

STATE OF MICHIGAN
COURT OF APPEALS

JUDITH HEWELT and JAMES HEWELT,

Plaintiffs-Appellants,

v

CAROL HETHERINGTON,

Defendant-Appellee.

UNPUBLISHED
November 9, 2004

No. 249044
Oakland Circuit Court
LC No. 02-042729-NI

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right the circuit court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10) and denying plaintiffs' motion for summary disposition in this third-party no fault insurance case. We affirm.

This Court reviews a trial court's decision on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion brought pursuant to MCR 2.116(C)(10) should be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001). A court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence then filed in the action or submitted by the parties in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Ritchie-Gamester v Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

Under the no-fault act, a person remains subject to tort liability for a noneconomic loss caused by his ownership, maintenance, or use of a motor vehicle "only if the injured person has suffered death, serious impairment of body function, or permanent disfigurement." MCL 500.3135(1). A serious impairment of a body function is 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); *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). For an impairment to be objectively manifested, there must be a medically identifiable injury or condition which has a physical basis. *Jackson v Nelson*, 252 Mich App 643, 653; 654 NW2d 604 (2002).

Defendant does not dispute that plaintiff Judith Hewelt demonstrated objectively manifested impairments. Defendant acknowledges that neck and jaw movement are important

body functions. Defendant asserts that plaintiff presented “no testimony or evidence to support that any objectively manifested injuries are definitively attributable to the automobile accident, beyond Plaintiff’s subjective complaints of pain and suffering.” Defendant also asserts that there is no genuine issue of material fact that plaintiff suffered a serious impairment. Defendant maintains that plaintiff’s subjective complaints of discomfort or pain while carrying out her activities are not sufficient to make any alleged impairment rise to the level of *serious* impairment, and asserts that “certainly, a soft tissue cervical strain and mild TMJ symptoms do not rise to the level of seriousness required to meet the statutory threshold for recovery.”

In determining whether the impairment affects the plaintiff’s general ability to lead his or her normal life, the court must conduct a multi-faceted 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.” *Kreiner*, 471 Mich at 132. Once this has been 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 effect” on the plaintiff’s life is insufficient because a de minimis effect would not, as objectively viewed, affect the plaintiff’s “general ability” to lead his life. [*Id.*, 133; emphasis in original.]

The *Kreiner* court set forth the following list of objective factors that may assist a court 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.” *Kreiner, supra*, 471 Mich 133-134 (footnotes omitted). This list is not meant to be exhaustive or exclusive, nor is any one factor dispositive: “the totality of the circumstances must be considered [when evaluating] whether the impairment ‘affects the person’s general ability to conduct the course of his or her normal life.’” *Id.*, 134.

Two weeks after the accident, Hewelt’s doctors observed slight swelling and slight crepitus in her left TMJ and joint space. Two years after the accident, various doctors identified Hewelt’s injuries as follows: ringing in her ears (tinnitus), some TMJ dysfunction on her right and left sides, mild disc protrusion at C6-7, mild to moderate neck and back muscular spasms and tenderness, mild limitation on head turning to the right, nonspecific motor unit changes in the right triceps, reduced global movement in the right lateral flexion, mild to moderate muscular spasm and tightness across the right shoulder. Hewelt’s course of treatment for these injuries included bite splint therapy, increasing to full-time for one year; frequent chiropractic care, and for a period of one month, three times per week; physical therapy, three times per week for a period of four months; and use of a headset at work to reduce neck irritation. In total, Hewelt missed one day and four months of work due to her injuries.

Given the substantial medical documentation of Hewelt’s injuries, we are satisfied that no factual dispute exists regarding the nature and extent of Hewelt’s injuries. Therefore, it is appropriate for this Court to determine whether Hewelt suffered a serious impairment of body function as a matter of law. MCL 500.3135(2)(i); *Kreiner, supra*, 471 Mich 132.

Finally, we must determine whether Hewelt's impairment affects her general ability to lead her normal life. In examining whether Hewelt's overall ability to lead her pre-accident life has been affected, this Court must consider her functional abilities and activities, including how long and how pervasively these activities and abilities were affected. *Kreiner, supra*, 471 Mich 135. Although an injury need not be permanent, "it must be of sufficient duration to affect the course of a plaintiff's life." *Id.*

Hewelt missed one day of work after the accident, and then approximately four months of work almost three years after the accident. She is able to perform all the tasks of her job as a dispatcher, although with some discomfort, including talking on the phone and using the computer. Hewelt uses a headphone to reduce tension on her neck. She continues to garden, exercise, clean the house, and take care of her family, although with discomfort and assistance. Hewelt has described her pain as "intermittent" and rated it as a two on a scale of ten, with ten being the worst pain possible. Her treatment has consisted of bite splint therapy beginning shortly after the accident, and chiropractic manipulation and physical therapy commencing over two years after the accident. Several of Hewelt's physicians noticed her injuries improving over the course of their examinations. No surgeries were performed. As of January 2003, no doctor considered Hewelt disabled and, with the exception of the bite splint which she may continue to wear at night, Hewelt was not receiving any medical treatment for her injuries. One of defendant's doctors opined that Hewelt's condition could not be improved with further chiropractic treatment. The evidence indicates that Hewelt's ability to move her neck and jaw, to use her back to lift objects, to garden, and to sit in a chair for lengths of time has been functionally diminished since the accident.

We conclude under these circumstances that Hewelt's general ability to lead her normal life has not been affected by her impairment. *Kreiner, supra*, 471 Mich 136-137 (holding that plaintiff Straub's impairments did not affect his general ability to lead his normal life where, although he underwent surgery, wore a cast, missed over two months of work, and could not operate his deer processing business, his injuries were not extensive, recuperation time was short, and the overall effect on his body function was not pervasive, evidenced by the fact that he returned to ninety-nine percent capacity). Accordingly, the circuit court did not err in granting defendant's motion for summary disposition and in denying plaintiffs' motion for summary disposition.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot