

STATE OF MICHIGAN
COURT OF APPEALS

ROLLIE S. DRIVER,

Plaintiff-Appellant,

and

KATHY ANN DAVIS,

Plaintiff,

v

ORA RUSSELL PERKINS,

Defendant,

and

BOB'S AUTO BODY, INC.,

Defendant-Appellee.

UNPUBLISHED

December 18, 2008

No. 279961

Clinton Circuit Court

LC No. 05-009810-NI

Before: Saad, C.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

In this case predicated on the no-fault insurance act, MCL 500.3101 *et seq.*, plaintiff Rollie S. Driver appeals as of right the order of the trial court granting summary disposition to defendant Bob's Auto Body, Inc., pursuant to MCR 2.116 (C)(10). We reverse and remand.

A trial court's decision on a motion for summary disposition is reviewed de novo on appeal. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). We review the record in the same manner as the trial court to determine whether the moving party was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). Review is limited to the evidence presented to the trial court at the time the motion was decided. *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003). When deciding a motion for summary disposition under MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in a light most favorable to the nonmoving party, *Corley v Detroit Bd of Ed*, 470 Mich

274, 278; 681 NW2d 342 (2004), drawing all reasonable inferences in favor of the nonmoving party, *Scalise v Boy Scouts of America*, 265 Mich App 1, 10; 692 NW2d 858 (2005).

According to § 3135 of the no-fault insurance act, a driver may be liable in tort if an accident caused a “serious impairment of body function” to another person. MCL 500.3135(1). In this action, plaintiff claims he has suffered a serious impairment of body function within the meaning of the act. The act prescribes the factual and legal analysis of these claims in relevant part as follows:

(2) For a cause of action for damages pursuant to subsection (1) filed on or after July 26, 1996, all of the following apply:

(a) The issues of whether an injured person has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(i) There is no factual dispute concerning the nature and extent of the person’s injuries.

(ii) There is a factual dispute concerning the nature and extent of the person’s injuries, but the dispute is not material to the determination as to whether the person has suffered a serious impairment of body function . . .

* * *

(7) As used in this section, “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 or her normal life. [MCL 500.3135(2)(a), (7).]

Pursuant to *Kreiner v Fischer*, 471 Mich 109, 121; 683 NW2d 611 (2004), a serious impairment of a body function is shown where the injury (1) is objectively manifested, (2) involves an important body function, and (3) affects the plaintiff’s general ability to lead his normal life. The first two factors of the *Kreiner* test are not at issue in this appeal. With respect to the third, *Kreiner* explained that proper consideration of the factor involves examining the totality of a plaintiff’s circumstances before and after the accident. *Id.* at 134. *Kreiner* provided a nonexhaustive list of guidelines to be used when evaluating whether impairments affect a plaintiff’s general ability to lead his normal life. Specifically, courts should consider “(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.* at 133 (footnotes omitted).

In this case, viewing the facts in a light most favorable to plaintiff, plaintiff was driving a van on northbound US 127 in Clinton County, Michigan, on August 1, 2003. He was traveling just below the posted speed limit of 70 miles per hour when a tow truck owned by defendant turned directly in front of him. Plaintiff sustained a medial tibial plateau fracture and traumatic hemarthrosis (bleeding into the joint) in his right knee. He was transported by ambulance to the hospital, where he underwent open reduction internal fixation surgery at the fracture site and

aspiration of hematomas. Three 6.5 mm cancellous screws with accompanying washers were used to stabilize the fracture reduction. Plaintiff's right leg was placed in a long-leg brace and locked at 30 degrees of flexion. He remained hospitalized for five days.

