STATE OF MICHIGAN

COURT OF APPEALS

THEON CRUMPLER, JR.,

Plaintiff-Appellant,

v

PRISCILLA MURRELL, XAVIER BYNUM, JAWS FOR JESUS, GAMAIEL RILEY, S & L ASSOCIATES, INC., and S & L TRANSPORTATION,

Defendants-Appellees,

and

PATRICIA MURRELL, AMERISURE INSURANCE COMPANY, and AMERISURE MUTUAL INSURANCE COMPANY,

Defendants.

UNPUBLISHED
January 13, 2009

No. 279933
Wayne Circuit Court
LC No. 04-437463-NI

Before: Servitto, P.J., and Owens and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right, challenging the trial court's order granting summary disposition in favor of defendants Priscilla Murrell, Xavier Bynum, Jaws for Jesus, Gamaiel Riley, S & L Associates, Inc., and S & L Transportation, with respect to plaintiff's claim for third-party noneconomic damages under the no-fault act, MCL 500.3135. We affirm.

I. Facts

This action arises from an automobile accident in December 2001. Plaintiff was previously injured in an automobile accident in 1986, in which he suffered a closed-head injury and a fracture of the seventh cervical vertebra. As a result of that accident, plaintiff suffered from spasms that impaired his ability to walk normally and safely, as well as perform a variety of other tasks, such as cooking, shopping, doing laundry, cleaning, and going to the bathroom. Since the 1986 accident, plaintiff has been under the constant care and supervision of his father and other family members. Plaintiff represented to his no-fault insurer, Automobile Club

Insurance Association (ACIA), that these injuries necessitated 24-hour attendant care for assistance with daily living and safety supervision.[1]

In the 2001 accident, plaintiff suffered a cervical muscle strain and, thereafter, experienced pain in his left knee and pain and weakness in his right shoulder. Because of his new knee problem, he could not climb stairs normally, and his shoulder problem prevented him from reaching for objects above his head. Plaintiff also contends that he began suffering from seizures or "twitching," about 40 per day that last approximately half a second, and affect his arms, legs, head, and neck. Plaintiff asserts that he did not suffer from such seizures before the accident. Later, defendant swore in an affidavit that he suffered from these "jerking activities" about 150 to 190 times per day, and that he could no longer engage in activities that he had engaged in before, such as writing, ironing, going out to eat, or walking. Plaintiff also indicated that he could still write and iron with his right hand, but the new twitching now prevented him from shaving, using a toothbrush normally, eating with a fork or knife, drinking from an open container, or using a microwave oven. His head twitching also disturbed his sleep. Plaintiff stated that before the 1986 accident, he "would have to worry about walking, maybe my foot catching and tripping, but now [after the 2001 accident] it's the knee and the foot together giving out, because I fell and I hurt my elbow from my head twitching." When asked how his regular activities were affected after the 2001 accident, plaintiff replied that he cannot go anyplace with stairs or go to any events that involve standing.

After the 2001 accident, plaintiff brought this action to recover noneconomic damages under MCL 500.3135, alleging that the 2001 accident caused a serious impairment of a body function that affected his general ability to lead his normal life. Defendants moved for summary disposition under MCR 2.116(C)(10), arguing that plaintiff had failed to establish any genuine issue of material fact that the impairment affected his general ability to lead his normal life. The trial court agreed and granted defendants' motions, relying in part on the doctrine of judicial estoppel because plaintiff had previously asserted in his lawsuits against ACIA that he required attendant care due to the 1986 accident.

II. Standard of Review

We review a trial court's summary disposition decision de novo. *Reed v Breton*, 475 Mich 531, 537; 718 NW2d 770 (2006). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Wilson v Alpena Co Rd Comm'n*, 474 Mich 161, 166; 713 NW2d 717 (2006). When ruling on a motion brought under MCR 2.116(C)(10), the trial court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Reed*, *supra* at 537. The motion should be granted if no genuine issue of any material fact exists and the moving party is entitled to judgment as a matter of law. *Huntington Woods v Detroit*, 279 Mich App 603, 614; __ NW2d __ (2008).

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[1] Plaintiff filed two lawsuits against ACIA for the recovery of personal injury protection benefits arising from the 1986 accident. Both actions concluded with settlements in which ACIA agreed to pay attendant care benefits for care that plaintiff received from his family.

III. Analysis

Plaintiff contends that although his abilities and activities were limited before the 2001 accident, his increased limitations after the accident affected his general ability to lead his normal life sufficient to meet the statutory threshold under MCL 500.3135(1). We disagree.

MCL 500.3135(1) provides that "[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." MCL 500.3135(7) 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."

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), our Supreme Court held that an injury does not generally affect a person's ability to lead a normal life unless the objectively manifested impairment of an important body function affects the *course* of the person's life. *Id.* at 130-131. The Court explained:

> Although 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 and he does not meet the "serious impairment of body function" threshold.
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> 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. Once this is identified, the court must engage in an objective analysis regarding 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. Merely "*any* effect" on the plaintiff's life is insufficient because a de minimus effect would not, as objectively viewed, affect the plaintiff's "general ability" to lead his life. [*Id*. at 131-133 (footnotes omitted).]

Although plaintiff presented evidence that his activities and abilities became more limited after the 2001 accident, we agree with the trial court that the difference is not substantial. *Id.* at 133. Accepting as true that the seizures affecting plaintiff's neck, shoulders, arms, and legs are new and distinct from the spasms plaintiff was experiencing before the accident, plaintiff has not shown that his lifestyle is appreciably more restricted or materially altered as a result of the new seizures. *Id.* at 131-134. The "added level of danger" that has allegedly disrupted his life has not substantially affected the "course or trajectory" of his normal life, although it has interrupted it. *Id.* at 131. Before the 2001 accident, plaintiff's activities were significantly restricted and he required 24-hour care and safety supervision. Plaintiff could not walk long distances and was prone to falling while walking short distances, due to spasms and "left foot drop." Plaintiff also required help with nearly all household duties, including cooking, laundry, and cleaning. After

the 2001 accident, plaintiff still has the same difficulties, albeit to a higher degree. Nonetheless, when plaintiff's post-accident abilities are compared to his pre-accident abilities, the change is not so significant as to affect the "trajectory" of his life. *Id*. at 133. Plaintiff still requires 24-hour attendant care and supervision, requires assistance with daily tasks, and still has difficulty walking. As such, the additional impairment that plaintiff has suffered, which has required some modifications to plaintiff's lifestyle, e.g., different hygiene practices and negotiation of stairways, does not involve a lifestyle alteration substantial enough to meet the threshold injury requirement of MCL 500.3135(1).

Further, after the 2001 accident, plaintiff indicated that he can no longer eat in a restaurant, shop in a mall, or attend a sporting event. However, plaintiff admitted that he has eaten in restaurants since the 2001 accident. He also admitted that he has not attended any sporting events for two years before the 2001 accident, and he did not provide any evidence regarding his shopping activities. He admitted that he could enjoy some of these activities if he used a wheelchair. However, such self-imposed restrictions do not establish the extent of plaintiff's residual impairment. *Id.* at 133 n 17. The trial court did not err by granting summary disposition for defendants.

Because we conclude that the trial court's summary disposition decision was proper, we find it unnecessary to address plaintiff's argument that the court erred to the extent that it concluded that the doctrine of judicial estoppel precluded the present action.

Affirmed.

/s/ Deborah A. Servitto
/s/ Donald S. Owens
/s/ Kirsten Frank Kelly