

STATE OF MICHIGAN  
IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

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DONALD M. SNYDER and LINDA L. SNYDER,

Plaintiffs,

v

File No. 03-23282-NI  
HON. PHILIP E. RODGERS, JR.

CAROL ANN STAUB,

Defendant.

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DECISION AND ORDER  
GRANTING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

The Plaintiff Donald Snyder and the Defendant Carol Staub were involved in an automobile accident at the corner of US 31 South/Division Avenue and Fitzhugh Drive on February 22, 2003. The Plaintiff filed this third party no-fault action seeking noneconomic damages for a serious impairment of an important body function.

The Defendant filed a motion for summary disposition, pursuant to MCR 2.116(C)(10), claiming that there exists no genuine issue of material fact and that she is entitled to judgment as a matter of law. More specifically, the Defendant claims that the Plaintiff has not suffered a serious impairment of an important body function as defined in MCL 500.3135(7).

STANDARD OF REVIEW

MCR 2.116(C)(10) provides that summary disposition may be entered on behalf of the moving party when it is established that, "except as to the amount of damages, there is no genuine

issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.”

The applicable standard of review for a motion for summary disposition brought pursuant to MCR 2.116(C)(10) was set forth in *Smith v Globe Life Ins Co*, 460 Mich 446; 597 NW2d 28 (1999) as follows:

This Court in *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996), set forth the following standards for reviewing motions for summary disposition brought under MCR 2.116(C)(10):

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *McCormic v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

#### APPLICABLE LAW

MCL 500.3135(1) provides:

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.

Recently, in *Kreiner v Fischer*, Docket No. 124757, decided July 23, 2004, the Michigan Supreme Court established a multi-step process to provide the lower courts with a basic framework for separating out those plaintiffs who meet the statutory threshold and those who do not:

First, the 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 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 plaintiff’s overall life. Once this is identified, the court must engage in an objective analysis regarding whether any difference between plaintiff’s pre- and post-accident lifestyle has actually affected the plaintiff’s “general ability” to conduct the course of his life. Merely “any affect” 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.

I.

WHETHER THERE IS A FACTUAL DISPUTE  
CONCERNING THE NATURE AND EXTENT  
OF THE PLAINTIFF'S INJURIES; OR, IF THERE IS A  
FACTUAL DISPUTE, IS IT MATERIAL TO THE  
DETERMINATION WHETHER THE PERSON HAS SUFFERED  
A SERIOUS IMPAIRMENT OF BODY FUNCTION

It is undisputed in this case that the Plaintiff had a history of back and right shoulder problems. He is claiming that the accident aggravated his pre-existing condition.

The Plaintiff was seen by Dr. Mandell on January 16, 2001 at the request of the Plaintiff's employer for a work-related injury that occurred on January 3, 2001. Based on a physical examination, Dr. Mandell described his impressions as follows:

I initially thought he had a sprain of his right shoulder, and spondylosis, which is a medical term for arthritis of the lumbar spine with evidence of what is technically called a spondylolisthesis, which is a developmental condition of the back that predisposes backs to instability as they get older. It's just an inherent defect in the formation of the joints of the spine, in this case the lower lumbar spine. (Mandell Deposition p 5.)

By June 28, 2001, because the Plaintiff's condition had not improved, Dr. Mandell ordered an MRI. The results of the MRI were:

He has multiple severe degenerative – multiple levels, meaning the lumbar vertebrae levels, of severe degenerative disk disease. . . arthritis of the spine . . . with evidence of the spondylolisthesis, which is the slippage of one vertebra on the other . . . (Mandell Deposition p 13.)

Dr. Mandell again saw the Plaintiff on October 16, 2001:

He told me that he had an increasing amount of difficulties with his shoulder. He was using it for bow hunting. Had trouble maintaining the tension necessary to pull a bow, I guess. Pain with rotational motions. (Mandell Deposition p15.)

Dr. Mandell concluded: "I felt, as I had before, that he had degenerative arthritis with the irritation of the muscles that support the shoulder called the supraspinatus." (Mandell Deposition pp 9-10.) On December 10, 2001, Dr. Mandell diagnosed "chronic rotator cuff tendinitis - long-standing irritation of the muscles that support the shoulder because they are overworking trying to overcome

the ravages of arthritis.” (Mandell Deposition p 16.) Dr. Mandell treated the Plaintiff again on January 16, 2002 for “chronic tendinitis of the right shoulder.” (Mandell Deposition p 17.)

Dr. Prusick saw the Plaintiff on August 30, 2001 for “ongoing problems with low back pain.” (Prusick Deposition p 14.) Dr. Prusick reviewed the MRI that:

. . .shows evidence of moderate degenerative change of multiple lumbar discs, in particular L2-3, L3-4 and L4-5 and fairly severe degenerative changes at L5-S1 with a Grade 1 spondylolisthesis approximately 25% at L5-S1. The study did show as well bilateral pars defects. (Prusick Medical Record 08/30/01.)

Dr. Prusick saw the Plaintiff again on October 8, 2001 and explained to him that what is seen on his x-ray has “probably been there for years; however, the stability of spondylolisthesis was probably disrupted at the time of the [work-related fall] and this is what is felt to be accounting for his current symptoms.” (Prusick Medical Record 10/08/01.) On November 28, 2001, Dr. Prusick noted: “I am not sure that we can predict that his back will not flare up if he does heavy stressful work again in the future.” (Prusick Medical Record 11/28/01.) On January 17, 2002, Dr. Prusick again saw the Plaintiff who stated: “. . . he woke up last Friday morning and could hardly get out of bed as he was having a lot in the way of back pain and muscle spasms” which he attributed to “play[ing] quite hard” with his granddaughter the night before. (Prusick Medical Record 01/17/02.)

On March 1, 2002, Dr. Prusick saw the Plaintiff for “right shoulder pain.” (Prusick Medical Record 03/01/02.) He ordered a repeat MRI, ruled out a rotator cuff tear and reaffirmed “severe arthritis of the shoulder joint.” (Prusick Deposition p 14.) Dr. Prusick referred the Plaintiff to Dr. Wickstrom for evaluation. He thought the Plaintiff “may be a candidate for a shoulder arthroscopy for debridement . . . but ultimately he will probably need a hemi-arthroplasty.” (Prusick Medical Record 03/01/02.)

Dr. Wickstrom saw the Plaintiff on March 7, 2002. His recommendations/plan was:

I think that he may ultimately need a total shoulder arthroplasty or at least a hemiarthroplasty. I think we could eliminate a lot of his discomfort and help his function significantly by doing an arthroscopic debridement and lavage of the glenohumeral joint and a limited decompression. (Wickstrom Medical Record 03/07/02.)

The Plaintiff did not elect to go ahead with the arthroscopic debridement because he did not have insurance that would cover the procedure. (Wickstrom Deposition at p 8.)

Dr. Prusick saw the Plaintiff again on May 13, 2002 when he treated him for “severe flare-up of back pain and spasm” which the Plaintiff indicated occurred when he bent over to move a garden hose. (Prusick Medical Record 05/13/02.)

Following the subject automobile accident, Dr. Prusick first saw the Plaintiff on February 26, 2003. His findings were:

His x-rays really showed only the degenerative changes we were aware of. There were no acute findings, no fractures. And, basically we just went through an assessment to make sure he had not had any new apparent injuries that needed to be addressed in a different way. (Prusick Deposition pp 16-17.) . . . There was “[n]othing that I could identify by x-ray at this point.” “. . .there were no apparent changes that we could distinctly say were new.” (Prusick Deposition p 17.)

Dr. Prusick explained:

“in somebody who has a preexisting back problem and they suffer from I’m going to say a limited tolerance to any kind of a high stress or strain insult, this was one of those events that likely exacerbated his underlying pain.” (Prusick Deposition p 17.)

