

STATE OF MICHIGAN
COURT OF APPEALS

ALI OMRAN AL-SAYAD,

Plaintiff-Appellant,

v

FARM BUREAU GENERAL INSURANCE
COMPANY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
February 12, 2008

No. 275031
Wayne Circuit Court
LC No. 04-438887-NF

Before: Gleicher, P.J., and O’Connell and Kelly, JJ.

PER CURIAM.

In this automobile negligence action, plaintiff appeals as of right the circuit court’s order granting summary disposition in favor of defendant. We affirm.

On February 22, 2004, a hit-and-run truck struck the rear of plaintiff’s vehicle, propelling it into a bridge overpass support. Plaintiff received emergency room treatment for his complaints of neck and upper back pain. In December 2004, plaintiff filed this action seeking noneconomic damages, alleging that as a result of the unidentified truck’s negligence, he sustained a serious impairment of an important body function. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that plaintiff’s injuries did not affect his general ability to lead a normal life. The trial court granted defendant’s motion in October 2006, and this appeal followed.

We review de novo a trial court’s summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). “In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” *Id.* If the moving party fulfills its initial burden, the party opposing the motion must provide the trial court with admissible evidentiary materials demonstrating the existence of a genuine and material issue of disputed fact, and may not rest on mere allegations. MCR 2.116(G)(4), (6); *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

The Legislature has limited tort liability for noneconomic loss to cases in which an injured plaintiff has suffered “a serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1). A “serious impairment of body function” means “an

objectively manifested impairment of an important body function that affects the person's general ability to lead his ... normal life." MCL 500.3135(7).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), the Michigan Supreme Court articulated a multistep process to guide a trial court's consideration whether a plaintiff has sustained a threshold injury. *Id.* at 131. The trial court must first determine whether a factual dispute exists concerning the nature and extent of the plaintiff's injuries. If there is no dispute, or if a dispute exists that is immaterial to whether a plaintiff has endured a serious impairment of a body function, the court must determine whether "an 'important body function' of the plaintiff has been impaired." *Id.* at 131-132. To merit further inquiry, a court has to find both that "an important body function has in fact been impaired," and that the impairment qualifies as objectively manifested. *Id.* at 132. A plaintiff who has sustained an objectively manifested impairment of an important body function must also demonstrate that the impairment affects his or her general ability to lead a normal life. *Id.* "In determining whether the course of the plaintiff's normal life has been affected, a court should engage in 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 the plaintiff's overall life." *Id.* at 132-133. This analysis must be followed by an objective determination of "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." *Id.* at 133. The *Kreiner* Court summarized that "[a]lthough some aspects of a plaintiff's entire normal life may be interrupted by the impairment, if, despite those impingements, the course or trajectory of the plaintiff's normal life has not been affected, then the plaintiff's 'general ability' to lead his normal life has not been affected." *Id.* at 131.

Defendant's motion for summary disposition focused solely on the last of the *Kreiner* inquiries, whether plaintiff's 2004 injuries affected his general ability to conduct his normal life. Accordingly, we review only that issue, and accept that plaintiff otherwise established an objectively manifested, serious impairment of an important body function.

Plaintiff alleges that the back, neck and shoulder injuries he sustained in the February 2004 accident rendered him unable to work or to perform the routine household activities that he previously performed while helping his wife care for their six children. At his deposition, plaintiff testified that before the accident, he worked 40 to 55 hours a week at Iraqi Community Services (ICS). There, he helped recruit interpreters for the United States Army, assisting applicants by picking them up at the airport, helping them with their luggage, and driving them to locations for "test[s] and exams." He claimed that his employment at ICS commenced in June or July 2003, and continued without interruption until his 2004 accident. According to plaintiff's deposition testimony, he could not work at ICS after his accident because his neck and back pain made it impossible for him to drive for more than 10 to 15 minutes at a time, or to lift even "a gallon of milk." Plaintiff testified that he had no employment after the accident, other than a brief and unsuccessful attempt to work in a grocery store. He declared that his "whole life had been ruined" by the injuries he sustained in 2004, although he admitted to having recently returned from a 45-day trip to Kuwait.

Defendant challenged plaintiff's claim that the 2004 accident affected his general ability to lead his normal life by presenting evidence establishing that two years before the 2004 accident, plaintiff sustained serious injuries in a different automobile accident. In 2002, a car rear-ended plaintiff's vehicle, herniating two of his cervical discs. Plaintiff's physician imposed

a prolonged period of disability. One physician's note states that plaintiff was to remain at rest through June 5, 2003. Other evidence presented to the circuit court reflects that in January 2003, plaintiff applied for social security disability benefits, alleging that he was "unable to work" due to disabling pain in his back, shoulder and neck, had difficulty walking, could stand for only two to three minutes, no longer drove, and required assistance with activities such as cooking, bathing and visiting. Plaintiff's social security benefit application included his declaration that his pain began in February 2002, and worsened to the point that "I may be paralyzed at any time." The application further averred that plaintiff felt "constant" pain, "even while I am lying down." Defendant argued that because plaintiff was totally disabled in 2003, the normal course of his life did not change as a result of the injuries he sustained in the February 2004 collision.

Defendant further alleged that plaintiff returned to work after the 2004 accident, and earned more income that year than he had in previous years. In support of this allegation, defendant submitted plaintiff's employment records and income tax returns. The employment records reveal that during the months after his accident, plaintiff worked as a store cashier. He quit that job in December 2004, "because of his wife being very sick." Another employment document provided to the circuit court reflects that plaintiff began working at a pizza restaurant in September 2005. Plaintiff's 2004 federal tax return states that he worked as a cashier and as a tutor. His tutoring business yielded gross receipts of \$17,909, and he earned approximately \$4,680 while working in the store.

Plaintiff countered this evidence with his September 2006 affidavit averring that he never actually received any social security benefits, that he made a full recovery from his disabling conditions before the February 2004 accident, and that he was working full time when the 2004 accident occurred. In support of these allegations, plaintiff submitted a pay stub from ICS. The pay stub indicates, however, that before plaintiff's accident in February 2004, he had received only three weeks' wages. Contrary to plaintiff's deposition testimony, the record contains no evidence that he worked for ICS in 2003.¹ Defendant's evidence establishing that plaintiff was disabled during most or all of 2003 thus remains un rebutted.

Plaintiff argues that his recent medical records demonstrate continuing physician-imposed restrictions that dramatically limit his ability to lead a normal life. The records supplied to the trial court, however, indicate that by June 2005, plaintiff's doctor recommended against "strenuous vocational or unvocational activities," but placed no other restrictions on plaintiff's life. Plaintiff has not submitted any evidence that the recommendation against strenuous activity prevented him from working as a cashier or a tutor, or impaired his ability to perform routine household tasks. Plaintiff also failed to produce any evidence that rebutted or countered defendant's submissions regarding his improved income and apparently increased hours of employment.

¹ In his brief on appeal, plaintiff claims to have earned \$11,834 while working with the Iraqi Community Center (sic) before the accident. This claim finds no support in his 2003 tax return, and plaintiff presented no documentary evidence refuting or explaining the pay stub record, which reflects only short-term employment.

The circuit court did not err when it concluded that plaintiff failed to demonstrate that he experienced a change in his general ability to lead his normal life. For most of 2003, plaintiff was disabled by his cervical spine herniations, and enjoyed only limited, short-term employment. If we assume that plaintiff fully and completely recovered from this injury before his 2004 accident, we are nevertheless left without evidence that the second accident demonstrably worsened plaintiff's employment status or curtailed his activities. According to the unrebutted documentary evidence of record, he earned more money after the accident than he did before it. Although plaintiff claims that he cannot perform normal activities of daily life, he provided the circuit court with no evidence to support this claim, and his medical records directly refute it. "Considered against the backdrop of his preimpairment life," plaintiff's "postimpairment life is not so different" that his general ability to lead it has been affected. *Id.* at 136.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly