

STATE OF MICHIGAN
COURT OF APPEALS

STEVEN PLACE,

Plaintiff-Appellee,

v

CAMERON GROENEWOUD,

Defendant-Appellant.

UNPUBLISHED
February 26, 2009

No. 282108
Wayne Circuit Court
LC No. 07-704968-NI

Before: Whitbeck, P.J., and O’Connell and Owens, JJ.

PER CURIAM.

Defendant appeals by leave granted an order denying his motion for summary disposition in this no-fault action, and granting summary disposition to plaintiff. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On January 17, 2006, defendant’s vehicle hit plaintiff’s car. Plaintiff, who is right-handed, suffered a wrist injury that required surgery, casting and extensive occupational therapy. Plaintiff was not able to return to work, where he was required to lift bags weighing 50 to 75 pounds, until approximately 11 months after the accident. Plaintiff recovered only 63 per cent of the range of motion in his wrist and has diminished grip strength, which will not improve. He re-injured the wrist approximately 18 months after the accident from overexertion. He suffered tendonitis and swelling, and was instructed to limit his activity.

Plaintiff indicated that he needed help with activities of daily living until approximately August 2006, eight months after surgery, and needed help with some things even after that date. Initially, he could comb his hair with his left hand, but got assistance with showers. He could not zip or button, and so wore sweat pants. He could not tie shoes, but used Velcro sandals in the summer and, if he could not find someone to tie his shoes, left the laces loose but knotted them to keep the shoes on in the winter. He had trouble using the toilet, brushing his teeth (until he got an electric toothbrush), and taking care of other basic needs.

Under the no-fault insurance act, MCL 500.3101 *et seq.*, a plaintiff may recover for non-economic damages if he “has suffered death, serious impairment of body function, or permanent serious disfigurement.” MCL 500.3135(1). A serious impairment of a 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 500.5135(7). The grant or denial of a

motion for summary disposition is reviewed de novo. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). The *Kreiner* Court outlined three steps to be used in discerning whether a plaintiff had met the statutory threshold. See also MCL 500.3135(2)(a). Each will be examined separately.

First, a court must determine that there is no factual dispute concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function. If a court so concludes, it may continue to the next step. But, if a court determines there are factual disputes concerning the nature and extent of a plaintiff's injuries that are material to determining whether the plaintiff has suffered a serious impairment of body function, the court may not decide the issue as a matter of law. MCL 500.3135(2)(a)(i) and (ii). [*Kreiner*, *supra* at 131-132; footnotes omitted].

Defendant suggests that he might have been able to establish a factual issue if plaintiff's surgeon had been deposed, but does not elaborate on the point. Moreover, nothing in the medical records or the surgeon's affidavit suggests that any supplementary testimony would have shed additional light on the nature and extent of plaintiff's injury. Plaintiff suffered a broken wrist that required surgery, and he will have permanent limitation on his range of motion and a permanent loss of his strength of grip. Pain with over-exertion has already occurred and he has a prognosis for future arthritis. Accordingly, the trial court properly determined that there was no material factual dispute regarding the nature and extent of plaintiff's injury.

The second step outlined in *Kreiner* is as follows:

[The court] must next determine if an "important body function" of the plaintiff has been impaired. It is insufficient if the impairment is of an unimportant body function. Correspondingly, it is also insufficient if an important body function has been injured but not impaired. If a court finds that an important body function has in fact been impaired, it must then determine if the impairment is objectively manifested. Subjective complaints that are not medically documented are insufficient. [*Id.* at 132].

Use of one's wrist is an important body function. *Kroft v Kines*, 154 Mich App 448, 452; 397 NW2d 822 (1986), vacated on other grounds 428 Mich 879 (1987). Impairment of this body function was established by plaintiff's initial inability to use his wrist and the subsequent limitations on use. The break was objectively manifested by CT scans and the surgeon's observations. Notably, defendant does not appear to contest this point.

The third step in *Kreiner* is as follows:

[The court] then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life. 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.¹⁶

The following nonexhaustive list of objective factors may be of assistance in evaluating whether the plaintiff's "general ability" to conduct the course of his normal life has been affected: (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 impairment¹⁷, and (e) the prognosis for eventual recovery. This list of factors is not meant to be exclusive nor are any of the individual factors meant to be dispositive by themselves. For example, that the duration of the impairment is short does not necessarily preclude a finding of a "serious impairment of body function." On the other hand, that the duration of the impairment is long does not necessarily mandate a finding of a "serious impairment of body function." Instead, in order to determine whether one has suffered a "serious impairment of body function," the totality of the circumstances must be considered, and the ultimate question that must be answered is whether the impairment "affects the person's general ability to conduct the course of his or her normal life." [*Kreiner, supra* at 132-134; some footnotes omitted].

¹⁶ Contrary to the dissent, we do not require that "every aspect of a person's life must be affected in order to satisfy the tort threshold . . ." *Post* at 154. Rather, in a quite distinct proposition, we merely require that the whole life be *considered* in determining what satisfies this threshold, i.e., whether an impairment "affects the person's general ability to lead his or her normal life."

¹⁷ Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point.

Defendant suggests that the effect on plaintiff's life was de minimus and that his life after the accident was essentially not altered. We disagree. Addressing the five factors outline above, we note (a) that the nature and extent of the impairment was a broken wrist that required surgery and will be permanently limited; (b) the treatment was invasive, and occupational therapy lasted until eleven months after the accident; (c) the duration is ongoing--apart from the initial impairment, plaintiff suffered further impairment after the surgery, impairment until he was returned to work, a continuing limitation on range of motion and grip strength, and continued limitations as evidenced by his May 2007 reinjury from overexertion; and (d) there is residual impairment. Defendant suggests that the continuing impairment is self-imposed based on pain and that this belies any serious impairment. However, in *McDaniell v Hemker*, 268 Mich App 269, 282-283; 707 NW2d 211 (2005), this Court held that the self-imposed analysis goes only to the residual impairment factor, which is only one of the five non-exhaustive factors to be considered in determining whether there is a threshold injury. Moreover, the *McDaniell* Court stated:

We note that a self-imposed restriction *not* based on real or perceived pain can be considered. If a plaintiff restricts himself or herself from doing something because the plaintiff is physically incapable of doing so, but not on the basis of pain, the restriction should be subject to consideration in determining the extent of any residual impairment. [*Id.* at 283].

Here, the surgeon noted expressly that plaintiff could not chop wood and could rake only sporadically. Moreover, plaintiff learned that he could not overexert almost one and one-half years after the injury, not due to pain but because the overexertion would result in additional injury. The surgeon noted that this subsequent injury had caused not only pain, but also tendonitis and swelling. It required a brace, a limitation on strenuous activities, and anti-inflammatory medication. Thus, there was a showing of residual impairment apart from self-imposed restrictions. The final factor (e) deals with the prognosis for eventual recovery. Here, it is anticipated that there will always be a limitation on range of motion and grip strength. Further, the prognosis is for arthritis.

The totality of the above factors must be evaluated to determine if the impairment “affects [plaintiff’s] general ability to conduct the course of his or her normal life.” The most significant effect on plaintiff’s normal life was during the initial 11 months when he could not independently take care of basic needs, could not work, and was engaged in occupational therapy up to five times per week. Long-term, it is noted that plaintiff described various recreational activities that he could no longer do as a result of this problem. He tried canoeing once, but it stressed his wrist. He could not use his one-person kayak because he could not do it alone. He could not bowl, garden, rake, shovel snow, split wood, or ride a motorcycle. He could do target practice with a pellet gun, but not with his .22 or a .357 magnum. Apart from these hobbies, he could not hold a book or write for any significant amount of time because his wrist would ache and cramp. Although plaintiff was able to attend to his basic needs and work as of 11 months after the accident, it appears that his life outside of work, which he only did 11 to 15 hours per week, was significantly altered. Moreover, apart from being unable to live his life as he once did, his thwarted desire to pursue his education likely affected the course and trajectory of his life. Accordingly, the trial court correctly held that plaintiff had suffered a serious impairment of body function as a matter of law.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O’Connell
/s/ Donald S. Owens