Dr. Prusick diagnosed the Plaintiff with a lumbar strain secondary to the accident. (Prusick Deposition p 30.) When asked how he diagnosed the lumbar strain, Dr. Prusick said:

The lumbar – and again, it would have been just fitting the best perceived mechanism. It would not have been as a way of any objective measure by virtue of x-rays or physical exam finding. It is an indication of what best clinically fit the condition and complaints. . . There were no objective changes that we were able to measure.” (Prusick Deposition p 33)

Dr. Wickstrom next saw the Plaintiff on April 22, 2003 because he “continued to have shoulder problems.” (Wickstrom Deposition p 9.) Interestingly, there is no mention of the automobile accident in the medical record of this visit. Instead, the record indicates that the Plaintiff “elected to wait and be reevaluated” because his insurance would not cover the procedures recommended by Dr. Wickstrom the year before. (Wickstrom Medical Record 04/22/03.) Suspecting a rotator cuff tear, Dr. Wickstrom recommended an MRI. The MRI was done on April 24, 2003. That MRI was “approximately the same” as the one previously done by Dr. Mandell.

(Wickstrom Deposition p 9.) Dr. Wickstrom saw the Plaintiff again on May 8, 2003. This time the Plaintiff complained of “ongoing pain in the right shoulder” which he said “significantly flared up” after the accident. (Wickstrom Medical Record 05/08/03.) In his records, Dr. Wickstrom indicated that the Plaintiff “did have some significant degenerative changes in the right shoulder prior to the automobile accident, but certainly an automobile crash of the magnitude he described could significantly aggravate his shoulder condition.” (Wickstrom Medical Record 05/08/03.) When asked about this conclusion at his deposition, Dr. Wickstrom testified at his deposition that “the patient came in and said that it started hurting after the automobile accident, and I stated that based on that history I would agree with that.” (Wickstrom Deposition p 39.) Dr. Wickstrom further testified as follows:

May 8<sup>th</sup>, 2003 is where he told you that his shoulder significantly flared up after the automobile accident, correct?

Yes.

And you have told us already several times that that’s based upon what Mr. Snyder told you, correct?

That’s correct.

You did not perform any objective test where you can tell us, taking away what Mr. Snyder told you, where you can tell us objectively that his shoulder flared up after the automobile accident?

No. (Wickstrom Deposition p 40.)

The Plaintiff testified that no medical provider restricted him from working following the accident. (Snyder Deposition p 46.) He nonetheless did not return to work because he “didn’t feel [he] could do it.” (Snyder Deposition p 46.) He further testified that his back did not stop him from working, just his shoulder. (Snyder Deposition p 47.) When asked how his shoulder was different after the accident, the Plaintiff testified that “[i]t wasn’t as painful before.” Before the accident, he “could work with it.”

There is no material factual dispute regarding the nature and extent of the Plaintiff’s injuries. Thus, it is proper to determine whether the Plaintiff sustained a serious impairment of body function as a matter of law. MCL 500.3135(2)(a)(I).

II.  
WHETHER THE PLAINTIFF HAS SUSTAINED  
A SERIOUS IMPAIRMENT OF AN  
IMPORTANT BODY FUNCTION AND, IF SO,  
WHETHER THE IMPAIRMENT IS OBJECTIVELY MANIFESTED

The Plaintiff claims that he had a lumbar sprain and injury to his right shoulder as a result of the accident. He testified that the lumbar sprain was a recurring problem - “[The accident] went and aggravated all my disks and my existing condition.” (Snyder Deposition p 33.) He further testified that his back injury did not prevent him from working following the accident. (Snyder Deposition p 34.)

The Plaintiff testified that his shoulder injury was also an aggravation of a preexisting condition. (Snyder Deposition pp 34-35.) “It wasn’t as painful before the accident.” (Snyder Deposition p 48.) While no physician restricted his working following the accident, he nonetheless did not work because he “didn’t feel [he] could do it.” (Snyder Deposition p 46.) He also testified that he could not mow and rake and do other repairs around the house and he could not hunt or fish. (Snyder Deposition pp 47-48.)

Since 2001, the Plaintiff’s x-rays and MRIs have shown that he has chronic degenerative arthritis in his back and right shoulder. The x-rays and MRI after the accident did not show “anything new.” The only thing that indicated that the accident aggravated the Plaintiff’s preexisting condition was the Plaintiff’s subjective complaints of pain. The same type of pain he experienced when he fell at work in January of 2001, went bow hunting in October of 2001, played hard with his granddaughter in January of 2002 and bent over to move the garden hose in May of 2002.

