

STATE OF MICHIGAN
COURT OF APPEALS

AARON LANE WHITE,

Plaintiff-Appellant,

v

DAVID FISHER, Personal Representative of the
ESTATE OF MICHAEL SCOTT FISHER,

Defendant-Appellee.

UNPUBLISHED
December 14, 2010

No. 293210
Montcalm Circuit Court
LC No. 08-010170-NI

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Plaintiff Aaron White appeals as of right the trial court's order granting defendant David Fisher's motion for summary disposition under MCR 2.116(C)(10).¹ We reverse and remand for further proceedings.²

I. BASIC FACTS

A. OVERVIEW

This case arises out of a motor vehicle accident that injured White. White sustained several injuries when the decedent lost control of a vehicle he was driving and hit a tree in the early morning hours of March 19, 2005. The accident caused White to be ejected from the vehicle. As a result, White fractured one of his vertebrae. In his deposition, White testified that he continued to experience pain in his back and right shoulder, and occasional pain in his neck. He also testified that he had trouble standing for long periods of time, that he felt pain when he worked, that he had difficulty bow hunting, and that he experienced memory problems.

¹ David Fisher is the personal representative of the Estate of Michael Scott Fisher.

² We have decided this appeal without oral argument pursuant to MCR 7.214(E).

B. WHITE'S MEDICAL TREATMENT

After the accident, White received medical treatment at the Carson City Hospital and then Spectrum Health in Grand Rapids, Michigan. A CT scan of White's brain dated March 19, 2005, indicated no evidence of intracranial hemorrhaging. Also, cervical spine x-rays and an MRI scan of the cervical spine dated March 19, 2005 did not identify any spine fractures. An MRI scan of the thoracic spine dated March 19, 2005 demonstrated a T4 fracture, which the doctors treated conservatively.

White sought additional treatment with an orthopedic surgeon, he attended physical therapy, and he received treatment from a physical medicine rehabilitation physician. In November 2005, White continued to complain of shoulder pain. White's treating physician referred him to Dr. Susan Day, an orthopedic surgeon at Bone and Joint Care of West Michigan. Dr. Day's November 21, 2005 MRI and accompanying medical report indicated mild tendinopathy, but no full-thickness rotator cuff tear. Dr. Day stated that White could be released to return to work without restrictions and that she did not believe White needed surgery at that time. Also, shoulder x-rays appeared to be within normal limits and were unremarkable. Radiographs of the thoracic spine demonstrated mid-thoracic levels to be within normal limits, indicating that the T4 compression fracture had healed.

During his September 26, 2008 deposition, White admitted that he had not received any recent treatment for his alleged injuries. White testified that he initially had back pain in his neck after the accident, but he acknowledged that his neck had not caused him any problems for about one year. White also indicated that he did not take any medication for his alleged pain.

C. WHITE'S INDEPENDENT MEDICAL EXAMINATION

On April 1, 2009, Dr. Randolph B. Russo of Orthopedic Associates of Michigan conducted an independent medical evaluation of White's neck and shoulder injuries. White complained of right shoulder pain. Dr. Russo's evaluation supported Dr. Day's approach in regard to conservative management of White's situation. Dr. Russo indicated that he did not see any evidence of progressive rotator cuff pathology, clinically or by history. White also complained of neck pain. Dr. Russo stated that White had two episodes of neck pain since the motor vehicle accident. However, he also noted that these episodes did not represent a recurrent problem and that White did not have any cervical symptoms. Dr. Russo concluded that White did not require any further medical care for the cervical region. Additionally, Dr. Russo indicated that White had sustained a T4 compression fracture and the subsequent conservative treatment showed a stable injury. Dr. Russo determined that White did not require further treatment and that no medical reason existed to restrict White's physical function as it related to thoracic compression fracture. Dr. Russo also found that White could continue working in an unrestricted state. Dr. Russo concluded that he did not see any medical indications for disability restrictions or limitations on White's physical activities as related to the motor vehicle accident.

