suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A court may determine whether someone has suffered a serious impairment as a question of law if there is no factual dispute 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 of whether the person has suffered a serious impairment of body function. MCL 500.3135(2)(a).

The no-fault insurance act defines a "serious impairment of body function" 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). Therefore, in order to sustain an action for noneconomic damages resulting from an automobile accident when claiming serious impairment of body function, a plaintiff must establish that he or she has sustained (1) an objectively manifested impairment (2) of an important body function (3) that affects the person's general ability to lead his or her normal life. *Kreiner v Fischer*, 471 Mich 109, 121; 683 NW2d 611 (2004). Here, an objectively manifested impairment exists based on medical observations that as a result of the automobile accident in issue, plaintiff suffers from a mild degenerative disc disease, a bulging disc, and irritation or inflammation of the nerve roots associated with the disc. In addition, it has been established that the movement of the back is considered an important body function. *Shaw v Martin*, 155 Mich App 89, 96; 399 NW2d 450 (1986). Therefore, resolution of this appeal turns on whether plaintiff also is able to prove that his injury affected his general ability to lead his normal life.

In *Kreiner*, our Supreme Court noted that the primary goal of this analysis is to evaluate the extent to which the plaintiff's life has been affected by the automobile accident:

[T]he effect of the impairment on the course of a plaintiff's entire normal life must be considered. 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.

The starting point in analyzing whether an impairment affects a person's "general," i.e., overall, ability to lead his normal life should be identifying how

his life has been affected, by how much, and for how long. Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life. Also, minor changes in how a person performs a specific activity may not change the fact that the person may still "generally" be able to perform that activity. [*Id.* at 131.]

The Court then set forth a nonexhaustive list of factors that may be considered in evaluating whether an injury affects the general ability to lead a normal life: "(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.

This analysis is highly plaintiff-specific: for example, a plaintiff who can no longer throw a baseball at 95 miles an hour might or might not be "seriously impaired" depending on whether the plaintiff was a professional baseball pitcher or "an accountant who likes to play catch with his son every once in a while." *Kreiner, supra* at 134 n 19. In other words, the question is not whether the plaintiff is able to live *a* normal life, but whether he is able to live *his* normal life.

Here, plaintiff presented evidence that he had to terminate his employment as a blackjack dealer in a casino because he was unable to stand for more than three hours, and he could not bend at the waist. However, plaintiff found other employment that paid a comparable income. He did not raise evidence showing that working as a dealer was of great personal significance to him, such that changing his occupation constituted a material alteration to his life. Accordingly, we do not find that plaintiff's change of employment establishes a change in his general ability to lead his normal life.

Plaintiff also alleges that he has trouble sleeping, that he has to sit while shaving, that he can no longer shovel snow, lift weights, or play basketball. He also has trouble performing chores such as laundry and carrying out the garbage. He emphasizes that he is only 26 years old. Theoretically, plaintiff could satisfy the *Kreiner* threshold if he showed that he led a highly active lifestyle until his injuries forced him into a more sedentary lifestyle for a period of some duration, even if he were not impaired in basic functions such as walking. However, in order to withstand summary disposition under MCR 2.116(C)(10), plaintiff must show that the evidence and all legitimate inferences establish a genuine issue of material fact. *Houdek v Centerville Twp*, 276 Mich App 568, 572-573; 741 NW2d 587 (2007).

Plaintiff asserts in his summary disposition and appeal briefs that he is no longer able to live his normal life. However, he does not adequately address the crucial question of whether the course and trajectory of his life have changed. He presents evidence that his movement is limited, and that he suffers pain, but he does not explain how these problems have affected his general ability to lead his normal life. Reviewing the documentary evidence attached to plaintiff's summary disposition brief, we do not find evidence that establishes a genuine question of material fact sufficient to withstand summary disposition. The physician's notes indicate that before the accident, plaintiff bowled in two leagues, played basketball, and held a gym membership, but he failed to include any evidence documenting how he had to restrict these activities, how extensively these restrictions curtailed his activities, or for how long he had to endure these restrictions after the accident.

In contrast, defendants included excerpts from the deposition of plaintiff's treating physician, Dr. Shimoda. Dr. Shimoda testified that plaintiff regained his ability to stand at the sink for 20 minutes without sitting down while shaving, and that he was working out with weights at home. He told her that he was sleeping better. He was restricted from lifting more than 20 pounds, but Dr. Shimoda explained that this applied only to repeated lifting over an 8-hour period, not occasional lifting. Additionally, defendants stated at the summary disposition hearing that plaintiff testified in his deposition that he was bowling again. Although defendants did not provide a copy of this portion of the deposition transcript, plaintiff's counsel was at the hearing, and presumably would have responded if this assertion were not true.

Plaintiff's failure to supply the documentary evidence necessary to support his claim that he is no longer able to live his normal life warrants judgment in defendants' favor.<sup>2</sup> Without supportive evidence, he fails to establish a genuine issue of material fact sufficient to withstand summary disposition under MCR 2.116(C)(10).

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

/s/ Henry William Saad  
/s/ William B. Murphy  
/s/ Pat M. Donofrio

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<sup>2</sup> It is not necessary to consider whether plaintiff's assertions would be sufficient to establish the threshold injury if they were supported by documentary evidence.