

STATE OF MICHIGAN
COURT OF APPEALS

ALI HASSAN ALMUSAAD,

Plaintiff-Appellee,

v

AUTO-OWNERS INSURANCE COMPANY,

Defendant-Appellant.

UNPUBLISHED

October 16, 2007

No. 273524

Wayne Circuit Court

LC No. 05-523083-CK

Before: Bandstra, P.J., and Talbot and Fort Hood, JJ.

PER CURIAM.

This appeal involves plaintiff's claim for uninsured motorist benefits from defendant, his no-fault insurer. Defendant appeals by leave granted from a circuit court order denying its motion for summary disposition pursuant to MCR 2.116(C)(10). We reverse. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This Court reviews de novo a circuit court's summary disposition ruling. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Id.* This Court also considers de novo issues of statutory construction, such as interpretation of the no-fault act. *Netter v Bowman*, 272 Mich App 289, 293; 725 NW2d 353 (2006).

Under the Michigan Court Rules, plaintiff's lack of participation in this litigation requires entry of summary disposition for defendant. After having discharged counsel, plaintiff failed to file any response to defendant's motion for summary disposition, contrary to MCR 2.116(G)(4). Because defendant supported its motion with documentation establishing that plaintiff did not suffer an injury that affected his general ability to lead his normal life, and because plaintiff offered no affidavits, depositions, or other admissible evidence creating a genuine issue of fact for trial, MCR 2.116(G)(6), the circuit court erred by denying defendant's motion for summary disposition. *Coblentz v City of Novi*, 475 Mich 558, 569-570; 719 NW2d 73 (2006).

The circuit court deemed summary disposition inappropriate because "there's information that [plaintiff's] doctor placed him under certain restrictions insofar as the activities that he may engage in," and that a jury should determine whether he was "having some difficulty leading his . . . normal life." To the extent that the circuit court made its ruling solely on the

basis of plaintiff's declaration at the summary disposition hearing that his doctor had advised him against working, the court improperly premised its ruling on hearsay. MRE 801 and MRE 802. MCR 2.116(G)(6).

Because the circuit court may have intended to incorporate by reference the documentary evidence that accompanied defendant's motion, we will consider whether this evidence gives rise to a genuine issue of fact. According to MCL 500.3135(1), "[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 . . . serious impairment of body function" The Legislature has defined "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." MCL 500.3135(7).

The Michigan Supreme Court set forth the following steps for courts to follow in determining whether a plaintiff has sufficiently alleged a serious impairment of body function:

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).

Second, if a court can decide the issue as a matter of law, it 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.

If a court finds that an important body function has been impaired, and that the impairment is objectively manifested, it 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.

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 impairment, 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. . . . Instead, in order to determine whether one has suffered a "serious impairment of body function," the totality of the circumstances must be considered [*Kreiner v Fischer*, 471 Mich 109, 131-134; 683 NW2d 611 (2004) (emphasis in original, footnotes omitted).]

The available documentary evidence undisputedly establishes that after the accident on December 16, 2004, plaintiff suffered a torn left rotator cuff.¹ We shall assume for purposes of this decision that the shoulder injury has impaired an important body function, and in light of the medical evidence documenting the shoulder injury, we will also assume that the injury qualifies as objectively manifested.² The question thus becomes whether any evidence tends to support that the shoulder injury has hindered plaintiff's general ability to lead his normal life.

A review of the evidence from which we may compare plaintiff's life before and after the accident reveals no substantiation of the proposition that the accident significantly and adversely affected his overall life. Although plaintiff made the unsupported proclamation at the summary disposition hearing that he had worked before the accident, the admissible evidence establishes that he was not working when the accident occurred. Plaintiff failed to respond to defendant's requests for admission, which included request nine, "Do you admit that you were unemployed on December 16, 2004?" and request 10, "Do you admit that you were not actively seeking employment on December 16, 2004?" See MCR 2.312(B)(1) (absent timely answers or objections, requests for admission are deemed admitted).³

At his deposition, plaintiff responded negatively to defense counsel's inquiry, "Besides playing guitar [because of numbness and tingling in a hand], is there anything else that you're not able to do since the time of your accident?" Plaintiff's failure to respond to the requests for

¹ Although one medical report mentions the presence of two "minute" bone spurs on plaintiff's spine, and an orthopedic surgeon's report documented his removal of a bone spur from plaintiff's left shoulder, no indication exists that these bone spurs either derived from or were exacerbated by the accident. An MRI report also mentions that plaintiff had a focal disc herniation at L5-S1, but concludes that this defect was "of doubtful clinical significance." Consequently, this opinion focuses on the left rotator cuff tear.

² Although plaintiff voiced general complaints of back pain during his March 2006 deposition, the record contains no evidence that objectively documents a continuing back condition. *Kreiner, supra* at 132.

³ The orthopedic surgeon's March 10, 2005, report also documents plaintiff's statement "that he was laid off 1 month before the accident." See MRE 803(6) (business record exception); MRE 801(d)(2)(A) (admission by party-opponent).

admission similarly deems admitted request eleven, “Do you admit that the only activity affected by your December 16, 2004 accident was your ability to play guitar?”

The only other evidence of plaintiff’s condition after his April 8, 2005, rotator cuff surgery is sparse, and consists of the very limited portion of plaintiff’s March 20, 2006, deposition in which plaintiff mentioned the existence of the following doctor-imposed restrictions:

Q. Has any of your doctors given you a list of things that they believe you shouldn’t do anymore?

Plaintiff: They give me since the surgery until November 2005 I can’t do anything. And I go to Dr. Joe, he make the decision in February. He stop everything. He don’t even touch me. He don’t give me something to lift, to check this. I accept to his decision. But he make decision from here to there, make ten or 20 minute decision, whatever

Accepting as true plaintiff’s testimony that in February 2006 his doctor imposed some restrictions, it would require speculation to read plaintiff’s broad statement as embodying any specific restrictions; plaintiff’s conclusory declaration that he “can’t do anything” cannot be taken literally. To the extent that plaintiff may have intended to identify that a doctor-recommended work restriction existed as of February 2006, because unrebutted evidence establishes that plaintiff did not work at the time of the accident, a post-surgery work restriction would not constitute a significant alteration of his pre-accident lifestyle.⁴

In summary, the evidence affords little meaningful comparison between plaintiff’s life before the accident with his life after the April 2005 arthroscopy, especially with regard to the ongoing nature and extent of plaintiff’s injuries, his prognosis for recovery, and the type or length of any necessary treatment. *Kreiner, supra* at 133. But because the available evidence agrees that (1) the only objective injury related to the accident constituted the small tear to plaintiff’s left rotator cuff, which was surgically repaired, and (2) this injury affected the course of plaintiff’s life only to the extent that it prevented him from playing the guitar, we conclude as

⁴ Defendant notes on appeal that at the summary disposition hearing, plaintiff possessed a slip of paper purportedly documenting that in June 2006, a doctor had restricted him from working. Even assuming the veracity of this proffered evidence, however, a work-related restriction still would not constitute a significant alteration of plaintiff’s pre-accident lifestyle.

a matter of law that the shoulder injury did not affect plaintiff's general ability to lead his normal life. *Id.* at 132-133. Consequently, the circuit court erred by denying defendant's motion for summary disposition pursuant to MCR 2.116(C)(10).

Reversed.

/s/ Richard A. Bandstra
/s/ Michael J. Talbot
/s/ Karen M. Fort Hood