D. ALLEGED EFFECT OF WHITE'S INJURIES ON HIS GENERAL ABILITY TO LEAD A NORMAL LIFE

In his deposition, White testified that his employer, Meridian Automotive Systems, terminated his employment after the accident because of the restrictions imposed as a result of his injuries. White testified that after he left Meridian Automotive Systems, he started his own company that sold, hauled, and set up manufactured homes. White owned and managed White's Manufactured Home Service for approximately one year. White testified that he eventually moved to Mississippi to work at Home Pride Siding. This job involved loading 10 x 10 boxes of vinyl siding and cutting the siding to size. White indicated that this job involved the same amount of physical work as the job he had at Meridian Automotive Systems.³ Further, White testified that he enjoyed bow hunting before the accident. White said that ever since the accident, he could no longer bow hunt because he could not properly hold the bow.

E. FISHER'S MOTION FOR SUMMARY DISPOSITION

In response to White's lawsuit, Fisher moved for summary disposition, arguing that White failed to prove a threshold injury under the test set forth in *Kreiner v Fischer*.⁴ Fisher's attorney admitted the fractured vertebra might qualify as a serious impairment of body function, but he also emphasized that the injury had healed and that doctors had not placed any restrictions on White. Further, White conceded that he had self-imposed his restrictions. The trial court granted Fisher's summary disposition motion.

II. SUMMARY DISPOSITION

A. STANDARD OF REVIEW

Under MCR 2.116(C)(10), a party may move for dismissal of a claim on the grounds that no genuine issue exists with respect to any material fact and the moving party is entitled to judgment as a matter of law. The moving party must specifically identify the undisputed factual issues and support his or her position with documentary evidence.⁵ The nonmoving party then has the burden to produce admissible evidence to establish disputed facts.⁶ The trial court must consider all the documentary evidence in the light most favorable to the nonmoving party.⁷ “[T]he court is not permitted to assess credibility, or to determine facts on a motion for

³ Dr. Russo's inspected White's hands during the evaluation and found callous formations consistent with performing ongoing manual labor activities.

⁴ See *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), overruled by *McCormick v Carrier*, ___ Mich ___ (Docket No. 136738, decided July 31, 2010).

⁵ MCR 2.116(G)(3)(b) and (4); *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

⁶ *Wheeler v Charter Twp of Shelby*, 265 Mich App 657, 663; 697 NW2d 180 (2005).

⁷ MCR 2.116(G)(5); *Maiden*, 461 Mich at 120.

summary judgment.”⁸ On appeal, we review de novo the trial court’s ruling on a motion for summary disposition.⁹

B. SERIOUS IMPAIRMENT OF BODY FUNCTION

Fisher argues that the trial court erred in granting White’s motion for summary disposition on his claim of serious impairment of bodily function because there were genuine issues of material fact for trial.

1. LEGAL STANDARDS

In interpreting the Legislature’s definition of “serious impairment of body function,” the Michigan Supreme Court recently overruled the test previously set forth in *Kreiner v Fischer*. Now, pursuant to *McCormick v Carrier*,¹⁰ a court must first determine “whether there is a factual dispute regarding the nature and the extent of the person’s injuries, and, if so, whether the dispute is material to determining whether the serious impairment of body function threshold [has been] met.”¹¹ “If . . . no factual dispute [exists], or no material factual dispute [exists], then whether the threshold [has been] met is a question of law for the court.”¹²

If the court may decide the issue as a matter of law, it should next determine whether the serious impairment threshold has been crossed. The unambiguous language of MCL 500.3135(7) provides three prongs that are necessary to establish a “serious impairment of body function”: (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).¹³

The *McCormick* Court summarized its analysis of the serious impairment of body function requirement as follows:

⁸ *Oade v Jackson Nat’l Life Ins Co*, 465 Mich 244, 265; 632 NW2d 126 (2001), quoting *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

⁹ *Roberts v Titan Ins Co*, 282 Mich App 339, 348; 764 NW2d 304 (2009).

