

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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RICKEY TIPTON,

Plaintiff-Appellant,

v

DONNA MAE LANG,

Defendant-Appellee.

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UNPUBLISHED

April 14, 2009

No. 282111

Kalamazoo Circuit Court

LC No. 06-000598-NI

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

In this automobile negligence suit, plaintiff Rickey Tipton appeals as of right the trial court's grant of summary disposition in favor of defendant Donna Lang under MCR 2.116(C)(10). On appeal, we must determine whether the trial court erred when it concluded that, as a matter of law, Tipton's injuries did not amount to a serious impairment of body function. See MCL 500.3135(1) and (7). Because we conclude that Tipton presented sufficient evidence to establish a question of fact on this issue, we reverse the trial court's grant of summary disposition in favor of Lang and remand for further proceedings consistent with this opinion.

**I. Basic Facts and Procedural History**

**A. Factual Background**

In November 2003, Lang was driving westbound on East Main Street in Kalamazoo. At the intersection of East Main Street and Sunnyside Drive, Lang attempted to turn right and head north on Sunnyside Drive, but lost control of her car. Lang collided with a car waiting to proceed south at the intersection. Tipton was a passenger in that car.

At his deposition, Tipton stated that he did not seek medical treatment on the day of the accident. Instead, he went to the hospital the next day after he woke with severe neck pain and could not move. Initially, Tipton's physicians treated him with physical therapy and pain medications. But, in April 2005, Tipton had surgery to fuse his neck vertebrae and insert a plate.

Tipton has been on disability since he injured his lower back and right shoulder while working in construction in 1993. Tipton testified that his work injuries had nothing to do with his neck, but admitted that his previous injuries prevented him from working, lifting heavy

weights, walking long distances, and raising his arm above his shoulder. However, he also stated that, before the recent accident, he could still fish, work in the yard, and volunteer to help at church funerals, which he can no longer do. He further testified that his new injuries have diminished his sex life and have forced him to sleep in his recliner rather than in bed with his wife.

## B. Procedural Background

In November 2006, Tipton sued Lang for damages arising out of the accident. Tipton alleged that Lang's negligent driving proximately caused his neck injury and other injuries and that the neck injury constituted a serious impairment of body function. Tipton also sought damages for economic losses.

In June 2007, Lang moved for summary disposition. In her motion, Lang argued that Tipton did not have an objectively manifested impairment to his neck and that any impairment did not amount to a serious impairment of body function. With regard to the serious impairment issue, Lang noted that there was evidence that Tipton was severely limited by the earlier accident and, as a result, could not have participated in the activities that he now claims to have participated in before the current accident. Lang also argued that any limitations were self-imposed and, therefore, could not be considered by the trial court. For these reasons, Lang asserted, the limitations did not constitute a serious impairment of body function.

In his brief in opposition to Lang's motion for summary disposition, Tipton argued that his neck injury was objectively manifested through computerized tomography (CT) and magnetic resonance imaging (MRI) scans. He also noted that his doctor had restricted his activities. Tipton argued that the limitations on his ability to fish, sleep in bed, engage in sexual activity, sit and watch his grandchildren's sporting events, and volunteer constituted changes in his ability to lead his normal life that rise to the level of a serious impairment of body function. In support of his brief, Tipton submitted his own affidavit and that of his physician, Stephen Ribaud, M.D.

In his affidavit, Tipton averred that he considered the ability to sleep in bed with his wife to be an important part of his life and that he can no longer do so as a result of his neck injury. He stated that he now has to sleep in his recliner and has been doing so since November 2003. In addition, Tipton stated that he is no longer able to sleep for more than 2 to 3 hours in a single night and noted that the frequency of his sexual relations with his wife have dropped from twice per week to once per month. Tipton also averred that his ability to participate in his regular activities have been diminished as a result of his neck injuries. He indicated that he can no longer fish; work at funerals; attend his grandchildren's sporting events; play with his grandchildren; travel; or perform chores, which included shoveling, gardening, maintaining the yard, and washing his car.

In his affidavit, Dr. Ribaud averred that he was Tipton's physician and that he had been treating Tipton for more than a decade and had treated him in the past for his work related injuries. Dr. Ribaud indicated that Tipton's neck injuries were clearly shown on the CT and MRI scans done shortly after the accident at issue. Dr. Ribaud stated that the severity of the injury warranted surgical intervention. Dr. Ribaud indicated that the surgery helped with

Tipton's pain, but did not eliminate it. Dr. Ribaud also indicated that he restricted Tipton's activities and attached a May 2007 form as evidence of the restrictions.

The trial court held a hearing on Lang's motion in August 2007. At the hearing, Lang's attorney noted that Tipton's life was already quite restricted by his earlier work accident and argued that the current accident did not alter those limitations: "when you focus on . . . whether this injury . . . affected his general ability to lead his normal life—it's very difficult to say [that] it did. In fact, I submit it's impossible given his pre-accident medical conditions and problems." Lang's attorney also dismissed Tipton's new affidavits as contradicted by Tipton's deposition testimony that he was not under any medical restrictions and noted that the new restrictions appear to be more liberal than the restrictions imposed after the previous accident. Lang's attorney further argued that the evidence suggested that Tipton merely elected not to engage in the listed activities because of perceived pain.

In response, Tipton's attorney argued that the evidence submitted on the motion for summary disposition established that Tipton's neck injury had changed the "course and trajectory" of Tipton's life. For that reason, Tipton's attorney argued, the trial court should not grant Lang's motion.

After the close of the arguments, the trial court explained that the real issue is whether Tipton's injuries affected his general ability to lead his normal life. The trial court then noted that there were no medical restrictions preventing Tipton from sleeping in his bed, having sexual relations, driving, fishing, or volunteering. The trial court also found it relevant that the restrictions imposed after the recent accident were less severe than the restrictions that applied before the accident. For these reasons, the trial court determined that it would be appropriate to grant Lang's motion for summary disposition.

The court signed an order granting Lang's motion on September 4, 2007.

On September 12, 2007, Tipton moved for reconsideration of the trial court's grant of summary disposition. The trial court denied the motion for reconsideration on October 30, 2007. Tipton now appeals as of right.

## II. Serious Impairment Threshold

### A. Standard of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005). This Court also reviews de novo the proper interpretation of the no-fault act. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004).

A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In challenging the factual sufficiency, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The burden then shifts to the opposing party to establish the existence of a factual dispute. *Id.* If the nonmoving party has the burden of proof on the claim at

trial, it may not rest on mere allegations or denials in pleadings, but must present affidavits, depositions, admissions, or other documentary evidence that establishes the existence of a factual dispute for the jury. *Id.* The trial court properly grants a motion under MCR 2.116(C)(10) when, after reviewing all the evidence submitted by the parties in the light most favorable to the nonmoving party, it concludes that there is “no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.” MCR 2.116(C)(10). “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

#### B. Establishing a Threshold Injury

Our Legislature has abolished tort liability arising from the ownership, maintenance, or use of a motor except under certain specific circumstances. See MCL 500.3135(3). A person may sue to recover for injuries that were intentionally caused and for economic damages in excess of the coverage provided under MCL 500.3107 to MCL 500.3110. See MCL 500.3135(3)(a), (c). In addition, 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.” MCL 500.3135(1). Hence, an injured person may only sue for noneconomic damages if he or she has suffered one of the threshold injuries. In the present case, Tipton asserted the right to recover for noneconomic losses caused by Lang’s use of a motor vehicle under the theory that he suffered a serious impairment of body function.<sup>1</sup>

A serious impairment of body function is defined to mean “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). Whether a plaintiff has suffered a serious impairment of body function is a question of law for the court if “[t]here is no factual dispute concerning the nature and extent of the person’s injuries” or “[t]here 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 . . . .” MCL 500.3135(2)(a)(i) and (ii). Thus, if there is a factual dispute concerning the nature and extent of the injury suffered by the plaintiff and that dispute is material to a determination as to whether the plaintiff has suffered a serious impairment of body function, a jury must resolve the factual dispute and determine whether the plaintiff has met the serious impairment threshold. MCL 500.3135(2)(a); *Kreiner, supra* at 131-132.

