

STATE OF MICHIGAN
COURT OF APPEALS

LEONARD LOVE,

Plaintiff-Appellant,

v

JOHN FURMAN CARR,

Defendant-Appellee,

and

JOHN DOE,

Defendant.

UNPUBLISHED
March 20, 2018

No. 337996
Wayne Circuit Court
LC No. 15-011897-NI

Before: GLEICHER, P.J., and BOONSTRA and TUKEL, JJ.

PER CURIAM.

This is a third-party no-fault action arising from a rear-end collision. The circuit court granted summary disposition to defendants, finding that plaintiff failed to establish that the injuries he sustained in the accident affected his general ability to lead his normal life. We vacate that judgement and remand for further proceedings.

I

On October 30, 2012, Love was a passenger in a vehicle driven by his friend, Gwendolyn Tanner. Tanner testified that while stopped at a traffic light her car was rear-ended by a vehicle that fled the scene. A witness provided Tanner with the vehicle's license plate number and she made a police report. The plate number corresponded to a car owned by defendant John Carr.

Love sought treatment at an emergency room the next day. He reported back pain but not neck pain. No treatment was provided other than analgesics. A few weeks later, Love consulted Dr. Louis Radden with complaints of constant pain in his back, right leg, neck and arm, as well as headaches. He told Dr. Radden that his pain started after the accident. Dr. Radden ordered a cervical spine MRI that revealed disc protrusion with an extruded disc fragment and mass effect on the cord at C4/C5, a "[b]road-based disc bulge" at C5/C6, and a "[d]iffuse disc bulge" at C6/C7. An MRI of Love's right shoulder reported partial tears of a rotator cuff tendon. Dr. Radden diagnosed Love with "cervical strain/sprain, cervical facet syndrome, cervical disc

herniation C4-5, C5-6, lumbar strain/sprain, lumbar facet syndrome, impingement syndrome of the right upper extremity and rotator cuff tear on the right.” He concluded that Love’s injuries were related to the auto accident.

Love brought this lawsuit in 2015, alleging that as a result of the accident he sustained physical injuries amounting to a serious impairment of body function and an aggravation of preexisting injuries. Defendants moved for summary disposition under MCR 2.116(C)(10), contending that Love’s condition had not been “exacerbated” by the accident. In support of their motion, defendants filed approximately 50 pages of medical records that defendants claimed “reveal[] no measureable difference between plaintiff’s life before and after the accident.” Because defendants’ motion and the circuit court’s ruling rested entirely on these records, we discuss their content in detail.

The first record, dated October 23, 1992, is a disability evaluation. According to the examiner’s report, Love slipped and fell at work in 1991 and hit his head on “the dumpsters,” injuring his head, neck and back. At the 1992 exam, Love complained of headaches and constant, radiating neck pain as well as numbness and tingling in his right leg. He reported that “sitting, standing, walking or bending are also impaired and quite difficult for him.” The evaluation elucidates that Love had continued to work as a die setter and press operator for three months after the accident, but his headaches increased and he could not tolerate the noise and vibrations of his workplace.

The disability examiner found that Love walked without difficulty and could squat and stand with no apparent weakness. His range of motion was only slightly limited, and he needed no assistance getting on and off the exam table. Love’s muscle strength was described as “generally intact on both sides.” The examiner concluded, “[T]here is no significant physical impairment related to his cervical and lumbosacral spine” and no evidence of radiculopathy, tightness or spasm. Referral to a neurologist was suggested for Love’s headache pain. No further treatment was advised.

The next record, dated June 22, 1993, is a psychiatric evaluation focusing on Love’s headache symptoms and accompanying auditory abnormalities. Love also reported depression, weight loss, insomnia, and suicidal ideation. The examiner noted that Love’s history included a closed head injury “and a subsequent chronic pain syndrome, leading to loss of job and social decline.” Psychiatric medications were prescribed.

A cervical spine x-ray report dated April 12, 2010 (apparently obtained at Oakwood Hospital but unaccompanied by any other records) concluded, “No appreciable arthritic findings.”

Defendants also presented a handful of Love’s records from the Veterans’ Administration Hospital. The VA treated Love for substance abuse in 2007. Love also received assistance for hearing loss attributable to his military service. One month before the accident, Love consulted the VA for chronic low back pain that he described as “intermittent, but more on than off.” The pain radiated down his right side to his hip, and sometimes to his upper right thigh. He requested narcotic pain medication. An MRI of Love’s lumbar spine revealed a mild disc bulge at L5-S1, and no spinal stenosis. Love successfully completed a chronic pain education class.

The VA records also include reports of visits after the accident. In 2014, Love complained of “mild intermittent cervicalgia [neck pain] since [a motor vehicle accident]” and was also evaluated for shoulder pain.

Defendants contended that these records proved that Love “had identical pain complaints prior to the subject accident,” for which he received social security disability benefits. Based on this evidence, defendants urged, the accident “had little to no effect on [plaintiff’s] ability to lead his normal life[.]”

In response, Love submitted his deposition testimony, Dr. Radden’s records, the postaccident MRI reports, and several postaccident disability certifications. Love testified that his work-related disability was primarily due to headaches that resulted from his head injury, and that the headaches eased after four or five years. Nevertheless, he continued to receive social security disability payments. While on disability and before the auto accident, as a “side job,” he cooked “all the time” for friends, family, his cousin’s tire shop, his church and others (he had been a cook in the Army). He has not been able to cook since the accident because he cannot stand on his feet for long periods of time, and his neck hurts. The cooking earned Love up to \$2,000 each year.

Love described that his accident-related injuries also curtailed other activities. He is no longer able to engage in recreational pursuits such as basketball, volleyball and fishing, and cannot walk for significant distances:

I used to go play basketball right across the street from my house, and -- at the park. I don’t -- I haven’t done that since the accident; I haven’t played any ball since then. I used to walk with no problem. Now I don’t even walk too far out. I really -- I may -- I don’t really walk too much far [sic]. I might go to the store across the street from my house. I’ll walk there because it’s right there. And I don’t have sex like I used to. I used to kind of jog a little bit. I don’t do that. I haven’t done that. I don’t cook like I used to. I can cook something to eat, but not like before. I do cook, because I like my own cooking, you know, more so, but I don’t cook certain things that cause me to stand on my feet a lot.

* * *

. . . I -- we played volleyball. I don’t really play that now. I used to play off and on, you know, and then we have -- when we go to parks that have certain recreation things, you know, I don’t do that now either. . . .

* * *

. . . And then I used to fish -- I haven’t been fishing since the accident but twice, and I used to fish three, four days a week. I can’t even -- that’s one of my hobbies that I really miss, because I used to fish all the time, and I miss not being able to go, because I know that I -- I can’t perform like I want to, and bending over and this and that, I -- I haven’t been fishing now -- you know, not -- I used to go at least two or three times a week. Now, since the accident, I’ve been maybe four times since the accident.

Before the accident he roller skated once every three to four months, but has not roller skated since.

Love described that he is able to walk for five to 10 minutes continuously at a slow pace; he used to be able to walk two to three miles at a time. Sitting, too, is difficult. Love testified that he can only sit for short periods of time before experiencing pain. He claimed that prior to the accident, he would have sex four to five times every week, but now only has sex “maybe once every two weeks.”

In response to defendants’ summary disposition motion, Love argued that his evidence supported that the car crash caused a new neck injury as reflected in the MRI, and new disabilities related to his neck. Love further contended that before the car crash, he was able to enjoy a variety of recreational activities and derived satisfaction (and a little money) from his cooking. He also emphasized that exacerbations of preexisting injuries are compensable. This evidence, he supported, sufficed to create a question of fact regarding whether he had sustained a serious impairment of a body function and, in particular, impairments that affected his general ability to lead his normal life.

The circuit court granted summary disposition, ruling from the bench in relevant part:

I will say that it’s not an easy case to decide. Mr. Love for a number of years, over 20 years has been receiving social security benefits on the basis that he is disabled from basically living a normal life. He’s had a history of a number of problems included in his application.^[1]

Back in 1993 he states, cannot handle his own financial decisions. I don’t think that’s particularly important here. He further claims that sitting, standing, walking and bending are impaired and quite difficult for him and that he had to use a cane for ambulation. When you review his physical condition prior to the accident, he was disabled from leading his normal life because of the variety of conditions.

After the occurrence of the accident that occurred on October 30th of 2012, he claims that in the . . . automobile collision he aggravated a preexisting condition and incurred additional injuries particular -- but the fact remains that prior to the accident he had impaired -- seriously impaired body functions that precluded him from leading his normal life. And after the accident he had the same conditions as he had before and as he has now. I don’t think the third prong of the [*McCormick*] test has been satisfied, therefore, the Court does grant the motion for summary disposition.

Love appeals this ruling.

¹ Love’s application for social security benefits is not included in the lower court record, and is not referenced in defendants’ pleadings.

II

Three relevant rules govern our de novo review of the circuit court’s decision. First, we consider the pleadings, admissions, affidavits, and other record documentary evidence “in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial.” *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). When the record leaves open an issue on which reasonable minds could differ, a genuine issue of material fact exists that precludes summary disposition. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may not make findings of fact or assess the credibility of witnesses when deciding a summary disposition motion. *White v Taylor Distrib Co, Inc*, 482 Mich 136, 142-143; 753 NW2d 591 (2008).

Defendants’ motion and the circuit court’s ruling centered on whether Love sustained a “serious impairment of body function,” described in the no-fault act 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(5). Defendants did not contest that Love’s claimed injuries were objectively manifested or that they involved an important body function. Rather, defendants argued (and the circuit court ruled) that Love’s disability history proved that any auto accident-related injuries could not have affected his ability to lead his normal life.

When evaluating whether a plaintiff’s injuries have affected the person’s general ability to lead his or her normal life, “courts should consider not only whether the impairment has led the person to completely cease a pre-incident activity or lifestyle element, but also whether, although a person is able to lead his or her pre-incident normal life, the person’s general ability to do so was nonetheless affected.” *McCormick v Carrier*, 487 Mich 180, 202; 795 NW2d 517 (2010). The plaintiff need only produce evidence

that some of the person’s *ability* to live in his or her normal manner of living has been affected, not that some of the person’s normal manner of living has itself been affected. Thus, while the extent to which a person’s general ability to live his or her normal life is affected by an impairment is undoubtedly related to what the person’s normal manner of living is, there is no quantitative minimum as to the percentage of a person’s normal manner of living that must be affected. [*Id.* at 202-203 (emphasis in original).]

“The serious impairment analysis is inherently fact- and circumstance-specific and must be conducted on a case-by-case basis.” *Id.* at 215.

Defendants’ evidence supported that in 1991, Love suffered injuries that disabled him from full-time *employment*. Contrary to the circuit court’s ruling, social security disability benefits are not awarded based on disability “from basically living a normal life.” Rather, eligibility for social security disability benefits depends on whether an individual’s medical condition “significantly limit[s]” the person’s “ability to do basic work activities—such as lifting, standing, walking, sitting, and remembering—for at least 12 months.” *Disability Benefits*, Social Security Administration, p 7, available at <<https://www.ssa.gov/pubs/EN-05-10029.pdf>> (accessed February 26, 2018). This determination centers on a person’s ability to do

the work he performed before his injury or illness, or to do other work considering the person's age, education, past work experience, and skills. *Id.* at 8.

No evidence of record supports that when awarding Love benefits, the Social Security Administration found his disabilities so severe that he could not "lead a normal life." Nor did any of the medical records defendant submitted establish that fact. To the contrary, the disability examiner found that Love had no detectable physical limitations and could perform all actions asked of him—walking, squatting, and standing—without discernable weakness. There is no comment whatsoever in the report regarding the activities that Love could or could not perform. Viewed entirely objectively (and not even in the light most favorable to Love), that record does not support defendants' argument.

The rest of the medical records submitted by defendants suffer from the same infirmity. We cannot locate any evidence in them that even hints at which activities Love could or could not perform before the accident. Although the records substantiate that Love occasionally complained of back and neck pain during the 20 years that elapsed between his work-related accident and the current automobile accident, no evidence suggests that he was so incapacitated that he could not enjoy occasional recreational activities or cook for friends and family. Given that Love is 61 years old, served in the military for six years and worked as a press operator for more than a decade, it is unsurprising that he would have occasionally experienced back pain. Viewed in the light most favorable to Love, the records support that he had a few visits for low back pain but never reported that his symptoms were disabling. The records shed no light whatsoever on Love's activity levels. And absolutely nothing in the medical records supports the circuit court's finding that Love "was disabled from leading his normal life because of the variety of his conditions."

On the other hand, Dr. Radden's records support that Love sustained a new, accident-caused injury to his neck. A cervical spine x-ray obtained in 2010 was negative. The cervical spine imaging performed after the accident revealed disc protrusions and a mass effect on the spinal cord. While Love apparently complained of neck pain before the accident, no evidence describes the extent of the pain, or indicates that the pain restricted his activities. Postaccident, Love described that he can no longer perform a variety of activities that were important to him because of neck and back pain. Despite that Love was not gainfully employed, he participated in several sports and was able to cook for others. No evidence refuted these claims.

Defendants contend that the records indicate that Love provided an inaccurate history to Dr. Radden, claiming that Love neglected to reveal that in 1991 he had been disabled from employment. Love was not questioned about this at his deposition, and Dr. Radden has not been deposed. Assuming the facts are as defendants portray them, Love's omission provides fuel for cross-examination. It does not entitle defendants to summary disposition. And we highlight *McCormick's* admonition that MCL 500.3135(5) requires only that a person's "general ability to lead his or her normal life has been *affected*, not destroyed." *McCormick*, 487 Mich at 202.

Viewed in the light most favorable to Love, the accident caused a marked change in his general ability to lead his normal life. Defendants' evidence to the contrary is speculative at best. While we acknowledge that a jury could infer that Love's 1991 disability from

employment prevented him from engaging in any other activities, the record provides no such evidence. Love's testimony and Dr. Radden's records establish the contrary proposition.

A jury could find that given Love's preexisting employment disabilities, the elimination of his opportunities for vocation and recreation significantly impacted Love's general ability to lead his normal life. That Love was unable to work due to injuries sustained in 1991 does not mean that he was unable to do any of the things he claimed to have enjoyed in the years thereafter. Certainly, no evidence supports defendants' claim that before the accident Love could not walk for more than a block, play basketball or volleyball, fish, or cook—only supposition that because he receives social security disability benefits and complained of occasional back pain, his life was unchanged. Supposition is not evidence. On summary disposition, the inferences to be drawn must favor Love, not defendants. Further, under the no-fault act "an injured party may recover if he can demonstrate that the accident aggravated a pre-existing condition." *Mollitor v Associated Truck Lines*, 140 Mich App 431, 438; 364 NW2d 344 (1985).

In granting summary disposition the circuit court violated the fundamental tenets of summary disposition jurisprudence by engaging in fact-finding regarding the extent of Love's disability, and by failing to credit Love's evidence. Compounding this error, the court made a credibility determination by entirely disregarding Love's deposition description of the ways in which his life changed after the accident. By deciding facts and discrediting Love, the court usurped the fact finder's role. Because questions of fact abound regarding whether Love's pre-accident life meaningfully differs from his post-accident life, summary disposition was improper.

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra
/s/ Jonathan Tukel