

STATE OF MICHIGAN  
COURT OF APPEALS

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GLENN FORGETTE,

Plaintiff-Appellee,

v

GAIL ANN JONES and BILL JONES  
ENTERPRISES, INC., d/b/a METRO AIRPORT  
TRUCK,

Defendants-Appellants.

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UNPUBLISHED

March 31, 2009

No. 281317

Wayne Circuit Court

LC No. 06-602109-NI

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendants appeal as of right the judgment in favor of plaintiff in this action to recover noneconomic damages under the no-fault act, MCL 500.3135, for a serious impairment of body function arising from an automobile/bicycle accident. We affirm.

On July 26, 2004, defendant Gail Jones was driving a motor vehicle owned by defendant Bill Jones Enterprises, Inc., when she struck plaintiff as he was riding a bicycle. Plaintiff alleged that he injured his lower back, right wrist, and left shoulder. Defendants argue that the evidence failed to show that plaintiff's injuries affected his general ability to lead his normal life and, therefore, the trial court erred by denying their motion for a directed verdict and posttrial motion for JNOV. We disagree.

We review a trial court's decision on a motion for a directed verdict de novo. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 131; 666 NW2d 186 (2003). We consider the evidence presented up to the time of the motion in the light most favorable to plaintiff, granting every reasonable inference and resolving any conflict in the evidence in plaintiff's favor, to decide whether a question of fact existed. *Thomas v McGinnis*, 239 Mich App 636, 643-644; 609 NW2d 222 (2000). In doing so, we recognize the jury's unique opportunity to observe the witnesses and the jury's responsibility to determine the credibility and weight of the witnesses' testimony. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). We also review de novo a trial court's decision regarding a motion for judgment notwithstanding the verdict (JNOV). *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000). "A motion for JNOV should be granted only

when there was insufficient evidence presented to create an issue for the jury.” *Pontiac School Dist v Miller, Canfield, Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997).

MCL 500.3135 provides, in pertinent part:

(1) A person remains subject to tort liability for noneconomic loss caused by his or her ownership, maintenance, or use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement.

(2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:

(a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person’s injuries.

(ii) There is a factual dispute concerning the nature and extent of the person’s injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function or permanent serious disfigurement. . . .

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(7) As used in this section, “serious impairment of a body function” means an objectively manifested impairment of an important body function that affects the person’s general ability to lead his or her normal life.

Defendants argue that plaintiff failed to establish that his injuries affected his general ability to lead his normal life. They also argue that there was no material factual dispute concerning the extent of plaintiff’s injuries and, therefore, the question is one of law, which the trial court should have resolved by granting their motions for a directed verdict and JNOV.

In *Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004), our Supreme Court held that an injury does not generally affect a person’s ability to lead a normal life unless the objectively manifested impairment of an important body function affects the course of the person’s life. The Court stated:

Accordingly, the 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. [*Id.* at 131.]

The Court further explained:

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 the 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 the plaintiff's overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between the 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 minimus 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." [*Id.* at 132-134 (footnotes omitted).]

In a footnote, the Court observed that "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain" do not establish factor (d), the extent of a residual impairment. *Id.* at 133 n 17.

We agree with defendants that plaintiff's shoulder injury did not establish a threshold injury. Although Dr. Kevin Sprague testified regarding the nature and extent of the injury, and plaintiff's surgery and post-surgical treatments, he did not testify regarding any ongoing effects from the torn rotator cuff injury. Further, although plaintiff testified regarding how his back and wrist injuries restrict his ability to participate in athletic and outdoor activities, he did not discuss how his shoulder injury continues to affect his life.

However, the evidence concerning plaintiff's back and wrist injuries, and the manner in which those injuries affected plaintiff's post-accident lifestyle, was sufficient to establish a serious impairment of body function. Plaintiff testified that his participation in hunting and fishing, and his involvement in other athletic and recreational activities, which were a significant part of his life before the accident, was severely curtailed and restricted because of the physical

limitations from his injuries. He still rode his bicycle, but only for shorter distances. He tried to resume his lawn maintenance chores, but was not able to do so because of the pain and he had to hire a lawn service. Plaintiff testified that his physical activities were an important part of his life and his identity. Plaintiff's son testified that plaintiff's stamina for fishing and hunting was sharply reduced, causing him to feel frustrated and left out.

The jury could find from the evidence that the non-exhaustive list of factors in *Kreiner, supra* at 133, weighed in favor of a finding that the course of plaintiff's life had been affected by the accident. With respect to factor (a), the nature and extent of plaintiff's back and wrist impairments affect numerous types of motion. Dr. Dean Louis testified that the ability to move the thumb is crucial to numerous life activities. Also, testimony established that plaintiff's back injury affects his ability to sit for prolonged periods.

The jury could also find that factor (b), type and length of treatment involved, weighed in plaintiff's favor because he has undergone wrist surgery, and required pain medication and physical therapy. Further, the evidence showed that plaintiff had limited treatment options, none of which were satisfactory. Dr. Louis testified that plaintiff's treatment options for his wrist injury involved choosing between pain management or surgery to fuse the wrist bones that would eliminate all movement of the wrist. The unavailability of effective treatments helps establish the extent of plaintiff's impairment.

Factors (c), duration of impairment, and (e), prognosis for eventual recovery, weigh in plaintiff's favor because Dr. Louis testified that the changes in plaintiff's wrist were "of such a magnitude" that he was unlikely to regain his former activity level. Dr. Setti Rengachary testified that plaintiff would have "ups and downs," meaning that on some days his pain would be worse, but on other days it "may be partially managed with pain medications." There was no indication that plaintiff would become pain-free, or ever be able to return to his former level of activity.

With respect to factor (d), extent of residual impairment, the evidence showed that plaintiff's limitations arise from the pain he experiences when he exerts his back or wrist. Defendants contend that plaintiff cannot establish a threshold injury under MCL 500.3135 because his limitations are self-imposed based on pain, rather than physician-imposed. Defendants rely on footnote 17 in *Kreiner, supra* at 133 n 17, in which, as noted above, our Supreme Court indicated that "[s]elf-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish" the extent of residual impairment referred to in factor (d). However, this Court has further explained that footnote 17 addresses self-imposed restrictions based on pain, but not physician-imposed restrictions, even when the physician-imposed restrictions are open-ended and based on the patient's experience of pain when performing a particular task. *McDaniel v Hemker*, 268 Mich App 269, 283-284; 707 NW2d 211 (2005). Thus, a physician-imposed restriction based on pain could establish the extent of the residual injury, especially if the physician pinpointed a physiological basis for the pain or believes that the patient is truly suffering. *Id.* at 284-285. Further, footnote 17 "is not a general proposition enunciated by our Supreme Court, but rather it is tied directly to one factor, factor d, and the Court emphasized that the enumerated factors are 'not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves.'" *Id.* at 285, quoting *Kreiner, supra* at 133-134.

Accordingly, simply because there may be self-imposed restrictions based on pain does not mean that a plaintiff has not established a threshold injury. A trial court must examine all the evidence presented; consider, if relevant, all the *Kreiner* factors; and view “the totality of the circumstances” in determining whether an impairment has affected “the person’s general ability to lead his or her normal life” as required by MCL 500.3135(7). [*McDaniel*, *supra* at 285, citing *Kreiner*, *supra* at 132, 134.]

Applying these principles here, we conclude that defendants were not entitled to a directed verdict or JNOV based on *Kreiner* footnote 17. As discussed previously, there was sufficient evidence presented from which the jury could evaluate factors (a), (b), (c), and (e) in plaintiff’s favor. Plaintiff’s reliance on self-imposed limitations arising from his pain neither precludes a finding in his favor with regard to factor (d), nor defeats his entire claim. Although plaintiff did not introduce evidence of physician-imposed restrictions based on pain, he introduced evidence that Drs. Louis and Rengachary found a physiological basis for the wrist and back pain that interfered with plaintiff’s ability to sit, walk, and grasp objects as necessary to participate in his valued recreational activities. In particular, Dr. Louis testified:

You establish [hand] dominance early in life and develop habit patterns which are difficult to change. I think anybody on the jury could imagine what it would be like if you – every time you pinched, it hurt, every time you went to grab something, it hurt or trying to hold the handlebars, it hurt. So the thumb, in response to your question, is incredibly important for all that. He has changes all down that axis, so it’s a real impediment to him.