If a court can decide the issue as a matter of law, it must then determine whether an important body function has been impaired and whether that impairment is objectively manifested. *Kreiner, supra* at 132. “Subjective complaints that are not medically documented are insufficient.” *Id.* Finally, if the court finds that there is an objectively manifested

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<sup>1</sup> Tipton also alleged in his complaint that he suffered economic losses. The trial court dismissed Tipton’s case in its entirety without addressing this alternate basis for proceeding to trial. See MCL 500.3135(3)(c). However, Tipton has not raised this issue as a claim of error on appeal.

impairment of an important body function, then it must determine whether the “impairment affects the plaintiff’s general ability to lead his or her normal life.” *Id.*

In order to determine whether the impairment affected the plaintiff’s general ability to lead his or her normal life, the court must engage in a multifaceted inquiry based on the totality of the circumstances. The court must compare “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,” and then determine “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 minim[is] effect would not, as objectively viewed, affect the plaintiff’s ‘general ability’ to lead his life.” *Id.* at 132-133.

### C. Application of the Law to the Facts

Lang moved for summary disposition under MCR 2.116(C)(10). In her motion, Lang challenged whether Tipton’s injuries met the serious impairment threshold. As noted, in order to establish the existence of an injury that constitutes a serious impairment of body function, a plaintiff must present evidence that he or she suffered an injury or injuries and that the injury or injuries impaired an important body function, that the impairment is objectively manifested, and that the impairment “affects the plaintiff’s general ability to lead his or her normal life.” *Kreiner, supra* at 132. Thus, once Lang challenged the sufficiency of Tipton’s claim that he suffered a serious impairment of body function through a properly supported motion under MCR 2.116(C)(10), Tipton had the burden of presenting evidence sufficient to establish a genuine issue of material fact as to whether he had suffered an injury,<sup>2</sup> that the injury impaired an important body function, that the impairment was objectively manifested, and that the impairment affected his general ability to lead his normal life. *Kreiner, supra* at 132. In order to establish the last point, Tipton had to present evidence concerning his pre- and post-accident life and the “significance of any affected aspects on the course of [his] overall life.” See *id.* at 132-133.

In the present case, Tipton alleged that he injured his neck and shoulder in the accident, but admitted at his deposition that his shoulder has healed and is now at the same level that it was before the accident. Thus, Tipton’s neck injury is the only injury at issue.

In order to constitute a serious impairment of body function, Tipton’s neck injury must be objectively manifested and determined to impair an “important body function.” *Id.* at 132. In his affidavit, Dr. Ribaud averred that Tipton suffered a ruptured disc in his neck, which required surgical intervention, and stated that the ruptured disc was manifested in CT and MRI scans. Although Lang briefly suggests that Tipton’s impairment was not an objectively manifested impairment of an important body function, the existence of the ruptured disc was clearly

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<sup>2</sup> This would normally include evidence that the accident caused the injury or aggravated a preexisting condition. See, e.g., *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000) (noting that recovery is allowed if the trauma caused by the accident triggered symptoms from a preexisting condition). However, Lang conceded causation for purposes of her motion.

objectively manifested by medical tests, which were interpreted by Tipton's physician, and the ability to move one's neck is an important body function. See *Netter v Bowman*, 272 Mich App 289, 305-306; 725 NW2d 353 (2006). Likewise, the fact that the injury required medical intervention including the implantation of a plate and the fusion of vertebrae are further objective manifestations of the impairment. Hence, there is evidence that Tipton has suffered an objectively manifested impairment to an important body function. Therefore, the dispositive issue is whether the impairment to Tipton's neck affected his general ability to lead his normal life.

At the summary disposition hearing, the trial court concluded that Tipton failed to present sufficient evidence that the impairment to his neck generally affected his ability to lead his normal life. The trial court acknowledged that Tipton claimed that he could no longer sleep in his own bed, had diminished sexual relations with his wife, and could no longer fish, volunteer, watch his grandchildren's games, or perform a variety of chores, but found it significant that the "documents and exhibits that have been attached do not address those things specifically from a medical point of view." The trial court also noted that Tipton's life was already quite restricted as a result of a previous injury. And, in examining the prior restrictions, the trial court found it noteworthy that Tipton's new restrictions appear to be less severe. The court explained: "But, again, the records outline—the disability records from before the accident outline that he spent most of his days watching TV and was not an active—very active individual." The court finally pointed out that Tipton's neck surgery appeared to go well. Based on these observations, the trial court concluded that, comparing Tipton's life before and after the accident, the "injury has not affected [Tipton's] general ability to lead a normal life . . . ." We do not agree with the trial court's assessment of the parties' evidentiary submissions; when viewed in the proper light, see *Quinto, supra* at 361, Tipton's submissions establish a question of fact as to whether the lasting changes to his general ability to lead his normal life rise to the level of a serious impairment.

In support of her motion, Lang submitted old reports wherein Tipton asserted that he was severely restricted in his activities as a result of his prior accident. These documents were submitted to show that Tipton's life after the recent accident is not much different than his life before. However, at his deposition, Tipton testified that he was able to perform and did perform numerous activities before the accident at issue, which he can no longer perform—even after his neck surgery. He specifically noted that he has lost the ability to fish, sleep in a bed, perform numerous chores, watch his grandchildren's sporting events, and has diminished sexual relations with his wife. In addition, Tipton submitted an affidavit in which he averred that these activities constituted an important part of his normal life before the accident.

In reviewing motions for summary disposition, courts are not permitted to assess credibility or determine facts. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Hence, we must accept Tipton's statement that he could perform those activities before the current accident and that he could not perform the same activities afterward. We must also accept Tipton's assessment of the importance of those activities in his life. Indeed, given that Tipton's life was already limited by his previous accident,<sup>3</sup> one might reasonably infer that the

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<sup>3</sup> Because Tipton does not allege that his prior injuries were temporary, we must consider  
(continued...)

activities that remained to him were even more important than they might have been before his work injury. Although we are not bound by unpublished opinions of this Court, see MCR 7.215(C)(1), we are persuaded by the majority analysis in *Anderson v Alexander*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 277980), on this point.

In *Anderson*, the trial court granted the defendant's motion for summary disposition on the grounds that the plaintiff was already in poor physical condition prior to the accident and, as a result, could not demonstrate that his new injury constituted a serious impairment. The majority in *Anderson* disagreed with the gravamen of the trial court's conclusion: "The mere fact that plaintiff was no longer young and was already unable to work because of a lower back injury does not necessarily mean that *further* back injury cannot affect the trajectory of the remainder of his life. Indeed, an injury that a completely healthy person might deem minor could, perhaps nonintuitively, have a tremendous *relative* impact on a person who already has limited mobility. The significance of plaintiff's well-established preexisting frailties and limitations could well be that an ostensibly small additional burden—which the permanent fusion of part of plaintiff's spine and loss of flexibility resulting therefrom certainly is, at a minimum—is nevertheless large enough to significantly impair what little such a plaintiff has left to lose."

Lang counters that Tipton's restrictions are all self-imposed based on real or perceived pain and, therefore, cannot be considered in determining whether Tipton's neck injury meets the serious impairment threshold. Self-imposed restrictions based on real or perceived pain do not establish the existence of a residual impairment, *Kreiner, supra* at 133 n 17, but physician imposed restrictions based on pain can establish the existence of a residual impairment, *McDaniel v Hemker*, 268 Mich App 269, 284; 707 NW2d 211 (2005). At his deposition, Tipton testified that Dr. Ribaudó had in the past told him to try and stay active by performing those activities that he was able to perform, but that he should refrain from activities that cause him pain. Hence, there is evidence that, if believed, would support the conclusion that Tipton was acting under a physician's advice when he limited his activities based on pain. Further, Dr. Ribaudó averred that he restricted Tipton's activities and submitted documentation of those restrictions with his affidavit. Although the restrictions do not specifically preclude Tipton from performing any of the activities mentioned, they do include restrictions on physical movement, such as lifting, sitting, standing, and walking, that would be required to perform those activities. Dr. Ribaudó also specifically averred that Tipton's neck injury would adversely affect Tipton's ability to lift, stand, bend, squat, kneel, sleep, and engage in sexual activity. There is record evidence from which a reasonable jury could find that Tipton could perform certain activities before the accident at issue, that those activities were important to his ability to lead his normal life, and that he can no longer perform them as a result of his injuries.

Lang asserts that this Court must disregard these restrictions because Tipton testified at his deposition that he was not under any restrictions. See *Dykes v William Beaumont Hospital*, 246 Mich App 471, 478-482; 633 NW2d 440 (2001). We do not agree. Tipton did state that he was not under any current formal medical restrictions, but also testified that Dr. Ribaudó told

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Tipton's lifestyle as it existed after his first accident and before the accident at issue. See *Benefiel v Auto-Owners Ins Co*, 482 Mich 1087, 1087; 759 NW2d 814 (2008).

him to go ahead and perform activities that do not cause him pain. In addition, the documented formal restrictions are dated after Tipton's deposition. Thus, his testimony may have been accurate at the time of the deposition. For these reasons, we cannot conclude that Tipton's deposition testimony clearly, intelligently and unequivocally established that his limitations were all self-imposed. See *Dykes, supra* at 480 (noting that statements of fact clearly, intelligently and unequivocally made are conclusively binding in the absence of any explanation or modification showing mistake or improvidence).

In addition, we acknowledge that there is record evidence that suggests that Tipton's surgery successfully alleviated some of his neck problems. However, it is not clear from the record that Tipton's ability to lead his life has returned to the same level as before the accident at issue. Indeed, Tipton has continually asserted that—even after his neck surgery—he is no longer able to sleep as soundly as before and cannot sleep in a bed. Nevertheless, even if we were to conclude that Tipton's injuries affected only the period following the accident at issue to the date of his neck surgery, we would still conclude that there is a question of fact as to whether the injury amounted to a serious impairment. An impairment does not have to be permanent in order to constitute a serious impairment of body function. See *Medukas, supra* at 508. Rather, it may "constitute a serious impairment of body function if its effect on the plaintiff's life is extensive." *Id.*, citing *Kreiner, supra* at 134. It is clear that Tipton's loss of the ability to fish, sleep in a bed, perform chores, observe his grandchildren's games, and have normal sexual relations with his wife for a period of approximately two years constitutes more than "a minor interruption in life." *Kreiner, supra* at 130. Indeed, the limitations were so significant and lasted for such a length of time that a reasonable jury could conclude that the injuries—even if temporary—amounted to a serious impairment.

#### D. Conclusion

When the totality of the evidence is viewed in the light most favorable to Tipton, reasonable minds might differ as to whether Tipton's neck injury affected his general ability to lead his normal life. Hence, there remains a genuine issue of fact as to whether Tipton's neck injury constitutes a serious impairment of body function. See *West, supra* at 183. For this reason, the trial court erred when it granted summary disposition in favor of defendant on the grounds that Tipton failed to establish a genuine issue of fact as to whether he suffered a serious impairment of body function. MCR 2.116(C)(10).

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing party, Tipton may tax costs under MCR 7.219(A).

/s/ Jane M. Beckering  
/s/ William C. Whitbeck  
/s/ Michael J. Kelly