¹⁰ *McCormick v Carrier*, ____ Mich ____ (Docket No. 136738, decided July 31, 2010), slip op at 34, citing MCL 500.3135(2)(a)(i) and (ii).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis. As stated in the *Kreiner* dissent, “[t]he Legislature recognized that what is important to one is not important to all[;] a brief impairment may be devastating whereas a near permanent impairment may have little effect.” *Kreiner*, 471 Mich at 145 (CAVANAGH, J., dissenting). As such, the analysis does not “lend itself to any bright-line rule or imposition of [a] nonexhaustive list of factors,” particularly where there is no basis in the statute for such factors. *Id.* Accordingly, because “[t]he Legislature avoided drawing lines in the sand . . . so must we.” *Id.*^[14]

It is undisputed that this Court must follow the precedents that the Michigan Supreme Court establishes,¹⁵ even when those precedents reverse previously well-established law. It is with this requirement in mind that we apply the legal standards in this case.

2. APPLYING THE STANDARDS

The new standards set forth in *McCormick* undoubtedly relax the well-established law of *Kriener* and create a more subjective framework within which a court must analyze a plaintiff’s significant impairment of body function under MCL 500.3135. MCL 500.3135 allows a plaintiff to recover non-economic damages if she has suffered “serious impairment of body function[.]”¹⁶ As previously stated, the no-fault insurance act defines “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.”¹⁷ In this case, the parties do not dispute the first two prongs of the analysis: that White suffered (1) an objectively manifested impairment and that the impairment affected (2) an important body function. Instead, White focuses on the third prong regarding his general ability to lead a normal life.

With respect to the third prong of the serious impairment test, the Michigan Supreme Court explained that in order to affect a person’s general ability to lead his or her normal life, the objectively manifested impairment of an important body function must influence some of the plaintiff’s capacity to live in his or her normal manner of living.¹⁸ The Court determined that “[b]y modifying ‘normal life’ with ‘his or her,’ the Legislature indicated that this requires a subjective, person- and fact-specific inquiry that must be decided on a case-by-case basis.”¹⁹ Further, because this analysis is subjective, “[d]etermining the effect or influence that the

¹⁴ *Id.* at slip op p 34-35.

¹⁵ *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993).

¹⁶ MCL 500.3135(1).

¹⁷ MCL 500.3135(7).

¹⁸ *McCormick*, ____ Mich at slip op 18-20.

¹⁹ *Id.* at slip op 20.

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."²⁰ The Court noted that this inquiry does not require that the plaintiff's ability to lead his or her normal life be destroyed—the statute merely requires that that ability be *affected*.²¹ “Thus, courts 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 her or her pre-incident life, the person's general ability to do so was nonetheless affected.”²² The Court went on to clarify that, because “the 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, . . . there is no quantitative minimum as to the percentage of a person's normal manner of living that must be affected.”²³ The Court further added that there is no “no express temporal requirement as to how long an impairment must last[.]”²⁴

In this case, White argues that the injuries he sustained as a result of the accident clearly affected his general ability to lead a normal life. White claims that he can no longer bow hunt because he cannot properly hold the bow. According to White's deposition testimony about his pre-accident life, he did not have any difficulties bow hunting. However, since the accident, he can no longer enjoy one of his main hobbies. In contrast, Fisher argues that White's general ability to lead a normal life has not been affected because his injuries have healed, he has not sought any medical treatment over the last three years, he no longer takes any medication, he continues to perform manual labor jobs, and his restrictions are self-imposed rather than imposed by a physician. Clearly, a genuine issue of material facts exists as to the effect that White's impairment has had on his ability to lead a normal life. Because a factual dispute exists, the trial court erred in granting Fisher's motion for summary disposition. Additionally, we cannot decide this issue as a matter of law because “factual questions [are] best left to the trier of fact.”²⁵

III. CONCLUSION

For the reasons stated above, we reverse the trial court's grant of summary disposition and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood

²⁰ *Id.* at slip op 20.

²¹ *Id.*

²² *Id.*

²³ *Id.* (emphasis in original).

²⁴ *Id.* at slip op 21.

²⁵ *Wilde v Gilland*, 189 Mich App 553, 556; 473 NW2d 718 (1991).