

STATE OF MICHIGAN
COURT OF APPEALS

JOSHUA CONKLIN,

Plaintiff-Appellant,

v

MARSHA SHACK and ERIC FRANCIS
EDWARDS,

Defendants-Appellees.

UNPUBLISHED

July 27, 2006

No. 268316

Shiawassee Circuit Court

LC No. 05-002142-NI

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

In this third-party action to recover noneconomic damages under the no-fault act, plaintiff appeals as of right from a circuit court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10).¹ Plaintiff challenges the trial court's determination as a matter of law that he did not suffer a serious impairment of body function. MCL 500.3135(1). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Summary disposition may be granted under MCR 2.116(C)(10) when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Maiden v Rozwood*, 461 Mich 109, 118, 120; 597 NW2d 817 (1999).

A plaintiff may recover noneconomic damages under the no-fault act only where the plaintiff has suffered "death, serious impairment of body function, or permanent serious disfigurement." MCL 500.3135(1). The issue whether a person has suffered a serious

¹ Defendants' motion was brought pursuant to MCR 2.116(C)(8) and (10). The trial court did not expressly identify the subrule under which it granted the motion, but its decision indicates that it relied on documentary evidence beyond the pleadings. Therefore, it is apparent that the motion was granted under MCR 2.116(C)(10). *Krass v Tri-Co Security, Inc*, 233 Mich App 661, 664-665; 593 NW2d 578 (1999).

impairment of body function or a permanent serious disfigurement is a question of law for the trial court to decide if the court determines that there is no factual dispute concerning the nature and extent of the person's injuries or that there is a factual dispute concerning the nature and extent of the person's injuries, but the dispute is not material to the determination whether the person has suffered a serious impairment of body function. MCL 500.3135(2)(a).

“‘[S]erious 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(7).

In this case, there is no dispute that plaintiff had an objectively manifested impairment of an important body function. Specifically, he sustained a compression fracture at T-12. Movement of the back is an important body function. *Chumley v Chrysler Corp*, 156 Mich App 474, 481; 401 NW2d 879 (1986).

However, to meet the requisite threshold, the impairment of an important body function must affect the course or trajectory of a person’s entire normal life. *Kreiner v Fischer*, 471 Mich 109, 130-131; 683 NW2d 611 (2004). In determining whether the course of a person’s normal life has been affected, a court should compare the plaintiff’s life before and after the accident and evaluate the significance of any changes on the course of the plaintiff’s overall life. *Id.*, pp 132-133. Even where there are minor changes in how the person performs an activity, a person may generally be able to continue performing that activity. *Id.*, p 131. The court may consider factors such as the nature and extent of the impairment, the type and length of treatment required, the duration of the impairment, the extent of any residual impairment, and the prognosis for eventual recovery. *Id.*, p 133. Residual impairment is not established by self-imposed restrictions based on real or perceived pain. *Id.*, p 133 n 17; *McDaniels v Hemker*, 268 Mich App 269, 282-283; 707 NW2d 211 (2005).

Given the evidence before the trial court, we find no error in the court’s conclusion that plaintiff’s injury did not affect the course or trajectory of his overall normal life. He was unable to work from approximately August 20, 2003, to March 12, 2004, and from January 21, 2005, to April 2005, but ultimately was able to continue his work stocking shelves at a grocery store. “[A]n impairment of short duration may constitute a serious impairment of body function if its effect on the plaintiff’s life is extensive.” *Williams v Medukas*, 266 Mich App 505, 508; 702 NW2d 667 (2005); see also *Kreiner, supra*, p 134. The evidence indicates that plaintiff was required to use a back brace for nearly six months. The checklists that plaintiff completed do not indicate a level of impairment for a period of time that had an “extensive” effect on plaintiff’s life. Plaintiff did not otherwise present evidence that the impairment during this period had an extensive effect on his life.

With respect to residual impairment, plaintiff reportedly suffered from back pain. He claimed at the time of his deposition that he was unable to engage in recreational activities such as football and bow hunting, but there is no evidence that these activities were important aspects of his life. Cf. *Williams supra*, p 509; see also *Kreiner, supra*, p 134 n 19. Moreover, plaintiff’s decision to refrain from those activities is not sufficient to establish residual impairment. “Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point [residual impairment].” *Kreiner, supra*, p 133 n 17. “[T]he extent of this residual impairment cannot be proven by way of self-imposed restrictions based on

real or perceived pain. Stated differently, [plaintiff] cannot establish the extent of [his] residual impairment by merely claiming that [he] has restricted [him]self from engaging in activities or making certain movements because [he] experiences pain.” *McDaniels, supra*, p 283. A self-imposed restriction may be considered where it is not based on pain, but rather because the plaintiff is physically incapable of performing the activity. *Id.*; see also *Williams, supra*, p 509 (indicating that a court may consider changes in activities that are consistent with a physician’s observation of limited movement). Plaintiff did not offer evidence linking his decision not to engage in football or hunting to a physician’s observation of limited movement or a physical incapability of performing some motion. Plaintiff did not present evidence of any physician-imposed restrictions. In the absence of physician-imposed restrictions or restrictions that are attributable to physical incapacity, the change in activities does not show residual impairment.

Plaintiff’s claim focuses on the presence of back pain; however, the plaintiff in *Kreiner, supra*, p 124-125, reported continuous pain in his lower back and right leg nearly two years after the accident and had to limit his workday. Inasmuch as the *Kreiner* Court deemed that plaintiff’s impairment was inadequate to meet the threshold, the instant plaintiff’s impairment injuries also fall short.

Affirmed.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra