

STATE OF MICHIGAN
COURT OF APPEALS

MEREDITH TAYLOR-MAGEE,

Plaintiff-Appellant,

v

HEIDI TURNBANISCH,

Defendant-Appellee.

UNPUBLISHED

December 20, 2005

No. 263421

Genesee Circuit Court

LC No. 04-079827-NI

Before: Owens, P.J., Saad and Fort Hood, JJ

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition pursuant to MCR2.116(C)(10). We affirm.

On October 20, 2001, plaintiff, then sixty-five years old, was injured when defendant made a left hand turn from a parking lot and struck the front of her stationary truck. Plaintiff maintains that she injured her right shoulder, neck, and lower back.

Plaintiff had a number of ongoing medical problems at the time of the accident. She received Social Security disability benefits for fibromyalgia, chronic fatigue syndrome, hypertension, and diabetes. She also suffered from lower back pain due to a herniated disk. In addition, plaintiff sustained injuries to her right shoulder from a fall down a flight of stairs approximately two months before this accident. Plaintiff suffered injuries in a second automobile accident on December 6, 2003.

After the first automobile accident at issue here, plaintiff began experiencing pain in her right shoulder, right elbow, and wrist, and sought treatment. She completed twelve weeks of physical therapy and was prescribed pain medication. Plaintiff maintained that after the first accident she could no longer sew, engage in making crafts, go to the movies, visit her grandchildren, cook, or wash dishes. She stated that it took approximately a year before she felt that she could resume these activities. However, she also admitted that, before the second accident, she could walk approximately two miles at least four times a week, and could sew, perform chores, cook, and travel. Plaintiff acknowledged that none of her treating physicians recommended surgery, and that she was not placed on any activity restrictions. She indicated that the restrictions were pain-related. Physician records support her continued complaints of

pain from her accident injuries; however, some records note that plaintiff's progress steadily improved and that pain medication was appropriately controlling her symptoms.

Plaintiff sued to recover noneconomic damages. Defendant moved for summary disposition pursuant to MCR 2.116(C)(10), arguing that her injuries did not meet the threshold standard for a serious impairment of body function. The trial court agreed and granted the motion.

We review a trial court's decision on a motion for summary disposition de novo. *Auto Club Group Ins Co v Burchell*, 249 Mich App 468, 479; 642 NW2d 406 (2001).

Under MCL 500.3135, a person is subject to tort liability for noneconomic loss caused by his use of a motor vehicle only if the injured person has suffered death, serious impairment of a body function, or permanent serious disfigurement. As used in this section, "serious impairment of body function" is defined 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(7).

In *Kreiner v Fischer*, 471 Mich 109; 683 NW2d 611 (2004), our Supreme Court provided a framework for determining whether a plaintiff meets the serious impairment threshold. First, a court is to determine whether a factual dispute exists "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." *Id.* at 131-132. If there are material factual disputes, a court may not decide the issue as a matter of law. If no material question of fact exists regarding the nature and extent of the plaintiff's injuries, the question is one of law. *Id.* at 132.

When a court decides the issue as a matter of law, it must then proceed to the second step in the analysis and determine whether "an 'important body function' of the plaintiff has been impaired." *Id.* When a court so finds, "it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life." *Id.* This involves an examination of the plaintiff's life before and after the accident. The court should objectively determine whether any change in lifestyle "has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Id.* at 132-133. "Merely 'any effect' 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." *Id.* at 133. The *Kreiner* Court provided a non-exclusive list of objective factors that may be used in making this determination. These factors include:

(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. *Id.*

Specifically in regard to residual impairments, the *Kreiner* Court noted, "Self-imposed restrictions, as opposed to physician-imposed restrictions, based on real or perceived pain do not establish this point." *Id.* at 133 n 17. However, we recently held that "[t]he necessary corollary of this language is that physician-imposed restrictions, based on real or perceived pain, can establish the extent of a residual impairment." *McDaniel v Hemker*, ___ Mich App ___, ___ NW2d ___ (2005), slip op at 8. This does not require that the physician offer a medically

identifiable or physiological basis for imposing restrictions based on pain; however, a recitation of a physiological basis provides support for the conclusion that the restrictions are physician-imposed, rather than self-imposed. *Id.* at 9. In addition, we recognized that self-imposed limitations based on physical inability rather than pain can support a finding that the plaintiff has suffered a threshold injury. *Id.* at 8.

Here, the actual extent of the injuries caused by the accident is difficult to separate from plaintiff's earlier injuries and physical infirmities. For purposes of this appeal, we consider the evidence in the light most favorable to the party opposing the motion, *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and assume that plaintiff's increased pain and movement restrictions were attributable to the accident. As such, plaintiff has arguably shown that she suffered an objectively manifested injury of an important body function.

However, we conclude that plaintiff has failed to show that her initial injuries, when coupled with any residual effects, changed her general ability to lead her normal life under the standard set out in *Kreiner, supra*. Plaintiff's injuries were lesser than those of the *Kreiner* plaintiffs, both of whom were found not to meet the threshold requirement. While plaintiff maintained that she was initially unable to participate in many of her pre-accident activities, she also admitted that she made a good recovery, and reached her pre-accident level within the year. In addition, plaintiff's reported inability to engage in her usual activities in the months following the accident appear to be entirely due to self-imposed limitations based on pain. These cannot establish a threshold injury. *Kreiner, supra* at 133 n 17.

Under the circumstances, we find that plaintiff has failed to establish that any impairment affected her general ability to lead her normal life.

Affirmed.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood