STATE OF MICHIGAN

COURT OF APPEALS

ANTHONY YARGER and DEBRA YARGER,

Plaintiffs-Appellants,

v

TIMOTHY GARCHOW, GARY PLATKO, and GLOBAL ALARM, INC.,

Defendants-Appellees,

and

STATE FARM INSURANCE,

Defendant.

UNPUBLISHED
February 24, 2009

No. 281971
Saginaw Circuit Court
LC No. 05-058599-NI

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

In this automobile negligence action, plaintiff appeals as of right from the trial court's opinion and order granting defendants Timothy Garchow's and Global Alarm, Inc.'s motion for summary disposition on the ground that plaintiff's injuries failed to meet the serious impairment threshold. Because we conclude that there were no errors warranting relief, we affirm.

The accident at issue occurred in December 2002. At that time, plaintiff had stopped for a red light and was waiting to turn right. After the light turned green, defendant Garchow, who was driving a vehicle owned by defendants Gary Platko and Global Alarm, Inc, rear-ended plaintiff. This accident followed a prior auto accident that occurred in December 2000, where plaintiff was also rear-ended.

Plaintiff's neck and right shoulder were injured in this first accident. The neck injury required a cervical fusion, which Dr. Schinco performed in 2001. According to Dr. Jurado, who treated plaintiff after the December 2000 accident, it was unrealistic to expect a full recovery from the first accident because of the "structural changes that have occurred in [plaintiff's] neck where he had [the] cervical fusion and his shoulder effusion in the right." Following the second accident, plaintiff continued to see Dr. Jurado, who noted on the day of the accident that plaintiff had "a very rigid posture," was in "much worse condition than before," and had an "apparent exacerbation of his shoulder pains and a very stiff back."

Before the first accident, plaintiff worked as a janitor for 14 years. The job was physically demanding and required him to carry heavy objects, mop, climb ladders, and push lawn mowers. In his free time, plaintiff enjoyed bowling, fishing, playing basketball and baseball, riding horses, having intimate relations with his wife four to five times a week, walking in malls, building tables with his brother-in-law, jogging five or six miles a day, and lifting weights. Plaintiff also helped with household chores by taking out the garbage, cutting the grass, vacuuming the house, and taking laundry baskets up from the basement. However, after the first accident, plaintiff's activities were limited. Plaintiff could not return to work as a janitor, and he could not bowl, play basketball, play baseball, or ride horses. Plaintiff could still fish, walk in malls, have intimate relations with his wife two to three times a week, build tables with his brother-in-law, and help with household chores.

After the second accident, plaintiff still could not return to work as a janitor, but after moving to Georgia, he did work for a year and a half as a head custodian. Plaintiff testified that after the second accident he could no longer fish like he used to, and only had intimate relations with his wife once a week. He also testified he would not have been able to help his brother-in-law build tables because of the carpal tunnel in both of his hands, and that he could not jog, do light upper body weight lifting, or help with household chores.

Plaintiff sued defendants for damages arising from the December 2002 accident. In October 2007, the trial court granted summary disposition in favor of defendants because plaintiff's injuries did not meet the serious impairment of body function threshold. This appeal followed.

A trial court's decision to grant summary disposition motion is reviewed de novo. *First Public Corp v Parfet*, 468 Mich 101, 104; 658 NW2d 477 (2003). Under MCR 2.116(C)(10), a motion for summary disposition tests if there is any factual support of the claim. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). "In deciding a motion pursuant to subrule (C)(10), the trial court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Under Michigan's no-fault act, MCL 500.3101 *et seq*, a person generally may not sue for injuries arising out of an automobile accident. *Kreiner v Fischer*, 471 Mich 109, 114; 683 NW2d 611 (2004). However, an injured person can sue for noneconomic loss if the person has suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). A serious impairment of body function is "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(7).

In *Kreiner*, the Michigan Supreme Court set forth a basic framework for courts to determine whether a person has suffered a serious impairment of an important body function. First, the court must determine whether there is a factual dispute regarding the nature and extent of the person's injuries. *Kreiner*, 471 Mich at 131-132. If there is a factual dispute, the court cannot decide the issue as a matter of law, unless the factual dispute is not material in determining if there was a serious impairment of body function. *Id*. at 132. Second, if the point can be decided as a matter of law, the court must determine if the plaintiff has suffered an

objectively manifested impairment of an important body function. *Id*. Third, if the court finds an objectively manifested impairment of an important body function, it "then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life." *Id*.

To determine whether the impairment affects the plaintiff's general ability to lead his normal life, the court must evaluate the totality of the circumstances to determine whether the impairment affects the plaintiff's "normal" life. This necessarily requires "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. When comparing the plaintiff's pre-accident life with his post-accident life, five nonexhaustive factors are considered: "(a) the nature and extent of the impairment, (b) the type and length of the 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. The existence of a residual impairment cannot be established through subjective complaints about pain, which the plaintiff claims prevents him from participating in certain activities; rather, the existence of a residual impairment must be based on physician-imposed restrictions. *McDanield v Hemker*, 268 Mich App 269, 282-284; 707 NW2d 211 (2005).

In this case, there is no material factual dispute regarding the nature and extent of plaintiff's injuries such that the court could not determine whether the second accident caused a serious impairment of an important body function as a matter of law. Further, it was objectively shown that an important body function of plaintiff's was impaired by the second accident. An MRI taken in February 2003, showed bulging discs in plaintiff's cervical spine. This was a change from an MRI taken before May 21, 2002, which did not show bulging discs. Additionally, an MRI of plaintiff's neck read by Dr. Schinco soon after the second accident showed "some degenerative changes at multiple levels," and Dr. Jurado noted that plaintiff had thoracic symptoms of pain from the second accident and that, since the second accident, several of plaintiff's symptoms had gotten worse. The use of one's neck and back is an important body function. *Chumley v Chrysler Corp*, 156 Mich App 474, 481-482; 401 NW2d 879 (1986). Notwithstanding this, plaintiff failed to demonstrate that, as a result of the second accident, he was not generally able to live his normal life.

Under *Kreiner*, the court had to compare the plaintiff's life before the accident with the plaintiff's life after the accident. Kreiner, 471 Mich at 132-133. However, this case is complicated by the fact that plaintiff's lifestyle had already been limited by an earlier accident. In this case, there is uncontradicted medical evidence showing that plaintiff's injuries sustained in the first accident were incapable of healing. On November 1, 2002, approximately one month before the second accident, Dr. Jurado explained to plaintiff "that it is unrealistic to do a full recovery in this light because of the structural changes that have occurred in his neck and shoulder where he had [the] cervical fusion and his shoulder effusion in the right." Because there was no evidence that the impairments from the first accident had resolved or would resolve, whether plaintiff has suffered a serious impairment depends on whether the injuries from the second accident altered his general ability to lead his life as it existed after the first accident. See *Benefiel v Auto-Owners Ins Co*, ___ Mich ___, ___; ___ NW2d ___ (2008) (stating that a plaintiff "who has suffered successive injuries bears the burden of proving that his current injury was caused by the subsequent accident" and, therefore, "must prove that his preexisting

impairment is temporary in order to have his pre-impairment lifestyle considered as his 'normal life.'").

Looking at plaintiff's health history, he generally suffers from similar health issues after the second accident as he did after the first accident.[1] Following the first accident, plaintiff had an MRI that showed "a mild broad-based disc protrusion at the C5-C6 areas." This injury was treated with a cervical fusion. Plaintiff was also seen by Dr. Jurado who, according to plaintiff got him "back to walking and everything." Plaintiff took Motrin, was involved in physical therapy, and was massaged frequently by his wife. Following the second accident, an x-ray in the emergency room did not indicate any broken bones or a misaligned spine, and Dr. Schinco, after an examination, did not feel surgery was warranted. After the second accident, plaintiff received therapy for approximately three months, was massaged by his wife, and saw Dr. Jurado from December 2002 to August 2003.

There was evidence that after the first accident plaintiff was experiencing headaches, and waking up two to three times a night. He also had a weak grip, early carpal tunnel, arthritis in his shoulder, he could not lift with his right arm, and could only lift ten pounds with his left arm. Just before the second accident, plaintiff was still experiencing neck pain, headaches, waking up two to three times a night from neck, shoulder and back pain, had a weak grip, dropped things, and had "some shakiness and balance problems." After the second accident, it was noted by Dr. Jurado that plaintiff had "headaches all night," still dropped things, had a weak grip, and woke up at night from pain in his right shoulder and upper back. Hence, plaintiff's symptoms following the first accident are substantially similar to those after the second accident.

Looking at plaintiff's employment history, plaintiff was unable to return to work as a janitor as a result of the first accident. According to plaintiff, he was set to return just days after the second accident. But this contradicts plaintiff's medical records from Dr. Jurado who noted

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[1] In examining whether plaintiff's general ability to lead his normal life was affected by the second accident, we do not consider the independent medical evaluation and follow-up letter generated for defendants. Only admissible evidence may be considered in a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 123 n 5; 597 NW2d 817 (1999). A physician's report is inadmissible hearsay unless it falls into an exception or exclusion. *People v Huyser*, 221 Mich App 293, 297; 561 NW2d 481 (1997). Because independent medical evaluations are not performed for the purpose of diagnosis or treatment, they are not admissible under the medical diagnosis exception. MRE 803(4). Likewise, independent medical evaluations, such as the one at issue here, are frequently generated in contemplation of litigation. Hence, they are inherently untrustworthy and, for that reason, are not admissible under the exception for records of regularly conducted activity. See MRE 803(6) (excepting records kept in the course of regularly conducted business activity unless the circumstances of preparation indicate lack of trustworthiness); *Attorney General v John A Biewer Co, Inc*, 140 Mich App 1, 17; 363 NW2d 712 (1985) (noting that documents prepared for litigation are not inherently trustworthy). Because the independent medical evaluation and follow-up letter are hearsay and do not fall under an exception, they cannot be considered for purposes of summary disposition.

about one month before the second accident, that plaintiff was disabled to work "in reference to the manual work," and he was working in "car sales for the last six months," which "has proven that he is functional to work but not as a custodian."

After the second accident, plaintiff was still not able to return to work as a janitor. One month after the second accident, plaintiff expressed a desire to return to work and discussed the needed clearance with Dr. Jurado, but was told he would be off until March 2003. In March, Dr. Jurado was willing to let plaintiff go back to work with a weight restriction of 20 pounds, and in May 2003, Dr. Jurado was willing to let plaintiff work with a weight restriction of 30 to 35 pounds. Plaintiff eventually moved to Georgia in 2005 and worked as a supervising custodian. From the evidence presented, plaintiff's working life as a janitor was not affected by the second accident.

Looking at plaintiff's home and recreation life, plaintiff testified that between the first and second accident he could not bowl, play basketball or baseball, or ride horses. He could fish, walk in malls, do light upper body weight lifting, and build tables with his brother-in-law. Just before the second accident, plaintiff was even able to jog, help with household chores, and have intimate relations with his wife two to three times a week. Following the second accident, plaintiff could still fish, although not like he used to, and plaintiff still had intimate relations with his wife, although only once a week. Also following the second accident, plaintiff would not have been able to help his brother-in-law to work on tables because of carpal tunnel in both his hands, and he was unable to jog, do light upper body weight lifting, or help with household chores.

The only activities plaintiff testified he could not participate in after the second accident, that he could participate in after the first accident, were building tables, jogging, walking in malls, participating in light upper body weight lifting, and helping with household chores. However, these limitations were not established through physician-imposed restrictions. Rather, these limitations appear to be self-imposed. But a residual impairment cannot be proved with "self-imposed restrictions based on real or perceived pain." *McDanield,* 268 Mich App at 283.

Regarding the upper body weight lifting and household chores, plaintiff's testimony contradicts notes made in his medical record by Dr. Jurado. In March 2003, three months after the second accident, Dr. Jurado noted that plaintiff has "started recently to lift a bundle of hay about 30 pounds in all, clean the house, [sweep] the floor, did the garbage, [and] shoveled this past week and the other day because of the snow." From the medical record, it appears that plaintiff can do light upper body weight lifting and could help with household chores. The medical record also indicates Dr. Jurado was aware of plaintiff's activities, and nevertheless chose not to restrict plaintiff from participating in them.

Regarding plaintiff's inability to walk in the malls, plaintiff has not shown any physician-imposed restriction preventing him from engaging in that activity. According to plaintiff, he was unable to walk in the malls after the second accident because his knees, back, and Achilles tendon could not handle it. However, plaintiff's Achilles tendon was injured in a work-related accident in 1994 or 1995, and his lower back pain is not auto-related. In October 2002, before the second accident, Dr. Jurado noted plaintiff was having low back, knee, and heel pain, which likely began with an earlier leg injury, and was exacerbated by the first motor vehicle accident. Further, during plaintiff's last visit, Dr. Jurado noticed that since the second accident several of

plaintiff's symptoms had gotten worse, like his legs giving way and pain in his lower back and mid-thoracic area. Despite this, plaintiff presented no evidence to show that as a result of this new pain Dr. Jurado or another physician imposed any restrictions.

Regarding plaintiff's ability to build tables, he did not present any evidence showing that his inability to work on tables was directly related to the second accident. According to plaintiff's testimony, the carpal tunnel resulted from the second accident, and he had no trouble with carpal tunnel in either of his hands before the second accident. However, at plaintiff's first visit to Dr. Jurado before the second accident, it was noted that plaintiff had carpal tunnel, grip weakness, and that he dropped things. Although a disability certificate issued in May 2003 indicated that plaintiff was on "permanent disability for custodial work, truck driving full time or any repetitive motions of neck, shoulders or hands," plaintiff presented no evidence to show that his hand injury arose from the second accident.

There was evidence that plaintiff's life was affected after the second accident: plaintiff required more medical treatment, experienced more pain in his neck, back and shoulder, and had some further limitations on his free time activities and ability to do housework. Nevertheless, there was little change between plaintiff's life after the December 2000 accident and the accident that occurred in December 2002. Because there was insufficient evidence that plaintiff's general ability to conduct the course of his life was affected by an objectively manifested impairment of an important body function due to the second accident, the trial court properly granted summary disposition in favor of defendants. *Kreiner*, 471 Mich at 136.

Affirmed.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly