

STATE OF MICHIGAN
COURT OF APPEALS

JEFFREY WILLIAMSON,

Plaintiff-Appellant,

v

JON B. MUNGER, Personal Representative of the
Estate of DAVID STUART THOMPSON,

Defendant-Appellee.

UNPUBLISHED

February 9, 2010

No. 287586

Livingston Circuit Court

LC No. 06-021967-NI

Before: Talbott, P.J., and Wilder and M.J. Kelly, JJ.

PER CURIAM.

In this third-party no-fault case, plaintiff appeals as of right the circuit court's order of dismissal, and also challenges the circuit court's order granting defendant's motion for summary disposition. We reverse and remand.

On January 6, 2005, defendant's decedent, David Stuart Thompson, and plaintiff were involved in a head-on collision between their vehicles. The damage to both vehicles was great, and plaintiff's knee forcibly struck the dashboard, causing a comminuted fracture of his right patella.

As a result of the injury, plaintiff had to use a knee immobilizer for three months, and had restricted work activity at his employment as an estimator for Wanko Electric. Plaintiff also worked in his own electrical contracting business. However, his ability to perform jobs has been negatively affected.

Plaintiff received three rounds of physical therapy, which did not alleviate the symptoms of pain and swelling. An MRI of the knee in July 2005 confirmed damage to the patella and patellar tendon. By mid-November 2005, due to ongoing symptoms, surgery was recommended. In March 2006, plaintiff underwent arthroscopic surgery. The surgery removed substantial scar tissue from the patellar tendon. As a result of the surgery, plaintiff had to take a week's time off of work.

Although plaintiff continues to go hunting, golfing, fishing and bike riding, he is only able to do so much less frequently. Plaintiff continues to live with ongoing pain in his knee while doing these activities, and while squatting, going up or down stairs, or kneeling.

Plaintiff's first argument¹ is that the trial court erred in granting the motion for summary disposition under Michigan's no-fault act, MCL 500.3101 *et seq.* We agree. We review de novo a trial court's decision on a motion for summary disposition. *Rose v Nat'l Auction Group, Inc.*, 466 Mich 453, 461; 646 NW2d 455 (2002).

The no-fault threshold injuries, if proven, allow recovery of noneconomic damages (pain and suffering). MCL 500.3135(1). One of the threshold injuries is a serious impairment of a body function. MCL 500.3135(7). Such impairment (1) must be objectively manifested, (2) must be of an important body function, and (3) must affect the plaintiff's ability to lead his normal life. MCL 500.3135(7).

In determining whether any difference in the plaintiff's pre- and post-accident lifestyle affected his general ability to conduct the course of his life, we consider the following non-exhaustive list of objective factors: "(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." *Kreiner v Fischer*, 471 Mich 109, 133; 683 NW2d 611 (2004) (footnotes omitted).² None of these factors is dispositive, and this Court must consider the totality of the circumstances. *Id.* at 133-134. Whether an injured party has suffered a serious impairment of a body function is a question of law if there is no factual dispute about the nature and extent of the injuries or any such dispute is immaterial. MCL 500.3135(2); *Kern v Blethen-Coluni*, 240 Mich App 333, 343; 612 NW2d 838 (2000).

Here, there is no dispute that plaintiff suffered a fractured patella. However, the extent and nature of the injury to plaintiff's patellar tendon are in dispute. While plaintiff contends that he suffered a ruptured or torn patellar tendon in addition to the ruptured patella, defendant repeatedly describes the injury only as a fracture of the patella itself. Thus the nature and extent of the injury are in dispute, and the threshold injury question cannot be decided as a matter of law. MCL 500.3135(2). The trial court therefore erred in granting summary disposition. *Benefiel v Auto-Owners Ins Co*, 277 Mich App 412; 745 NW2d 174 (2007), reversed and remanded on other grounds, 482 Mich 1087; 759 NW2d 814 (2008).

In addition, even if the nature and extent of plaintiff's injury were not factually in dispute, we find that, for the reasons explained below, a genuine issue of material fact exists with

¹ Defendant argues that this court lacks jurisdiction because the parties dismissed, without prejudice, plaintiff's excess economic damages claims. A stipulation to dismiss without prejudice the claims remaining after the involuntary dismissal of other claims does not create a final order appealable by right. *City of Detroit v State of Michigan*, 262 Mich App 542, 545; 686 NW2d 514 (2004). However, at oral argument, the parties agreed that the excess economic damages claims were not going to be tried, despite their dismissal without prejudice; therefore, *City of Detroit* is distinguishable, and jurisdiction properly rests in this Court. Further, to the extent that this analysis is flawed, we treat the matter as an appeal as on leave granted.

² Our Supreme Court has granted leave to appeal in a case involving issues similar to *Kreiner*. See *McCormick v Carrier*, ___ Mich ___, 770 NW2d 357 (2009). However, this opinion is based on the law as it exists at this time.

regard to whether plaintiff's impairments affected his general ability to lead his normal life. *Kreiner, supra*, 471 Mich at 131.

In *Kreiner, supra*, 471 Mich at 130, and the companion case of *Straub v Collette*, the principal issue was similar to the case at bar, namely, whether the plaintiffs' impairments affected their general ability to lead their normal lives. "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." *Kreiner, supra*, 471 Mich at 131. Specific activities in the plaintiff's life should be examined and ranked according to their significance in the plaintiff's overall life. *Id.*

If the court finds that the plaintiff suffered a serious impairment, and that it is objectively manifested, it then conducts 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." *Kreiner, supra*, 471 Mich at 132-133. Then the court conducts an objective analysis to determine whether any difference in the plaintiff's pre- and post-accident lifestyle affected his general ability to conduct the course of his life. *Id.* at 133. Relevant factors include "(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.* (footnotes omitted). None of these factors is dispositive; a short-term impairment may qualify as a threshold injury, and a long but mild impairment may not; the court must look at the totality of the circumstances. *Id.* at 133-134.

Plaintiff argues that he suffers an impairment in the functioning of his knee, because he experiences pain when using it. We conclude that this impairment is objectively manifested. There is un rebutted testimony that plaintiff, while able to work, has to bend his legs a different way or kneel on one knee when working. Also, plaintiff underwent surgery and continues to take pain medication to alleviate ongoing residual symptoms.

The next question is whether there is a genuine factual issue as to whether the impairment affected plaintiff's general ability to lead his normal life. *Kreiner, supra*, 471 Mich at 131. Under *Benefiel*, there is such a genuine issue of fact. In *Benefiel*, the plaintiff was involved in two auto accidents, though the claims in the case only arose from the second accident. The plaintiff suffered a spinal injury which was impossible to separate between the two accidents. *Benefiel, supra*, 277 Mich App at 416. Plaintiff suffered from a disc herniation and disc degeneration that ultimately required a multilevel discectomy and fusion. *Id.* This Court held, in relevant part, that the circuit court erred in finding, as a matter of law, that plaintiff's injuries did not affect his general ability to lead his normal life. *Id.* at 417-434. While the Supreme Court reversed with regard to other holdings, it affirmed this Court's ruling that the trial court erred in granting summary disposition as to the serious impairment issue. *Benefiel, supra*, 277 Mich App at 814. The Supreme Court stated:

The Court of Appeals properly reversed the Livingston Circuit Court's grant of summary disposition for the defendant because there remain disputed issues of fact. Viewing the evidence in the light most favorable to the plaintiff, the defendant has failed to show that, as a matter of law, the plaintiff cannot establish a serious impairment of body function. See MCL 500.3135(7); *Kreiner*

v Fischer, 471 Mich 109; 683 NW2d 611 (2004). [*Benefiel, supra*, 277 Mich App at 814.]

Here, following the accident, plaintiff's work for Wanko Electric resumed only with significantly impaired walking. Also, for the first several weeks following the injury, while plaintiff used the knee immobilizer and was instructed not to bend his knee, he could not do electrical work for his own company, Williamson Electric. Plaintiff could not call on customers, and he could not bend, kneel, climb ladders or steps or perform other activities that required bending his knee.

Plaintiff was in a knee immobilizer for two or three months. Plaintiff also testified that he used a cane, a walker, a wheelchair or crutches during the time he used the immobilizer, and for a time thereafter. Walking is an important body function, *Kern, supra*, 240 Mich App at 343, and an impaired walking function for three months is a substantial period of time, especially for a person whose jobs require substantial ambulation.

There is also un rebutted testimony that plaintiff's driving was impaired. This occurred while his knee was immobilized, and also following the surgery. Driving is an important body function in today's society. Compare *Kern, supra*, 240 Mich App at 343.

While on vacation, plaintiff experienced pain while engaging in vacation activities. After his family's February 2005 vacation, plaintiff continued to experience pain both in his work activity and his recreational activity, and he testified that his hunting, fishing, golfing and coaching activity were all restricted because of his knee. Over a year after the accident, surgery was still indicated, and it involved removal of significant amounts of scar tissue from plaintiff's knee.

After his surgery in March 2006, plaintiff was completely off work for a week. Plaintiff has returned to some activities and hobbies, but much less frequently, and only with pain. These impairments constitute more than "a minor interruption in life." *Kreiner, supra*, 471 Mich at 130. Given all of the above evidence, viewed in a light most favorable to plaintiff, we conclude that there is a genuine issue of material fact regarding whether plaintiff's impairment affected his general ability to lead his normal life. See *Benefiel, supra*, 277 Mich App at 814; also compare *Kreiner, supra*, 471 Mich at 131.

We emphasize that plaintiff's injuries are not so serious that we can hold, as a matter of law, that he suffered a serious impairment of body function. Compare *McDaniel v Hemker*, 268 Mich App 269, 282-284; 707 NW1d 211 (2005), in which this Court held that the plaintiff suffered, as a matter of law, a serious impairment. In *McDaniel*, the plaintiff sustained cervical damage that was permanent and painful, and that restricted movement of her back, shoulders, neck, and head. *Id.* at 275-281. Similarly, in *Williams v Medukas*, 266 Mich App 505, 509; 702 NW2d 667 (2005), the plaintiff suffered a fractured right shoulder and hand, and he could not use his arms for a month, and did not work for three months, and could no longer play golf, which he had loved to do. This Court held that the plaintiff demonstrated, as a matter of law, a serious impairment of body function. *Id.* Here, while we cannot say that as a matter of law plaintiff suffered a serious impairment, plaintiff *has* presented enough evidence of impairment, and its impact on his life, as discussed above, to raise a genuine issue of fact that must be submitted to a jury. *Benefiel, supra*, 277 Mich App at 814.

Plaintiff also argues that he suffered a loss of career which constitutes a serious impairment of body function. Plaintiff cites *Caiger v Oakley*, 285 Mich App 389; 775 NW2d 828 (2009). In *Caiger*, this Court reversed a grant of summary disposition in a case involving a knee injury that prevented the plaintiff from returning to his prior career as a painter. *Id.* at 390, 395. The plaintiff had to permanently depend on an artificial joint for his mobility, and continued to suffer from chronic pain, which also prevented him from engaging in a previous hobby of woodworking. *Id.* at 395. While *Caiger* held that there was a genuine issue of fact regarding whether the plaintiff's knee problems resulted from the accident, it also held that the plaintiff had established an impairment of an important body function that affects his ability to lead his normal life. *Id.*

We agree with plaintiff's argument. *Caiger* supports plaintiff's position that a loss of a career is an objective indication of a serious impairment of body function. While *Caiger* involved a clearer example of a loss of career, plaintiff here has presented enough evidence, discussed above, to raise a genuine issue of fact regarding impairment of his career as an independent electrician.

Plaintiff also argues that there is a genuine issue of fact regarding whether he suffered a temporary serious impairment of body function. We agree. The duration of the impairment is a relevant factor that courts must consider. *Kreiner, supra*, 471 Mich at 131; see also *id.* at 133. An impairment does not have to be permanent in order to constitute a serious impairment of body function. *Medukas, supra*, 266 Mich App at 508, citing *Kern, supra*, 240 Mich App at 341. Here, as discussed above, plaintiff's work and recreation³ were impaired for substantial amounts of time. For example, plaintiff had to use a knee immobilizer for three months. Long after the accident (nearly a year), surgery was still needed for plaintiff's knee. Over a year post-accident, the surgery resulted in the removal of substantial amounts of scar tissue. Plaintiff was again immobilized after the surgery for a week. Given this evidence, when considered in a light most favorable to plaintiff, there is a genuine issue of fact regarding whether plaintiff suffered a temporary serious impairment. See generally *Kreiner, supra*, 471 Mich at 131, 133.

Plaintiff also⁴ argues that the district court, after a reassignment of the case from the circuit court judge,⁵ erred in failing to reverse the circuit court judge's summary disposition order; in refusing to consider case law addressing temporary serious impairment; in refusing to permit plaintiff to submit evidence that, even if he did not meet the threshold at the time summary disposition was granted, his condition later worsened, and he met the threshold later,

³ Plaintiff's un rebutted testimony established that his recreational life, before the accident, was substantial. His recreational activities were frequent and numerous.

⁴ After summary disposition was granted and reconsideration was denied in 2006, the order did not dispose of all claims of all the parties, because the circuit court stated that the motion for summary disposition did not relate to economic injuries, and therefore summary disposition was not granted as to those injuries. Accordingly, the case continued into 2007 and 2008.

⁵ The record reflects that this case was reassigned from a circuit court judge to a district court judge, to assist with the circuit court judge's civil docket.

after the case was reassigned. In light of our disposition of the first issue, this issue is moot. *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 221; 761 NW2d 293 (2008).

Reversed and remanded for further proceedings consistent with this opinion. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder

/s/ Michael J. Kelly