Although the exact dates are not entirely clear from the record, plaintiff was required to be completely non-weight bearing on his right leg for approximately six weeks, and restricted to partial weight bearing until approximately three months after the accident. He was unable to drive until October 2003. Plaintiff's daughter-in-law moved in with him and transported him to various appointments, bought groceries, and assisted plaintiff with various activities at home for approximately four months.¹ Due to either the hematomas or bone perforating the skin at the time of the accident, plaintiff developed an area of necrosis on his knee that eventually healed on its own. By November 13, 2003, plaintiff was able to bear full weight on his right leg. In December, one of plaintiff's surgical screws fractured and bulged underneath the skin, which required partial removal by way of a surgical procedure in plaintiff's doctor's office in January 2004. In April 2004, plaintiff was discharged from active treatment for his knee.

While it is undisputed that plaintiff had degenerative arthritis in both knees prior to the accident, he remained active. Significantly, plaintiff lives with his girlfriend Kathy Davis and has been helping her raise her five grandchildren since 1998. Davis adopted the children in 2000. Plaintiff considers himself the only father figure in the children's lives, and until the time of the accident, he took part in all of their activities.²

Following the accident, plaintiff is left with a permanent limp. He experiences pain with various physical activities, and can no longer sleep on his right side. Plaintiff has difficulty in climbing stairs, bending and stooping, walking long distances, standing for long periods of time, walking on uneven surfaces, and he can no longer climb a ladder.³ Notably, he can no longer play football or basketball, or engage in several other physical activities with the children. Plaintiff's doctor has opined that these problems are consistent with and would be expected given the nature and extent of his injuries. The accident has also caused a varus deformity (structural inward deviation) of plaintiff's right knee, further complicating the prognosis of and treatment for his pre-existing arthritis, which includes a potential knee replacement. While plaintiff experiences popping, clicking, and locking of the right knee upon initiating ambulation—problems that he did not experience before the injury and that are consistent with the injury—it is not entirely clear whether these problems are due to the injury or his pre-existing arthritis. Plaintiff's doctor has opined that these residual impairments are permanent. In the future, plaintiff may also require additional hardware removal, as the remaining surgical screws

¹ Plaintiff's girlfriend, with whom he resides, was also injured in the accident.

² Plaintiff was 67-years old at the time of the accident and retired from employment.

³ At his deposition, plaintiff testified that "there's lots of stuff I can't do" as a result of his injuries from the accident. When asked specifics, plaintiff provided several but not all of the problems described above, the rest of which were contained in a subsequent affidavit that was supplemental to and did not contradict his deposition testimony. *Atkinson v City of Detroit*, 222 Mich App 7, 11-12; 564 NW2d 473 (1997).

continue to irritate him on occasion. Although plaintiff's doctor did not impose any specific physical limitations due to the need to maintain muscle tone and motion in plaintiff's knee, he did instruct plaintiff not to engage in any activity that causes him too much pain.

Plaintiff cites *McDaniel v Hemker*, 268 Mich App 269; 707 NW2d 211 (2005), to show that treatment by a physician may lead to self-imposed restrictions that can evidence residual impairment. In *McDaniel*, this Court described the plaintiff's residual impairment as follows:

The impairment here can be best described as the inability of McDaniel, in many situations, to position or maneuver her upper body, extremities, and neck and head in such a way that avoids pain from ligamentous injuries of the cervical spine, thereby interfering with or precluding various activities in McDaniel's life. This claimed impairment is continuing or ongoing and remains to discomfort McDaniel following the injury; therefore, it qualifies as a "residual" impairment. [*Id.* at 283.]

In *McDaniel*, the plaintiff's treating physician "instruct[ed] her to adjust her activities based on her pain level." *Id.* at 284.

In this case, plaintiff's physician testified that he instructed plaintiff to adjust his activities based on his pain level. Plaintiff testified to a significant number of limitations and affected activities in his daily life, including the inability to walk normally, which his doctor testified were consistent with and expected given the nature and extent of plaintiff's injuries. Accepting plaintiff's assertions regarding his physical limitations as true, then the existence of a residual impairment for purposes of considering this summary disposition motion is established. As such, we conclude that plaintiff has presented sufficient evidence from which a fact finder could conclude that his injury has affected the overall course of his life.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering