STATE OF MICHIGAN

IN THE COURT OF APPEALS

FRANCIS ARABO,
Plaintiff-Appellant

-v- NO. 87861

MICHAEL ALAN TURNBELL,
Defendant-Appellee

BEFORE: Allen, PJ; Cynar and Robert C. Livo*, JJ.

PER CURIAM.

Plaintiff Francis Arabo was involved in an automobile accident with defendant Michael Alan Turnbell on February 16, 1983. Plaintiff filed a complaint on January 3, 1985, alleging that defendant was negligent. The trial court granted defendant summary disposition pursuant to MCR 2.116(10) on September 18, 1985, having found as a matter of law that plaintiff did not suffer a serious impairment of body function. Plaintiff appeals as of right.

The details of the accident are not germane to the issues raised on appeal. However, it is worth noting that defendant contested the allegations of negligence and alleged comparative negligence. Moreover, directly after the collision, plaintiff told police officers at the accident scene that he had not been injured. He maintains that he began experiencing pain about three hours after the accident.

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* Circuit Judge sitting on the Court of Appeals by assignment.

During the following three years, plaintiff treated with or consulted three physicians. The medical reports of these physicians were attached to defendant's motion for summary disposition in support thereof. It appears that these doctors had different opinions regarding the nature and extent of plaintiff's injuries. However, for reasons set forth hereinafter, we do not regard these differences as material.

Michael Goldman, D.O. opined on June 1, 1983, that plaintiff had soft tissue injuries and a good prognosis. He felt that plaintiff was capable of performing any avocational activity. On October 5, 1983, Dr. Goldman found that plaintiff had "fully and completely recovered from any soft tissue injuries that he sustained as a result of his automobile accident." Further, he opined that plaintiff could engage in any vocational or avocational activity without any restrictions.

In contrast to Dr. Goldman's report, Edward Maxim, M.D., diagnosed plaintiff as having a probable herniated lumbar disc, chronic bursitis and tendonitis in the left shoulder, and osteoarthritis of the cervical spine, lumbosacral spine and left acriomioclavular joint. He believed that the osteoarthritis probably pre-existed the accident but opined that the disc and shoulder soft tissue injuries resulted from the accident. Plaintiff saw Dr. Maxim on only one occasion, April 6, 1984. Dr. Maxim recommended hospitalization with pelvic traction and thereafter, a back brace or plastic body cast if responsive to traction, or further testing and possible surgery if not responsive. Plaintiff never followed up on Dr. Maxim's recommendations.

Finally, Emil Sitto, M.D., examined plaintiff on the day following the accident and diagnosed plaintiff as having a whiplash injury, sprained knees, a sprained left shoulder, and a sprained lumbar spine. On May 13, 1983, Dr. Sitto

again diagnosed whiplash injury, a sprained spine which may have aggravated pre-existing degenerative arthritis, and traumatic strain of the muscles, ligaments, tendons and connective tissues of the spine.

At the hearing on the motion for summary disposition, plaintiff argued that that the motion was premature since discovery was not complete. Plaintiff averred that he intended to depose Drs. Sitto and Maxim on October 16, 1985. This date was not within the cut-off time for discovery prescribed in an order which emanated from the pretrial conference held on April 23, 1985. See MCR 2.301(A)(3). In any event, at the hearing on defendant's motion, plaintiff's counsel represented that these depositions would demonstrate only that Dr. Sitto had treated plaintiff for his back condition after the May 13, 1983 examination.

We note that under Rizzo v Kretschmer, 389 Mich 363; 207 NW2d 316 (1973), the trial court would not be precluded from granting summary disposition as long as it treated plaintiff's assertion as a "pleading" and gave it the same consideration that would be afforded admissions, depositions, documentary evidence, and affidavits. Moreover, summary disposition would not be precluded by Kortas v Thunderbowl & Lounge, 120 Mich App 84; 327 NW2d 401 (1982), since in Kortas the error in granting summary judgment was the failure to consider as true and in a light most favorable to plaintiff, the assertion that their expert would provide testimony which would create a genuine issue of material fact. In the present case, there was no assertion that the deposition testimony of Drs. Sitto and Maxim would create a genuine issue of material fact. Rather, the assertion was limited to the allegation that plaintiff had continued treating with Dr. Sitto after the last examination of which the court had a record. We do not view this assertion as one involving a material fact or as one that creates a genuine issue.

We review a trial court's decision regarding serious impairment by viewing the evidence in a light most favorable to the injured plaintiff and determining (1) whether there is a material factual dispute as to the nature and extent of a plaintiff's injuries and if not, (2) whether reasonable minds could differ on the question of whether a serious impairment of body function exists. Akin v Slocum, Mich App (Docket No 82995, rel'd 6-10-86); Bennett v Oakley, Mich App (Docket No 85705, rel'd 7-1-86); but see, Kelleher v Kuchta, 138 Mich App 45, 47; 359 NW2d 224 (1984); Walker v Caldwell, 148 Mich App 827, 831; 358 NW2d 703 (1986). Whether such an impairment exists must be decided on a case by case basis. Cassidy v McGovern, 415 Mich 483, 503; 330 NW2d 22 (1982), reh den 417 Mich 1104 (1983). However, in order to meet the threshold of a serious impairment of body function, the injury must be objectively manifested, serious, and it must impair an important body function. Cassidy, 504-505.

The trial court indicated that its decision was in part based on the fact that plaintiff suffered only soft tissue injuries. Contrary to the trial court's intimation, an objectively manifested soft tissue injury can constitute a serious impairment of body function. Wood v Dart, Mich App (Docket No 85057, rel'd 9-9-86). Limited flexion, if diagnosed by a passive range of motion test, will suffice as the type of medical measurement of an injury needed for a finding of objective manifestation. Salim v Shepler, 142 Mich App 145; 369 NW2d 282 (1985); Shaw v Martin, Mich App (Docket No 86197, rel'd 10-6-86). An active range of motion test, where the plaintiff, for example, merely states that he cannot bend, will not suffice. Shaw, supra. The medical reports by Drs. Goldman and Maxim indicate that passive range of motion tests were performed on plaintiff's back and left shoulder. Since Dr. Maxim thereafter concluded that plaintiff suffered injuries to his back and shoulder,

the evidence when viewed in a light most favorable to plaintiff supports a finding of objectively manifested injuries.

We must also conclude that plaintiff's injuries involved an important body function. The movement of one's back is regarded as an important body function. Shaw, supra; 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, Mich App (Docket No 8870, rel'd 7-22-86); Burk v Warren (After Remand), 137 Mich App 715, 725; 359 NW2d 541 (1984), lv grtd 422 Mich 935 (1985).

Since we have found the impairment of two important body functions, plaintiff's right to proceed to trial on his negligence claim depends on whether his injuries were also serious. The seriousness of an injury is measured by an objective standard. In order to be regarded as serious, the injury must significantly impair the plaintiff's ability to lead a normal life. Moreover, the seriousness of the injury must be measured by comparison to the other two thresholds for recovery found in the no-fault act, death and serious disfigurement. The determination must also take into consideration the legislative reasons for limiting the recovery of noneconomic losses, namely, the prevention of overcompensation for minor injuries and the reduction of litigation in automobile accident cases. Cassidy, 503, 505; Wood, supra; Routley v Dault, 140 Mich App 190, 193; 363 NW2d 460 (1984), lv grtd 422 Mich 935 (1985).

Plaintiff was deposed on September 18, 1985. Although he is Chaldean and speaks no English, an interpreter translated the questions for plaintiff and then translated plaintiff's answers. Plaintiff testified that his arm still feels numb and that he has back pain. However, he has not taken pain medication for over two years. Because of his

back, it hurts to stand after he has been sitting for two hours. In addition, he stated that before the accident, he could carry a big briefcase but now, he cannot even hold a bag, apparently because of a problem with gripping. Presumably, plaintiff could hold a bag or briefcase with his right hand. Plaintiff also asserted that before the accident he was capable of working but maintained that now he had lost that capacity. However, plaintiff admitted that he had not worked since he came to the United States in 1980. He also admitted that he did not play sports before or after the accident and that he did not do housework. He did mow the lawn but now his son takes care of this task. Plaintiff now attends English classes for approximately two hours per day. When not in class, he watches television or listens to the Arabic radio station. Plaintiff stated that before the accident he often went to the Arab casino or coffee shop, whereas now, he goes infrequently.

Viewed objectively, we cannot conclude that plaintiff's injuries have had a significant impact on his ability to lead a normal life. Besides mowing the lawn, plaintiff did not identify any activity which he performed before the accident that he could no longer perform because of his injuries. We do not doubt that plaintiff has experienced pain. However, one cannot recover under the no-fault act merely for pain and suffering. Pain and inconvenience which do not affect the ability to lead a normal life will not suffice to meet the threshold for recovery under the no-fault act. Kroft v Kines, Mich App (Docket No 85780, rel'd 6-24-86).

Affirmed.

/s/ Glenn S. Allen, Jr.
/s/ Walter P. Cynar
/s/ Robert C. Livo