Similarly, Dr. Rengachary was asked whether plaintiff’s injury would “cause pain that would slow someone down and prevent him from doing those things [hunting, fishing, sports].” Dr. Rengachary agreed that “[p]ain is the major factor in this case.” This testimony establishes medically how plaintiff’s activities involve motions that necessarily cause pain. Dr. Louis’s testimony that plaintiff’s wrist pain was “a real impediment,” and Dr. Rengachary’s testimony that plaintiff’s pain would interfere with his activities, establish that plaintiff’s pain does not merely discourage him from engaging in certain activities, but actually prevents him from doing so. Furthermore, the totality of circumstances established that plaintiff led a highly active lifestyle before the accident, that his athletic and outdoor activities gave significant meaning to his life, and that his injuries forced him to substantially curtail or restrict these activities. Accordingly, the evidence established a material factual dispute whether plaintiff suffered a serious impairment of body function within the meaning of MCL 500.3135(7). Consequently, this was a question properly presented to the jury, rather than one for the court to decide as a matter of law. MCL 500.3135(2)(a). The trial court properly denied defendants’ motions for a directed verdict and JNOV with respect to defendants’ claim that plaintiff failed to establish that the course and trajectory of his life was altered as a result of the accident.

Defendants also argue that they were entitled to a directed verdict or JNOV because plaintiff failed to establish the existence of an objectively manifested impairment. Defendants failed to preserve this issue by raising it in their motion for a directed verdict or JNOV in the trial court. *Zdrojewski v Murphy*, 254 Mich App 50, 62; 657 NW2d 721 (2002). Therefore,

defendants must establish a plain error affecting their substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

Proof that a plaintiff suffered a serious impairment of a body function requires proof of an “objectively manifested impairment of an important body function.” MCL 500.3135(7). An objectively manifested impairment is a “medically identifiable injury or condition that has a physical basis.” *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002). The plaintiff must establish that the defendants’ conduct caused the impairment, consistent with the general elements of proof for negligence claims. *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Defendants argue that plaintiff failed to prove a physical basis for his impairments that was causally related to the accident. They argue that plaintiff’s experts merely speculated that he suffered a fracture of the lumbar area of his back and the right wrist, and that there was no objective evidence of injuries to these areas. They also contend that plaintiff failed to prove that any impairments of these body areas were caused by the accident. We disagree.

Contrary to defendants’ assertions, Dr. Rengachary’s and Dr. Louis’s testimony regarding the existence and cause of plaintiff’s back and wrist impairments was not merely speculative. Dr. Louis testified that plaintiff’s CT scan and arthrogram revealed abnormalities in the wrist that were associated with a past fracture. He opined, within a reasonable degree of medical certainty, that plaintiff’s wrist conditions were not a normal part of the aging process. Dr. Louis also refuted the inference that the lapse in time between the accident and plaintiff’s attempt to seek treatment for his wrist negated a causal connection. He explained that the condition worsens with time, and that plaintiff might have been focusing on his rotator cuff injury before concentrating on the wrist problem because the shoulder injury was a more urgent problem.

Dr. Rengachary testified that plaintiff had a bony spur and protruding disk in the same location as the soft tissue injury to plaintiff’s back after the accident; he correlated the bony spur and disk problem to the photographs of the bruises on plaintiff’s back after the accident. He explained why the absence of objective proof of a fracture contemporaneous with the accident did not disprove that the subsequent condition resulted from a fracture suffered during that accident. This testimony was not speculative, but rather was based on an objective medical explanation for the progression of a condition and the available data regarding plaintiff’s injuries. Neither Dr. Rengachary nor Dr. Louis based his finding of a causal connection on the fallacy of *post hoc ergo propter hoc*. Both physicians premised their opinions on reasonable inferences based on their medical knowledge of how injuries develop over time.

Defendants contend that Dr. Louis’s testimony was unreliable because he was the third wrist specialist who plaintiff saw, and that the two previous physicians did not find a causal connection between the wrist condition and the accident. Defendants refer to reports by Leo Ottoni, M.D., a wrist specialist who treated plaintiff’s condition. These reports do not positively state that plaintiff’s wrist condition was unrelated to the accident. In any event, the weight and credibility of Dr. Louis’s testimony was for the jury to decide. *Phillips v Deihm*, 213 Mich App 389, 401-402; 541 NW2d 566 (1995).

Contrary to defendants’ argument, none of plaintiff’s expert witnesses indicated that plaintiff suffered from a degenerative condition that arose independent of the accident.

Defendants did not call any witnesses to refute plaintiff's evidence that he had objectively manifested injuries in his wrist and back, which were causally related to the accident. Under these circumstances, defendants were not entitled to a directed verdict or JNOV with respect to the existence of an objectively manifested injury causally related to the accident.

We affirm.

/s/ Henry William Saad  
/s/ Richard A. Bandstra  
/s/ Joel P. Hoekstra