In *Arabo v Turnbell*, 157 Mich App 575; 403 NW2d 470 (1987), the Court recognized the following:

The movement of one’s back is regarded as an important body function. *Shaw v Martin*, 155 Mich App 89; 399 NW2d 450 (1986); *Sherrell v Bugaski*, 140 Mich App 708, 711; 364 NW2d 684 (1984). Similarly, the proper functioning of one’s shoulder is deemed important. *Ulery v Coy*, 153 Mich App 551; 396 NW2d 480 (1986); *Burk v Warren (After Remand)*, 137 Mich App 715, 725; 359 NW2d 541 (1984), lv gtd 422 Mich 938 (1985).



While the Plaintiff's degenerative arthritis is objectively manifested on the x-rays and MRI's, the x-rays and MRI taken after the accident are essentially the same as the x-rays and MRI taken before the accident. Not one of the treating physicians was able to testify to any objective manifestation of an injury resulting from this accident.

For this reason the Defendant's motion for summary disposition should be granted.

### III.

#### WHETHER THE IMPAIRMENT AFFECTS THE PLAINTIFF'S GENERAL ABILITY TO LEAD HIS NORMAL LIFE

In *Kreiner, supra*, the Supreme Court addressed this issue at length, saying:

Determining whether the impairment affects the plaintiff's "general ability" to lead his normal life requires considering whether the plaintiff is "generally able" to lead his normal life. If he is generally able to do so, then his general ability to lead his normal life has not been affected by the impairment.

*Random House Webster's College Dictionary* (1991) defines "general" as "considering or dealing with broad, universal, or important aspects." "In general" is defined as "with respect to the entirety; as a whole." *Id.* "Generally" is defined as "with respect to the larger part; for the most part." *Id.* *Webster's New International Dictionary* defines "general" as "the whole; the total; that which comprehends or relates to all, or the chief part; a general proposition, fact, principle, etc.; - opposed to particular; that is, opposed to special." Accordingly, determining whether a plaintiff is "generally able" to lead his normal life requires considering whether the plaintiff is, "for the most part" able to lead his normal life.

In addition, to "lead" one's normal life contemplates more than a minor interruption in life. To "lead" means, among other things, "to conduct or bring in a particular course." Given this meaning, the objectively manifested impairment of an important body function must affect the *course* of a person's life. Accordingly, the affect of the impairment on the course of a plaintiff's entire normal life must be considered. 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.

The starting point in analyzing whether an impairment affects a person's "general" i.e., overall, ability to lead his normal life should be identifying how his life

has been affected, by how much, and for how long. Specific activities should be examined with an understanding that not all activities have the same significance in a person's overall life. Also, minor changes in how a person performs a specific activity may not change the fact that the person may still "generally" be able to perform that activity.

The Court also set out a nonexhaustive list of objective factors that 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.

The Court explained:

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.

In the instant case, the impairment is low back and right shoulder pain. Prior to the accident, the Plaintiff was diagnosed with chronic degenerative arthritis and was undergoing conservative treatment - physical therapy and medication. He was told before the accident that he was a candidate for arthroscopic debridement and ultimately either a hemiarthroplasty or total arthroplasty. He had delayed these treatment options because he did not have insurance that would cover them. Yet, every time he engaged in any strenuous or heavy work activity, he experienced a painful flare up. Such episodes were a part of the Plaintiff's normal life. The automobile accident may have brought the Plaintiff to surgery a little sooner than he would have otherwise, but it is not the cause of his chronic degenerative arthritis or the reason that he required surgery. As a result of the surgery, the Plaintiff may well experience less pain than he did before the accident.

For this additional reason, the Defendant's motion for summary disposition should be granted.


CONCLUSION

The Plaintiff has not sustained an objectively manifested serious impairment of an important body function that affects his general ability to lead his normal life.

The Defendant's motion for summary disposition should be and hereby is granted. This action is dismissed with prejudice.

IT IS SO ORDERED.

This decision and order resolves the last pending claim and closes the case.



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HONORABLE PHILIP E. RODGERS, JR.  
Circuit Court Judge

Dated: 9/14/04