STATE OF MICHIGAN

COURT OF APPEALS

PATRICK M. KEELEY and JULIA A. KEELEY,

Plaintiffs-Appellants,

v

JOHN R. JACKSON,

Defendant-Appellee.

UNPUBLISHED
January 10, 2006

No. 263937
Ingham Circuit Court
LC No. 04-000560-NI

Before: Fitzgerald, P.J. and O'Connell and Kelly, JJ.

PER CURIAM.

In this third-party automobile negligence case, plaintiffs appeal the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. Facts

In May 2003, plaintiff Patrick M. Keeley[1] was the driver of a vehicle that was stopped, about to exit Grand River Park and turn left to enter westbound traffic on Main Street in Lansing. Shortly after turning onto Main Street, plaintiff's vehicle was struck from behind by the vehicle driven by defendant John R. Jackson. Plaintiff filed a complaint against defendant alleging that, as a result of this collision, he suffered back injuries and wage loss beyond three years from the time of the accident.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) arguing that there was no genuine issue of material fact that plaintiff did not suffer a serious impairment of a body function. Plaintiff, who has had a long history of back problems, produced extensive medical records demonstrating a degenerative spinal condition. Defendant emphasized in his motion that, while the evidence demonstrated that plaintiff has suffered spinal problems

[1] We use the singular "plaintiff" hereinafter because plaintiff Julia A. Keeley's claim is derivative.

and related pain, none of the records and none of the deposition testimony demonstrated that plaintiff suffered any objectively manifested back injury as a result of the accident.

Plaintiff responded to the motion citing numerous medical records, which demonstrated that he has, for many years, suffered a degenerative spinal condition. The medical records also showed that plaintiff regularly complained of various pains, which he attributed to this condition. After the accident, plaintiff complained of increased and different pain than he experienced before the accident. Plaintiff also argued that, regardless of his claim for noneconomic damages, he is entitled to economic damages pursuant to MCL 500.3107 and 500.3135(3)(c).

After hearing the motion and response, the trial court stated, "I cannot find any objectively discovered or documented new injury that grew out of the motor vehicle accident or that objectively verifies exacerbation of his prior condition." The trial court further stated that plaintiff's subjective complaints of pain did not constitute an objectively manifested injury. It also stated that, despite the fact that plaintiff stopped working, he failed to show that his general ability to lead his normal life was affected when no doctor ever concluded that plaintiff was disabled from working. The trial court also ruled that plaintiff has not suffered any wage loss as a result of the accident. It noted that plaintiff voluntarily chose to stop working and yet performed numerous other activities including taking vacations, painting a house, and driving his children to school. The trial court granted defendant's motion and dismissed plaintiff's claims.

II. Analysis

We review de novo the grant or denial of a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. The trial court may grant summary disposition under if, considering the substantively admissible evidence in a light most favorable to the nonmoving party, there is no genuine issue concerning any material fact and the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

A. Serious Impairment of a Body Function

Plaintiff first contends that the trial court erred in ruling plaintiff did not suffer a serious impairment of a body function as a result of the accident. 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); *Kreiner*, *supra* at 131-132; *Kern v Blethen-Coluni*, 240 Mich App 333, 343-344; 612 NW2d 838 (2000). This appeal concerns the threshold question whether plaintiff suffered a serious impairment of a body function. 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). A plaintiff must also demonstrate that the injury was caused by the alleged accident. MCL 500.3135(1) provides:

> 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. [Emphasis added.]

Further, it is well-established that in all negligence claims, "a plaintiff must prove four elements: (1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, (3) causation, and (4) damages." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000).

We agree with the trial court that plaintiff presented no evidence that he suffered a serious impairment of a body function as a result of the accident. First, although plaintiff presented evidence that he has sustained objectively manifested back injuries, such as "spurring," "degenerative changes," "mild hypertrophy," "facet arthrosis," "mild central stenosis," and "bulging," he has failed to present *any* evidence demonstrating that these injuries were *caused by* the accident. The evidence shows that plaintiff, for many years, has suffered from a degenerative spinal condition. However, none of the physicians who treated plaintiff stated, either in their records or in deposition testimony, that any of the alleged injuries were caused by the accident. Aside from a *post hoc ergo propter hoc* argument,[2] plaintiff cites no evidence whatsoever indicating that any of his alleged injuries were caused by the accident.

