

STATE OF MICHIGAN
COURT OF APPEALS

SHAWN BROOKS,

Plaintiff-Appellant,

v

REGINALD EDWARD ANDERSON and JOHN
DOE,

Defendants,

and

GRANGE INSURANCE COMPANY OF
MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

September 23, 2010

No. 292068

Wayne Circuit Court

LC No. 08-111193-NI

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

In this automobile negligence action, plaintiff Shawn Brooks appeals as of right the trial court's order granting summary disposition in favor of defendant Grange Insurance Company of Michigan under MCR 2.116(C)(10). In granting summary disposition, the trial court determined that Brooks' injuries did not affect his general ability to lead his normal life within the meaning of MCL 500.3135(7) as construed in *Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004), overruled by *McCormick v Carrier*, ___ Mich ___, ___ NW2d ___ (2010). Because Brooks' injuries did not meet the serious impairment threshold, the trial court dismissed Brooks' suit. See MCL 500.3135(1). On appeal, we conclude that the trial court erred when it determined that Brooks' injuries did not meet the serious impairment threshold and dismissed Brooks' suit. Because we conclude that—on the present record—Brooks' injuries met the serious impairment threshold, we reverse the trial court's order dismissing Brooks' suit and remand for further proceedings.

Brooks alleged that in May 2007 he was injured when the vehicle in which he was riding as a passenger was struck from behind. He stated that his face hit the dashboard during the accident and became swollen to the point where he could not open his mouth. X-rays showed that he had multiple fractures to his lower jaw and he underwent surgery to correct the fractures. According to Brooks, his physicians secured his jaw with "like rubber bands and everything,"

inserted a plate in his chin, and inserted screws and wires on both sides of his jaw. Brooks' medical records show that in May 2007, he underwent surgery for open reduction and internal fixation of the fractures. The surgery included placement of a 2.4-millimeter titanium plate secured by four screws to span the right parasymphysial fracture and a two-millimeter plate secured with three screws in the angle region of the left mandible. Brooks remained in the hospital for three days after the surgery and had the elastics holding his jaw shut removed approximately two to three months later.

At a follow-up appointment in June 2007, Brooks reported that the pain was slowly improving, but that he was experiencing significant twitching of the lower lip and chin. There was no evidence of malocclusion of his molars. In July 2007, he reported difficulty opening and closing his mouth. The physician noted a decreased range of motion, swelling over the left jaw, and tenderness to palpation. At that time, the physician had Brooks' remaining sutures removed and prescribed physical therapy to help with the range of motion.

In August 2007, Brooks reported to his physician that he had "done well" since his visit in July. Approximately a week earlier, he reported sharp pin and needle sensations in his chin and lower lip area that had previously been numb. He stated that he had eaten a meal that included steak, but upon chewing on the left side, he heard a pop and then developed pain and facial swelling. He reported that the swelling had decreased but a clicking sound was still present. The physician noted that Brooks' range of motion was still limited, that he had mild swelling and tenderness, and that a "click" could be palpated when he opened and closed his mouth. A CT scan "showed nonunion and probable irregularity with erosive changes of the margins of the fracture fragments and suspicious loosening of the metallic instrumentation." The physician stated that the right side of Brooks' jaw seemed to be healing well, but that he had increased pain and tenderness on the left side, which correlated with findings on the CT scan "of possible improper healing and possibly incomplete reduction of the fracture." The physician referred Brooks to a surgeon for a second opinion regarding the appropriate course of action.

At his deposition in July 2008, Brooks testified about how his jaw injury had affected his life. He explained that his eye waters when he chews, he cannot eat certain foods, and that he drools constantly:

Q. As we're sitting here today, what type of complaints do you have as a result of that facial injury?

A. I drool a lot. I can't chew anything hard, not potato chips, chicken, anything, anything hard. When I do chew, it makes my eye water, this eye here, when I chew.

Q. Your left eye?

A. This one. Yes, left eye. My whole chin feels like needles sticking me. Right now as I'm speaking to you, my lips, as I'm moving my lips, the more I move my lips, the more in my chin feel [sic] like little needle pricks.

* * *

Q. What's the hardest thing you're able to eat?

A. The hardest piece of food that I can eat probably is sandwich like, you know, sandwich or ham sandwich or something.

* * *

Q. You mentioned specifically potato chips and chicken. Have you had any potato chips or any chicken since May 28, 2007?

A. I tried.

Q. What happened?

A. I couldn't do it.

Q. Did you spit the food out?

A. I couldn't chew it. I couldn't bite down to chew it. I could not chew it.

* * *

Q. Your drooling, how often do you get that?

A. Every day.

Q. All the time?

A. All the time. Sitting right here now, I keep doing like this to keep looking—it's embarrassing to me.

Grange Insurance eventually moved for summary disposition under MCR 2.116(C)(10). Grange Insurance characterized Brooks' testimony as indicating that his only impairment was that one of his eyes watered when he eats certain foods, which Grange Insurance claimed did not rise to a level that it affected his general ability to lead his normal life under *Kreiner* and the trial court agreed:

All right. This is a threshold injury again and [Brooks] did have a pretty serious mouth injury and fracture. But he recovered pretty well and no employment was affected, no other activities were affected, there were no doctor-imposed restrictions. When you look at the test for how it affected his normal life, he did have some trouble eating, but aside from that it really didn't affect his normal life.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. *Id.* at 120. A reviewing court must consider the affidavits, depositions, admissions, and other documentary evidence submitted by

the parties and, viewing that evidence in the light most favorable to the nonmoving party, determine whether there is a genuine issue of material fact for trial. *Id.*

A plaintiff may not sue for noneconomic damages arising from the negligent operation of a motor vehicle unless the plaintiff has suffered “death, serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1). A serious impairment of body function is “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).

Although the trial court examined the evidence in light of the serious impairment threshold as construed by our Supreme Court in *Kreiner*, 471 Mich 109, the Supreme Court recently overruled *Kreiner*. See *McCormick*, ___ Mich at ___. Under the test stated in *McCormick*, in order to meet the serious impairment of body function threshold, a plaintiff must present evidence establishing “(1) an objectively manifested impairment (observable or perceivable from actual symptoms or conditions) (2) of an important body function (a body function of value, significance, or consequence to the injured person) that (3) affects the person’s general ability to lead his or her normal life (influences some of the plaintiff’s capacity to live in his or her normal manner of living).” *Id.* at ___.

In this case, Grange Insurance’s motion focused on Brooks’ ability to show that the injury to his jaw affected his general ability to lead his normal life.¹ “[T]he common understanding of to ‘affect the person’s ability to lead his or her normal life’ is to have an influence on some of the person’s capacity to live in his or her normal manner of living.” *Id.* at ___. The inquiry requires a “subjective, person- and fact-specific inquiry that must be decided on a case-by-case basis. Determining the effect or influence that the impairment has had on a plaintiff’s ability to lead a normal life necessarily requires a comparison of the plaintiff’s life before and after the incident.” *Id.* “[C]ourts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her pre-incident normal life, the person’s general ability to do so was nonetheless affected.” *Id.* “[T]he plain language of the statute only requires that some of the person’s *ability* to live in his or her normal manner of living has been affected, not that some of the person’s normal manner of living has itself been affected.” *Id.*

Brooks’ injury affected the functioning of his mouth. The treatment included surgical insertion of two titanium plates and seven screws that are intended to be permanent. His mouth was secured shut from the date of surgery, May 29, 2007, until sometime after June 13, 2007. As of August 22, 2007, his range of motion was still limited and a CT scan “showed nonunion and probable irregularity with erosive changes of the margins of the fracture fragments and suspicious loosening of the metallic instrumentation,” suggesting “possible improper healing and possibly incomplete reduction of the fracture.” As of July 2008, Brooks still suffered residual impairment that prevented him from eating foods harder than a ham sandwich, including potato chips and chicken, and he drooled constantly.

¹ Defendant conceded for purposes of its motion that Brooks’ fractured jaw was an objectively verifiable injury and that the use of an individual’s jaw was an important body function.

Grange Insurance contended, and the trial court noted in its ruling, that Brooks did not present evidence of doctor-imposed restrictions. In *Kreiner*, 471 Mich at 133 n 17, the Court stated that self-imposed restrictions based on real or perceived pain do not establish the extent of residual impairment. See also *McDaniel v Hemker*, 268 Mich App 269, 282; 707 NW2d 211 (2005). The extent of residual impairment was one of several factors that the Court in *Kreiner* identified as relevant in evaluating whether a plaintiff's general ability to lead his or her normal life had been affected. However, in *McCormick*, the Court held that *Kreiner* erred in adopting those factors because they were not necessarily based on the statute's text. *McCormick*, ___ Mich at ___. Therefore, the absence of physician-imposed restrictions on activities no longer has the significance that it did under *Kreiner*.

In *Fisher v Blankenship*, 286 Mich App 54, 57; 777 NW2d 469 (2009), the plaintiff fractured a front tooth. Because of the condition of his surrounding teeth, his dentist extracted 14 of his top front teeth and replaced them with a denture. *Id.* The plaintiff missed a few days of work, but was able to perform his household chores and did not claim a significant effect on his social life. He "had trouble eating certain foods like corn on the cob." *Id.* at 58. He drooled occasionally and the denture altered his speech. *Id.* He believed that the dental work altered his appearance and that he felt awkward kissing his wife. *Id.* The daily process of removing and replacing the denture could take 45 minutes to an hour when he was having difficulty due to a severe gag reflex. *Id.* This Court compared the facts of that case to those in *Moore v Cregeur*, 266 Mich App 515; 702 NW2d 648 (2005), which involved a plaintiff who used special visual aids, and those in *Caiger v Oakley*, 285 Mich App 389, 395; 775 NW2d 828 (2009), which involved a prosthetic knee. The Court in *Fisher* stated:

We find *Moore* applicable here. Fisher cannot eat without the "special device" of his denture implant. He also presented evidence of his pain and difficulty in using this device as well as evidence that he drools occasionally because of the denture, and that the denture has altered his speech. Like the plaintiff's vision impairment in *Moore*, Fisher's tooth "loss will affect every aspect of [his] life to some degree and will affect certain specific activities . . . even more." [*Moore*, 266 Mich App at 521.] In addition, this Court recently held that a plaintiff who elected to have knee replacement surgery after his knee was injured in a car crash had established a serious impairment of body function; this was in part because he "is still missing a portion of his body that he will never retrieve" and now "must forever depend on an artificial joint for his mobility" [*Caiger*, 285 Mich App at 395.] Although this case involves a set of prosthetic teeth rather than a prosthetic joint, the same analysis applies: Fisher must forever rely on a prosthetic device in order to participate in everyday life activities such as eating and speaking. [*Fisher*, 286 Mich App at 64-65.]

Applying the standards set forth in *Kreiner*, this Court held: "Fisher's loss of teeth and the concomitant need for a prosthesis constitutes a serious impairment of body function as a matter of law." *Id.* at 65.

As in *Fisher*, Brooks' injuries have affected his ability to participate in the everyday life activity of eating. Unlike in *Fisher*, Brooks did not testify that his speech was affected. However, whereas the plaintiff in *Fisher* drooled occasionally, Brooks drools "[a]ll the time." The plaintiff in *Fisher* had trouble eating certain foods like corn on the cob. In this case Brooks

is unable to chew foods harder than a ham sandwich on soft bread. The injury to the plaintiff in *Fisher* resulted in the implantation of posts to secure the partial denture. But Brooks required the insertion of two metal plates and seven screws on the sides of his lower jaw. Although Brooks' injuries did not affect his ability to work,² eating is a significant activity, for health, pleasure, and socializing. Thus, on the present record, the impairment has "affected his general ability to lead his normal life because it influenced some of his capacity to live in his normal, pre-incident manner of living." *McCormick*, ___ Mich at ___. The trial court erred in determining that, as a matter of law, Brooks' alleged injuries did not affect his general ability to lead his normal life. For this reason, we reverse the trial court's order granting summary disposition in favor of Grange Insurance.

Although we have concluded that the trial court erred in granting the motion at issue here, we do not preclude the possibility that Grange Insurance may yet demonstrate that there is no question of material fact on the threshold issue. "Determining the effect or influence that [an] impairment has had on a plaintiff's ability to lead a normal life necessarily requires a comparison of the plaintiff's life before and after the incident." *McCormick*, ___ Mich at ___. There is record evidence that suggests that Brooks may already have been suffering from limitations on his ability to eat that were unrelated to the present accident. However, because the record has not been developed on this issue, we decline to hold that, as a matter of law, Brooks has met the serious impairment threshold. We also decline to address Brooks' discussion as to whether he was injured in an "accident." The trial court did not grant summary disposition on this basis and it is unnecessary to address this issue in this appeal.

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

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly

² Brooks last worked in 1996 or 1997 and received social security disability benefits because he has osteogenesis imperfecta, also known as brittle bone disease, and doctors would not release him to work.