

STATE OF MICHIGAN
COURT OF APPEALS

RUDI KLEMM,
Plaintiff-Appellant,

DEC 5 1986

v

No. 87247

LOTTI ENGARDIO,
Defendant-Appellee.

BEFORE: D. F. Walsh, P.J., M. J. Kelly and C. W. Simon*, JJ.

PER CURIAM

Plaintiff Rudi Klemm appeals the order of the circuit court granting summary disposition to defendant Lotti Engardio, MCR 2.116(C)(10), and denying plaintiff's motion for reconsideration.

Plaintiff's complaint arose out of an accident involving his motorcycle and defendant's automobile. The circuit court found that plaintiff had not suffered a serious impairment of body function within the meaning of MCL 500.3135; MSA 24.13135. Plaintiff's claim for noneconomic damages was therefore dismissed.

Where there is no material factual dispute as to the nature and extent of a plaintiff's injuries, the trial court must determine as a matter of law whether there has been a serious impairment of body function under the no-fault act. Cassidy v McGovern, 415 Mich 483; 330 NW2d 22 (1982), reh den 417 Mich 1104 (1983). On appeal, this Court reviews the evidence in a light most favorable to the injured party in order to determine if the trial court erred in finding that an impairment is not serious. Bennett v Oakley, ___ Mich App ___ (docket no. 85705, rel'd July 1, 1986), Kelleher v Kuchta, 138 Mich App 45, 49; 359 NW2d 224 (1984) (concurring opinion of Kelly, J.).

*Circuit judge, sitting on the Court of Appeals by assignment.

In Sherrell v Bugaski, 140 Mich App 708, 710-711; 364 NW2d 684 (1984), this Court discussed the test of "seriousness" of impairment:

"Although the trial court must decide the question on a case-by-case basis, the following factors must be considered. * * * By its own terms, the statute requires that any impairment be 'serious.' MCL 500.3135(1); MSA 24.13135(1), William [sic] v Payne, 131 Mich App 403; 346 NW2d 564 (1984).

* * *

"When considering the seriousness of the injury, the court should be mindful of the other threshold requirements for recovery of noneconomic loss (i.e., death and permanent serious disfigurement), and the legislative reasons for limiting the recovery of noneconomic losses, namely, to prevent overcompensation of minor injuries and to reduce litigation in automobile accident cases. Williams, supra; Braden v Lee, 133 Mich App 215; 348 NW2d 63 (1984). When determining whether a certain injury meets the threshold requirement for recovery of noneconomic loss, the court should apply an objective standard and look to the effect of the injury on the individual's general ability to lead a normal life. Cassidy, supra; Williams, supra; Braden, supra."

The applicable law was also discussed in Kanaziz v Rounds, ___ Mich App ___ (docket no. 83946, rel'd July 8, 1986)(slip opinion pp 2-3):

"The threshold requirement of serious impairment of body function is a significant obstacle to tort recovery for noneconomic loss. Franz v Woods, 145 Mich App 169; 377 NW2d 373 (1985). The legislative intent in creating thresholds for recovery was to allow the catastrophically injured victim to recover. Workman v DAIIE, 404 Mich 477; 274 NW2d 373 (1979).

"To determine whether an injury meets the threshold requirement of impairment of an important body function, the injured plaintiff's ability to lead a normal lifestyle must be considered. Simple difficulty or inconvenience in daily life does not meet the threshold. Morris v Levine, 146 Mich App 150; 379 NW2d 402 (1985). There must be a general inability to live what objectively can be determined to be a normal lifestyle. Morris, supra. * * * Although permanence is relevant to a finding of serious impairment, an injury does not have to be permanent to be serious. Id., 505-506."

See also Farquhar v Owens, 149 Mich App 208; ___ NW2d ___ (1986), where Judge Brennan declined to find that the plaintiff's injury was the type of "catastrophic" injury contemplated in MCL 500.3135, supra.

Summary judgment for the defendant was affirmed in Routley v Dault, 140 Mich App 190, 194-195; 363 NW2d 450 (1984), lv gtd 422 Mich 935 (1985):

"We hold that the trial court did not err in finding as a matter of law that plaintiff did not suffer serious impairment of

body function. From the time of the accident until after recovery from the second operation the plaintiff was somewhat restricted in walking and lifting, but he was not incapacitated for an extended period of time, nor was he, in any significant manner, prohibited from engaging in his normal daily activities. After the second operation plaintiff was permitted, and indeed encouraged, by his doctor to return to employment which did not involve heavy lifting. Although plaintiff allegedly continues to experience some pain, he is not confined to bed and he is able to perform normal body functions, and to engage in normal day-to-day activities. There is nothing to indicate that plaintiff is incapacitated or that his discomfort interferes with his normal life style. See McDonald v Oberlin, 127 Mich App 73, 76; 338 NW2d 725 (1983); Braden v Lee, *supra*. The fact that plaintiff's previous employment involved some heavy lifting does not change the intrinsic nature or extent of the injury. The seriousness of the injury must be determined by an objective evaluation of its effect on the person's body functions and the ability to perform common day-to-day activities, and not by extrinsic considerations such as the nature of the person's employment."

In Ulery v Coy, ___ Mich App ___ (docket no. 88870, rel'd July 22, 1986), the plaintiff suffered from lack of strength in her arm, limitation of movement and some loss of ability to grip. She avoided lifting at shoulder level, didn't pick up groceries or her granddaughter, avoided opening car doors, didn't sleep on her left shoulder, didn't vacuum, and had difficulty giving back rubs to her husband. Her physician and psychologist said she could not return to work as a waitress without successful corrective surgery. This Court acknowledged that the plaintiff had suffered "some adverse impact as a result of the accident," slip opinion p 2, but affirmed entry of summary disposition for the defendant. The Court found no record indication that the plaintiff's difficulties had "interfered in a significant manner with her ability to lead a normal life style." Slip opinion p 3. While the plaintiff could not return to work as a waitress without surgery, there was no indication that she could not "obtain gainful employment in a less physically demanding position." Id.

In another recent case, this Court reversed the order of partial summary judgment for the defendants, finding that the plaintiff's impairment was "serious":

"The undisputed facts presented by plaintiff indicate that she has been unable to lead a normal life since her accident. It is uncontested that, still five years after the accident, she

wears a back brace almost continuously, treats with two doctors on a weekly basis and takes pain medication. She was unable to return to work for three and one half years despite several attempts to do so. Moreover, her ability to participate in social and recreational activities and perform daily household chores has been severely hampered. In light of these uncontested facts, plaintiff has not lived a normal life since her accident." Wood v Dart, ___ Mich App ___ (docket no. 85057, rel'd September 9, 1986), slip opinion p 4 (footnote omitted).

Viewing the evidence in the instant case in a light most favorable to plaintiff, we are persuaded that he has not suffered the type of injury--i.e., catastrophic injury--for which the Legislature intended to retain tort liability.

According to plaintiff's deposition testimony, he suffers from low back pain as a result of the accident. He was not rendered unconscious in the accident and did not seek medical assistance until he went to the hospital emergency room the next day. X-rays were taken at the hospital and plaintiff was given medication. He was told to maintain strict bed rest and to see his doctor as soon as possible. He did not stay overnight at the hospital.

Plaintiff spent the next two weeks lying down. He saw a doctor as soon as possible. The doctor's initial assessment was that ice packs, rest, good body alignment and stretching would help plaintiff. During the course of his extended treatment of plaintiff, the doctor recommended an adjustment in plaintiff's posture while walking, various exercises, placement of something firm on the seat in plaintiff's truck, and use of a back support. The doctor recommended plaintiff's return to work a few weeks after the accident. Plaintiff continued to experience pain but noted significant relief when he wore the back support.

Plaintiff described his job, both before and after the accident, as a truck driver doing both long and short hauls. Generally his duties do not include loading and unloading the truck. He missed three weeks of work immediately following the accident. His job did not change following the accident except that he found he was working only three or four days a week

instead of his normal five or six days. Prior to the accident he worked 55 to 60 hours a week. There have been days following the accident when he has refused to work because of his pain.

A chiropractor who examined plaintiff at the request of plaintiff's attorney opined that plaintiff may have to consider another occupation, one which does not involve "prolonged sitting, lifting, or bending."

In an affidavit signed four months after his deposition, plaintiff stated that he had been seeing his doctor regularly since the deposition and that his doctor had mentioned the prospect of surgery. The doctor told him that lower back surgery is not always successful. On the doctor's advice, plaintiff had begun to wear the molded back support at all times. The doctor had also prescribed a device to keep plaintiff's back stable while driving. Plaintiff continued to do the prescribed exercises two to three times a day. His back hurts every day and he avoids any activity involving bending, lifting and twisting because of the resultant severe pain. He no longer water skis, dances or bowls. He has continued to miss work intermittently and his doctor has suggested a change in careers due to his back problems. After a day's driving, he can barely get out of the truck and must lie down. Plaintiff describes his current social life, previously active, as "non-existent."

Notwithstanding the curtailment of plaintiff's social life and his persistent pain, the record does not disclose a general inability on plaintiff's part to live what objectively can be determined to be a normal life. In contrast to the situation of the plaintiff in Wood v Dart, supra, no evidence in this case suggests that plaintiff is unable to perform customary activities of daily life. In addition, he returned to work shortly after the accident and, with intermittent exceptions, has worked continuously since then.

We are sympathetic to plaintiff's pain. When we view his injury in light of the other threshold requirements found in the no-fault act -- death and permanent serious disfigurement, -- however, we are compelled to conclude that he has not suffered a serious impairment of body function for purposes of MCL 500.3135, supra.¹

Affirmed.

/s/ Daniel F. Walsh
/s/ Michael J. Kelly
/s/ Charles W. Simon

FOOTNOTE

- ¹ Because we find that plaintiff's injury is not "serious" for no-fault purposes, we do not address the questions of objective manifestation and impairment of body function. See Williams v Payne, supra, at 409.