Second, while the evidence shows that plaintiff's complaints of pain changed and increased after the accident, plaintiff's subjective complaints of pain are not an objective manifestation of an injury.[3] For an impairment to be objectively manifested, there must be a medically identifiable injury or a condition that has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 652-653; 654 NW2d 604 (2002). The medical records are replete with references to plaintiff's complaints of pain and assertions that it was caused by the accident. However, as stated above, none of plaintiff's physicians stated that plaintiff suffered any physical injury as a result of the accident. The evidence demonstrating that plaintiff's pain has changed and increased, does not, beyond mere speculation, demonstrate that plaintiff suffered any injury that was caused by the accident.

This case is distinguishable from *Wilkinson v Lee*, 463 Mich 388, 395; 617 NW2d 305 (2000), in which our Supreme Court stated, "Regardless of the preexisting condition, recovery is allowed if the trauma caused by the accident triggered symptoms from that condition." In *Wilkinson*, the plaintiff's treating physician testified that the accident precipitated symptoms of the plaintiff's preexisting tumor. *Id.* Specifically, he stated, "The brain has to move inside the head and when there is a six centimeter tumor, then there is some small microchanges or small hemorrhages that could develop and *the friction of the tumor against the brain is what precipitates the symptoms, even though the tumor wasn't activated in size nor its growth.* *Id.* at 395-396 (emphasis in original). Thus, in *Wilkinson*, the plaintiff's physician identified a medically identifiable physical injury caused by the accident that precipitated the symptoms of a preexisting condition. In this case, plaintiff has only presented evidence that his pain increased

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[2] This fallacious argument is that because one event follows another the first event caused the second.

[3] This issue is distinguishable from whether, after an objectively manifested injury has been determined, subjective pain constitutes an impairment that affects the plaintiff's general ability to lead his or her normal life. *Kreiner, supra* at 133 n 17.

and changed after the accident. He has not demonstrated a medically identifiable physical injury that precipitated the symptoms of his preexisting condition as in *Wilkinson.*

Therefore, we conclude that the trial court did not err in ruling that plaintiff, as a matter of law, did not suffer an objectively manifested injury as a result of the accident.[4]

B. Wage Loss

Plaintiff also asserts that the trial court erred in ruling that plaintiff failed to present evidence "that he will suffer a wage loss beyond three years from the date of the motor vehicle accident." We find that the trial court's ruling in this regard lacks specificity. The proper question is whether plaintiff demonstrated that he will suffered wage loss *as a result of the accident* beyond three years from the date of the accident. While we agree with plaintiff that he demonstrated that he has suffered wage losses from the time of the accident, he has not presented any evidence that he has or will suffer wage loss as a result of the accident.

Pursuant to MCL 500.3135(3)(c) and 500.3107, plaintiff sought economic damages in excess of the three-year limitations in the no-fault act. We recognize that this Court has specifically held that an injured party may recover excess economic work loss damages under MCL 500.3135(3)(c) even where they have not met the threshold requirements necessary to sustain a cause of action for noneconomic damages under MCL 500.3135(1). *Clark v Auto Club Ins Ass'n,* 150 Mich App 546, 553-554; 389 NW2d 718 (1986); *Oullette v Kenealy,* 424 Mich 83, 88; 378 NW2d 470 (1985). However, a plaintiff must still show that he suffered or will suffer wage loss as a result of the alleged accident. No-fault work-loss benefits are intended to compensate an injured person "'by providing protection from economic hardship caused by the loss of the wage earner's income *as a result of* an automobile accident.'" *Marquis v Hartford Accident & Indemnity (After Remand),* 444 Mich 638, 644; 513 NW2d 799 (1994), quoting *Perez v State Farm Mut Ins Co,* 418 Mich 634, 640; 344 NW2d 773 (1984) (LEVIN, J.) (emphasis added).

Plaintiff has indeed submitted evidence that his wages have decreased from the time of the accident. However, plaintiff has failed to demonstrate that this loss was caused by the accident. The trial court correctly pointed out that there was no evidence that plaintiff suffers any injuries or pain that prevent him from going to work. None of plaintiff's doctors indicated that plaintiff is unable to work as a result of the accident or, for that matter, unable to work for any reason. Moreover, the evidence demonstrates that plaintiff, while going on vacations, painting a house, and driving his children to school, voluntarily chose to cease working. Therefore, we agree that plaintiff has failed to demonstrate any wage loss as a result of the accident.

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[4] "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." *Kreiner, supra* at 132 (emphasis added). Because plaintiff has failed to demonstrate any objectively manifested injury caused by the accident we need not address whether plaintiff's alleged injuries affect his general ability to lead a normal life.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly